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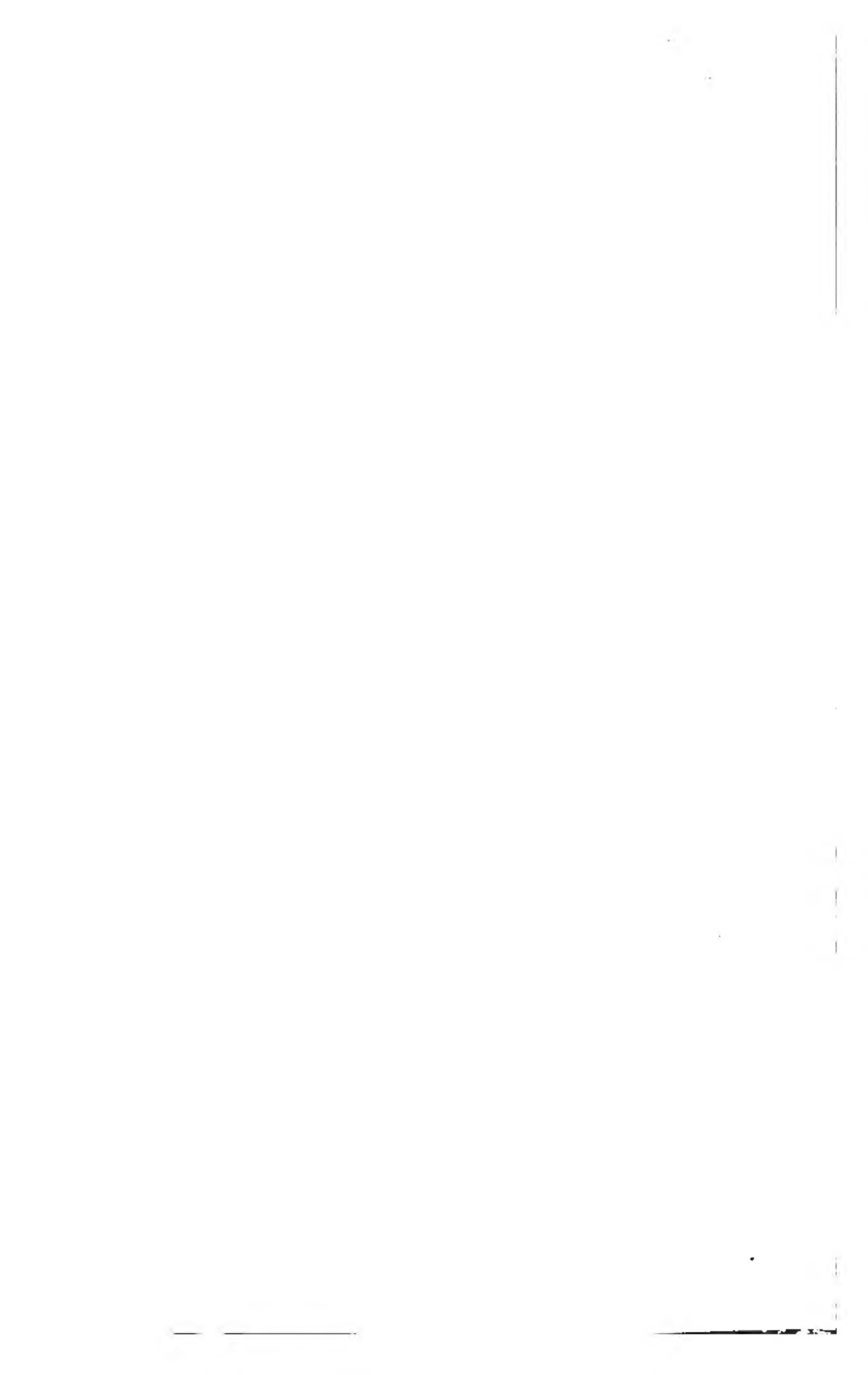
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RAILROAD REPORTS

(Vol. 29 American and English
Railroad Cases, New Series)

A COLLECTION OF ALL

CASES AFFECTING RAILROADS OF EVERY KIND,
DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES.

EDITED BY

THOMAS J. MICHIE.

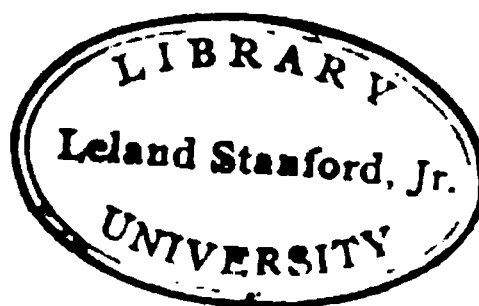
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TABLE OF CASES.

Adams, Revenue Agent, Yazoo & M. V. R. Co. <i>v.</i> (Miss.).....	519
Alabama Great Southern R. Co. <i>v.</i> Brooks (Ala.).....	375
Alabama Midland Ry. Co. <i>v.</i> Hatcher (Ga.).....	486
Alabama Midland Ry. Co. <i>v.</i> Stevens (Ga.).....	568
Alabama Midland Ry. Co., Stevens <i>v.</i> (Ga.).....	568
Alabama & V. Ry. Co., Burnham <i>v.</i> (Miss.)	17
Anderson <i>v.</i> City & Suburban Ry. Co. (Ore.).....	763
Ann Arbor R. Co., Brunick <i>v.</i> (Mich.).....	591
Atchison, T. & S. F. Ry. Co., Mendenhall <i>v.</i> (Kan.).....	685
Atchison, T. & S. F. Ry. Co., Rolfs <i>v.</i> (Kan.).....	920
Atchison, T. & S. F. Ry. Co., Wilson <i>v.</i> (Kan.)	664
Atlanta Ry. Co. <i>v.</i> Randall (Ga.)... ..	698
Atlantic & D. Ry. Co. <i>v.</i> West (Va.).....	291
Atwell, Illinois Cent. R. Co. <i>v.</i> (Ill.).....	317
Baker <i>v.</i> Boston Elevated Ry. Co. (Mass.).....	831
Baldoni, Georgia R. Co. <i>v.</i> (Ga.).....	68
Baltimore & Ohio Railroad Co., Francis Winslow, Appt., <i>v.</i> (U. S.)... ..	792
Baltimore & O. R. Co. <i>v.</i> State, to Use of Roming (Md.).....	619
Baltimore & O. S. W. R. Co. <i>v.</i> Harbin (Ind.).....	956
Baltimore & O. S. W. R. Co. <i>v.</i> State <i>ex rel.</i> Greenwood (Ind.).....	611
Bankers' Mutual Casualty Co. <i>v.</i> Minneapolis, St. P. & S. S. M. Ry. Co. (C. C. A.).....	16
Barry <i>v.</i> Burlington Ry. & Light Co. (Iowa)....	675
Beasley <i>v.</i> Texas & P. Ry. Co. (C. C. A.).....	463
Beaver, Chicago & E. I. R. Co. <i>v.</i> (Ill.).....	641
Beringer <i>v.</i> Dubuque St. Ry. Co. (Iowa)....	872
Birmingham Ry. & Electric Co., Sweet <i>v.</i> (Ala.).....	784
Birmingham Ry., Light & Power Co. <i>v.</i> Nolan (Ala.).....	89
Blue Ridge Ry. Co., Boyd <i>v.</i> (S. Car.).....	754
Boston Elevated Ry. Co., Baker <i>v.</i> (Mass.).....	831
Boston Elevated Ry. Co., Hannon <i>v.</i> (Mass.)	862
Boston El. Ry. Co., Burns <i>v.</i> (Mass.).....	918
Boston El. Ry. Co., Wadsworth <i>v.</i> (Mass.)	778
Boston & L. R. R., Lyons <i>v.</i> (Mass.).....	268
Boston & M. R. R., Day <i>v.</i> (Me.).....	626
Boyd <i>v.</i> Blue Ridge Ry. Co. (S. Car.) ...	754
Boyle <i>v.</i> Savannah, F. & W. Ry. Co. (Ga.).....	430
Boyle, Savannah, F. & W. Ry. Co. <i>v.</i> (Ga.)	430
Brooks, Alabama Great Southern R. Co. <i>v.</i> (Ala.).....	375
Brooks <i>v.</i> Louisville & N. R. Co. (Ky.).....	401
Brunick <i>v.</i> Ann Arbor R. Co. (Mich.).....	591
Brunswick & W. R. Co. <i>v.</i> Ponder (Ga.).....	45
Bullard <i>v.</i> Southern Ry. Co. (Ga.).....	606
Burlington Ry. & Light Co., Barry <i>v.</i> (Iowa).....	675
Burnham <i>v.</i> Alabama & V. Ry. Co. (Miss.).....	17
Burns <i>v.</i> Boston El. Ry. Co. (Mass.).....	918
Burns <i>v.</i> Metropolitan St. Ry. Co. (Kan.).....	476
Burns <i>v.</i> Southern Ry. Co. (S. Car.).....	321
Bussey, Missouri, K. & T. Ry. Co. <i>v.</i> (Kan.).....	667
Callahan <i>v.</i> St. Louis Merchants' Bridge Terminal Ry. Co. (Mo.)..	293
Cambern, County Treasurer, Missouri, K. & T. Ry. Co. <i>v.</i> (Kan.)..	806
Camden & S. Ry. Co., Corkhill <i>v.</i> (N. J.).....	786
Carroll <i>v.</i> New York, N. H. & H. R. R. (Mass.).....	313
Casey, Louisville Ry. Co. <i>v.</i> (Ky.).....	789
Cattano <i>v.</i> Metropolitan St. Ry. Co. (N. Y.).....	153
Central of Georgia Ry. Co. <i>v.</i> Dorsey (Ga.).....	857
Central of Georgia Ry. Co. <i>v.</i> Duffy (Ga.).....	660
Central of Georgia Ry. Co. <i>v.</i> McKinney (Ga.).....	71
Central of Georgia Ry. Co. <i>v.</i> Murphey (Ga.).....	28
Central of Georgia Ry. Co. <i>v.</i> Vining (Ga.).....	312
Chandler's Adm'r, Louisville, H. & St. L. Ry. Co. <i>v.</i> (Ky.).....	365
Chicago City Ry. Co. <i>v.</i> Fennimore (Ill.).....	644

Chicago & A. R. Co. <i>v.</i> Gore (Ill.).....	951
Chicago & A. R. Co. <i>v.</i> Murphy (Ill.).....	864
Chicago, B. & K. C. Ry. Co., Saar <i>v.</i> (Iowa).....	554
Chicago, B. & Q. R. Co. <i>v.</i> Roberts (Neb.).....	277
Chicago, B. & Q. R. Co. <i>v.</i> Winfrey (Neb.).....	689
Chicago & E. I. R. Co. <i>v.</i> Beaver (Ill.).....	641
Chicago & E. I. R. Co. <i>v.</i> Randolph (Ill.).....	632
Chicago & E. R. Co. <i>v.</i> Keith (Ohio).....	204
Chicago & G. W. Ry. Co., Larkin <i>v.</i> (Iowa).....	852
Chicago, M. & St. P. Ry. Co., Duree <i>v.</i> (Iowa).....	369
Chicago, M. & St. P. Ry. Co., Glanz <i>v.</i> (Iowa).....	213
Chicago, M. & St. P. Ry. Co., Schultz <i>v.</i> (Wis.).....	343
Chicago & N. W. Ry. Co., Fitzgibbon <i>v.</i> (Iowa).....	680
Chicago & N. W. Ry. Co., Kinyon <i>v.</i> (Iowa).....	569
Chicago & N. W. Ry. Co., Steber <i>v.</i> (Wis.).....	656
Chicago, R. I. & P. Ry. Co. <i>v.</i> Huggins (Ind. Ter.).....	555
Chicago, R. I. & P. Ry. Co., Mayne <i>v.</i> (Okla.).....	61
Chicago, R. I. & P. Ry. Co., Sankey <i>v.</i> (Iowa).....	306
Choctaw, O. & G. R. Co., Kilpatrick <i>v.</i> (C. C. A.).....	501
City Electric Ry. Co., Mabry <i>v.</i> (Ga.).....	900
City & Suburban Ry. Co., Anderson <i>v.</i> (Ore.).....	763
City Transfer Co. <i>v.</i> Draper (Ga.).....	119
Columbia, N. & L. R. Co., Oliver <i>v.</i> (S. Car.).....	708
Commonwealth <i>v.</i> Louisville & N. R. Co. (Ky.).....	13
Consolidation Coal Co., Lonaconing, M. & F. Ry. Co. <i>v.</i> (Md.).....	8
Corkhill <i>v.</i> Camden & S. Ry. Co. (N. J.).....	786
Cox <i>v.</i> South Shore & B. St. Ry. Co. (Mass.).....	461
Crady, Illinois Cent. R. Co. <i>v.</i> (Ky.).....	37
Crary <i>v.</i> Lehigh Val. R. Co. (Pa.).....	119
Dalton, Kansas City, Ft. S. & M. R. Co. <i>v.</i> (Kan.).....	187
Davis <i>v.</i> Seaboard Air Line Ry. (N. Car.).....	790
Day <i>v.</i> Boston & M. R. R. (Me.).....	626
Delaware, L. & W. R. Co., McGrath <i>v.</i> (N. J.).....	334
Desaussure, Southern Ry. Co. <i>v.</i> (Ga.).....	147
Dierig <i>v.</i> South Covington & C. St. Ry. Co. (Ky.).....	42
Dillon <i>v.</i> Iowa Cent. Ry. Co. (Iowa).....	336
Divinney, Missouri Pac. Ry. Co. <i>v.</i> (Kan.).....	679
Dolphin <i>v.</i> New York, N. H. & H. R. Co. (Mass.).....	341
Dorsey, Central of Georgia Ry. Co. <i>v.</i> (Ga.).....	857
Dotson, Illinois Cent. R. Co. <i>v.</i> (Ky.).....	380
Draper, City Transfer Co. <i>v.</i> (Ga.).....	119
Dubuque St. Ry. Co., Beringer <i>v.</i> (Iowa).....	872
Duffy, Central of Georgia Ry. Co. <i>v.</i> (Ga.).....	650
Dufresne, South Chicago City Ry. Co. <i>v.</i> (Ill.).....	137
Duree <i>v.</i> Chicago, M. & St. P. Ry. Co. (Iowa).....	369
Elkins, Judge <i>v.</i> (Mass.).....	830
Elkins <i>v.</i> South Carolina & G. R. Co. (S. Car.).....	598
Elmore <i>v.</i> Seaboard Air Line Ry. Co. (N. Car.).....	410
Erie R. Co., Minor <i>v.</i> (N. Y.).....	53
Fennimore, Chicago City Ry. Co. <i>v.</i> (Ill.).....	644
Fewings <i>v.</i> Mendenhall (Minn.).....	422
Fielders <i>v.</i> North Jersey St. Ry. Co. (N. J.).....	875
Fitzgibbon <i>v.</i> Chicago & N. W. Ry. Co. (Iowa).....	680
Flanagan Bank <i>v.</i> Graham (Ore.).....	446
Florida Cent. & P. R. Co. <i>v.</i> Sullivan (C. C. A.).....	840
Fort <i>v.</i> Southern Ry. (S. Car.).....	91
Ft. Worth & R. G. Ry. Co. <i>v.</i> Southwestern Telegraph & Telephone Co. (Tex.).....	222
Forty-Second St., M. & St. N. Ave. Ry. Co., Riddle <i>v.</i> (N. Y.).....	373
Foster <i>v.</i> Old Colony St. Ry. Co. (Mass.).....	894
Frazee, Louisville & N. R. Co. <i>v.</i> (Ky.).....	22
Fremont, E. & M. V. R. Co., Hendricks <i>v.</i> (Neb.).....	281
French, Louisville Ry. Co. <i>v.</i> (Ky.).....	473
Galligan <i>v.</i> Old Colony St. Ry. Co. (Mass.).....	896
Garbaccio <i>v.</i> Jersey City, H. & P. St. Ry. Co. (N. J.).....	666

TABLE OF CASES

V

Garlick <i>v.</i> Pittsburgh & W. Ry. Co. (Ohio).....	234
Garlick <i>v.</i> Pittsburgh, Y. & A. R. Co. (Ohio)	234
Georgia R. Co. <i>v.</i> Baldoni (Ga.).....	68
Gila Valley, G. & N. R. Co. <i>v.</i> Lyon (Ariz.).....	817
Gilmore <i>v.</i> Seattle & R. Ry. Co. (Wash.).....	143
Gipe, Pittsburg, C., C. & St. L. Ry. Co. <i>v.</i> (Ind.).....	383
Glanz <i>v.</i> Chicago, M. & St. P. Ry. Co. (Iowa).....	213
Gore, Chicago & A. R. Co. <i>v.</i> (Ill.)....	951
Gorman's Adm'r <i>v.</i> Louisville Ry. Co. (Ky.).....	803
Graham, Flanagan Bank <i>v.</i> (Ore.).....	446
Gray <i>v.</i> Washington Water Power Co. (Wash.).....	479
Gregg, Southern Ry. Co. <i>v.</i> (Va.).....	808
Griffin <i>v.</i> Southern Ry. (S. Car.).....	758
Gulf, C. & S. F. Ry. Co. <i>v.</i> Steele (Tex.).....	492
Hamilton, G. & C. Traction Co. <i>v.</i> Parish (Ohio).....	193
Hannon <i>v.</i> Boston Elevated Ry. Co. (Mass.).....	862
Harbin, Baltimore & O. S. W. R. Co. <i>v.</i> (Ind.).....	956
Haselton <i>v.</i> Portsmouth, K. & Y. St. Ry. (N. H.).....	705
Hatcher, Alabama Midland Ry. Co. <i>v.</i> (Ga.).....	486
Hendricks <i>v.</i> Fremont, E. & M. V. R. Co. (Neb.).....	281
Hesse <i>v.</i> Meriden, S. & C. Tramway Co. (Conn.)	774
Hill, Southern Ry. Co. <i>v.</i> (Ga.).....	568
Hines <i>v.</i> Texas & P. Ry. Co. (C. C. A.).....	675
Holmes <i>v.</i> United States (C. C. A.).....	486
Houston, E. & W. T. Ry. Co., Thweatt <i>v.</i> (Tex.).....	428
Huggins, Chicago, R. I. & P. Ry. Co. <i>v.</i> (Ind. Ter.).....	555
Illinois Cent. R. Co. <i>v.</i> Atwell (Ill.).....	317
Illinois Cent. R. Co. <i>v.</i> Crady (Ky.).....	37
Illinois Cent. R. Co. <i>v.</i> Dotson (Ky.).....	380
Illinois Cent. R. Co., Long's Adm'r <i>v.</i> (Ky.)	349
Illinois Cent. R. Co. <i>v.</i> Matthews (Ky.).....	769
<i>In re</i> Opening of Ludlow St., in City of Yonkers (N. Y.).....	202
Iowa Cent. Ry. Co., Dillon <i>v.</i> (Iowa).....	336
Jersey City, H. & P. St. Ry. Co., Garbaccio <i>v.</i> (N. J.).....	666
Johnson <i>v.</i> New York Cent. & H. R. R. Co. (N. Y.).....	595
Johnson <i>v.</i> Richmond, F. & P. R. Co. (Va.).....	498
Judge <i>v.</i> Elkins (Mass.).....	830
Kansas City, Ft. S. & M. R. Co. <i>v.</i> Dalton (Kan.).....	187
Kansas City, Ft. S. & M. R. Co. <i>v.</i> Little (Kan.).....	701
Kansas City, Ft. S. & M. Ry. Co. <i>v.</i> Walker (Ark.).....	595
Kansas City, M. & B. R. Co. <i>v.</i> McShan (Miss.).....	768
Keith, Chicago & E. R. Co. <i>v.</i> (Ohio).....	204
Kernan <i>v.</i> Market St. Ry. Co. (Cal.).....	471
Kibler <i>v.</i> Southern Ry. (S. Car.).....	891
Kilpatrick <i>v.</i> Choctaw, O. & G. R. Co. (C. C. A.)... ..	501
Kinyon <i>v.</i> Chicago & N. W. Ry. Co. (Iowa).....	569
Kird <i>v.</i> New Orleans & N. W. Ry. Co. (La.).....	682
Knight, Comptroller, People <i>ex rel.</i> New York Cent. & H. R. R. Co. <i>v.</i> (N. Y.).....	547
Lancaster & C. Ry. Co., Ringstaff <i>v.</i> (S. Car.).....	652
Landers, Louisville & N. R. Co. <i>v.</i> (Ala.).....	96
Landis, Western Maryland R. Co. <i>v.</i> (Md.).....	20
Larkin <i>v.</i> Chicago & G. W. Ry. Co. (Iowa).....	852
Lasseter, Southern Ry. Co. <i>v.</i> (Ga.).....	146
Lawshe <i>v.</i> Tacoma Railway & Power Co. (Wash.)	38
Lee, Louisville & N. R. Co. <i>v.</i> (Ala.).....	815
Leftwich, St. Louis, I. M. & S. Ry. Co. <i>v.</i> (C. C. A.).....	86
Lehigh Val. R. Co., Crary <i>v.</i> (Pa.)	119
Lenhart, Pennsylvania Co. <i>v.</i> (C. C. A.).....	847
Leviton, Potter <i>v.</i> (Ill.).....	625
Lima Ry. Co. <i>v.</i> Little (Ohio).....	162
Little, Kansas City, Ft. S. & M. R. Co. <i>v.</i> (Kan.).....	701
Little, Lima Ry. Co. <i>v.</i> (Ohio).....	162
Logan <i>v.</i> Wabash Ry. Co. (Mo.).....	274
Lonaconing, M. & F. Ry. Co. <i>v.</i> Consolidation Coal Co. (Md.).....	8

Long's Adm'r <i>v.</i> Illinois Cent. R. Co. (Ky.).....	349
Louisville, H. & St. L. Ry. Co. <i>v.</i> Chandler's Adm'r (Ky.).....	365
Louisville & N. R. Co., Brooks <i>v.</i> (Ky.).....	401
Louisville & N. R. Co., Commonwealth <i>v.</i> (Ky.).....	13
Louisville & N. R. Co. <i>v.</i> Frazee (Ky.).....	22
Louisville & N. R. Co. <i>v.</i> Landers (Ala.).....	96
Louisville & N. R. Co. <i>v.</i> Lee (Ala.).....	815
Louisville & N. R. Co., Morningstar <i>v.</i> (Ala.)	902
Louisville & N. R. Co., Wikle <i>v.</i> (Ga.)	333
Louisville Ry. Co. <i>v.</i> Casey (Ky.).....	789
Louisville Ry. Co. <i>v.</i> French (Ky.).....	473
Louisville Ry. Co., Gorman's Adm'r <i>v.</i> (Ky.).....	803
Lynn & B. R. Co., Witherington <i>v.</i> (Mass.).....	838
Lyon, Gila Valley, G. & N. R. Co. <i>v.</i> (Ariz.).....	817
Lyons <i>v.</i> Boston & L. R. R. (Mass.).....	268
McAllister <i>v.</i> People's Ry. Co. (Del.).....	957
McGrath <i>v.</i> Delaware, L. & W. R. Co. (N. J.).....	334
McKinney, Central of Georgia Ry. Co. <i>v.</i> (Ga.).....	71
McShan, Kansas City, M. & B. R. Co. <i>v.</i> (Miss.)..	768
Mabry <i>v.</i> City Electric Ry. Co. (Ga.)..	900
Market St. Ry. Co., Kernan <i>v.</i> (Cal.).....	471
Mathieson <i>v.</i> Omaha St. Ry. Co. (Neb.).....	469
Matthews, Illinois Cent. R. Co. <i>v.</i> (Ky.).....	769
Mayne <i>v.</i> Chicago, R. I. & P. Ry. Co. (Okla.).....	61
Mendenhall <i>v.</i> Atchison, T. & S. F. Ry. Co. (Kan.).....	685
Mendenhall, Fewings <i>v.</i> (Minn.).....	422
Mercantile Trust Co. <i>v.</i> Pittsburgh & W. Ry. Co. (Lake, Inter- vener) (C. C. A.).....	354
Meriden, S. & C. Tramway Co., Hesse <i>v.</i> (Conn.).....	774
Metropolitan St. Ry. Co., Burns <i>v.</i> (Kan.).....	476
Metropolitan St. Ry. Co., Cattano <i>v.</i> (N. Y.).....	153
Metropolitan St. Ry. Co. <i>v.</i> Rouch (Kan.).....	457
Meyere <i>v.</i> Nashville, C. & St. L. Ry. (Tenn.)...	947
Milwaukee, B. & L. G. R. Co., State <i>ex rel.</i> Vilter Mfg. Co. <i>v.</i> (Wis.)..	261
Minneapolis & St. L. R. Co., Simonson <i>v.</i> (Minn.)	190
Minneapolis, St. P. & S. S. M. Ry. Co., Bankers' Mutual Casualty Co. <i>v.</i> (C. C. A.).....	16
Minneapolis, St. P. & S. S. M. Ry. Co., Snell <i>v.</i> (Minn.).....	636
Minor <i>v.</i> Erie R. Co. (N. Y.).....	53
Missouri, K. & T. Ry. Co. <i>v.</i> Bussey (Kan.)...	667
Missouri, K. & T. Ry. Co. <i>v.</i> Cambern, County Treasurer (Kan.)...	806
Missouri Pac. Ry. Co. <i>v.</i> Divinney (Kan.).....	679
Mix, Northern Pac. Ry. Co. <i>v.</i> (C. C. A.)	739
Mobile St. Ry. Co. <i>v.</i> Watters (Ala.).....	184
Moody <i>v.</i> Springfield St. Ry. Co. (Mass.)	116
Morgan's Louisiana & T. R. & S. S. Co. <i>v.</i> Railroad Commission of Louisiana (La.).....	122
Morningstar <i>v.</i> Louisville & N. R. Co. (Ala.).....	902
Mott <i>v.</i> Southern Ry. Co. (N. Car.).....	444
Murphey, Central of Georgia Ry. Co. <i>v.</i> (Ga.).....	28
Murphy, Chicago & A. R. Co. <i>v.</i> (Ill.).....	864
Myers <i>v.</i> Southern Ry. Co. (S. Car.).....	92
Nash <i>v.</i> Southern Ry. Co. (Ala.)...	780
Nashville, C. & St. L. Ry., Meyere <i>v.</i> (Tenn.).....	947
New Orleans & N. W. Ry. Co., Kird <i>v.</i> (La.).....	682
New York Cent. & H. R. R. Co., Johnson <i>v.</i> (N. Y.).....	595
New York, N. H. & H. R. R., Carroll <i>v.</i> (Mass.).....	313
New York, N. H. & H. R. R. Co., Dolphin <i>v.</i> (Mass.).....	341
Nolan, Birmingham Ry., Light & Power Co. <i>v.</i> (Ala.).....	89
Norfolk & W. R. Co., Wall <i>v.</i> (W. Va.).....	580
Northern Pac. Ry. Co. <i>v.</i> Mix (C. C. A.)...	739
Northern Pac. Ry. Co. <i>v.</i> Tynan (C. C. A.).....	394
North Jersey St. Ry. Co., Fielders <i>v.</i> (N. J.).....	875
North Jersey St. Ry. Co., Paginini <i>v.</i> (N. J.).....	930
O'Bryan, Southern Ry. Co. <i>v.</i> (Ga.).....	59

TABLE OF CASES

VII

Oklahoma City, Southern Kansas Ry. Co. <i>v.</i> (Okla.)	244
Old Colony St. Ry. Co., Foster <i>v.</i> (Mass.).....	894
Old Colony St. Ry. Co., Galligan <i>v.</i> (Mass.).....	896
Old Colony St. Ry., Timms <i>v.</i> (Mass.).....	783
Oliver <i>v.</i> Columbia, N. & L. R. Co. (S. Car.).....	708
Omaha St. Ry. Co., Mathieson <i>v.</i> (Neb.).....	469
Paginini <i>v.</i> North Jersey St. Ry. Co. (N. J.).....	930
Parish, Hamilton, G. & C. Traction Co. <i>v.</i> (Ohio).....	193
Pennsylvania Co. <i>v.</i> Lenhart (C. C. A.).....	847
Pennsylvania Co. <i>v.</i> Reidy (Ill.).....	562
People <i>ex rel.</i> New York Cent. & H. R. R. Co. <i>v.</i> Knight, Comptroller (N. Y.).....	547
People's Ry. Co., McAllister <i>v.</i> (Del.).....	957
Philadelphia & R. Ry. Co., Winkler <i>v.</i> (Del.).....	361
Pittsburg, C., C. & St. L. Ry. Co. <i>v.</i> Gipe (Ind.)	383
Pittsburgh & W. Ry. Co., Garlick <i>v.</i> (Ohio).....	234
Pittsburg & W. Ry. Co. (Lake, Intervener), Mercantile Trust Co. <i>v.</i> (C. C. A.).....	354
Pittsburgh, Y. & A. R. Co., Garlick <i>v.</i> (Ohio).....	234
Ponder, Brunswick & W. R. Co. <i>v.</i> (Ga.)	45
Port Blakely Mill Co., Roberts <i>v.</i> (Wash.).....	403
Portsmouth, K. & Y. St. Ry., Haselton <i>v.</i> (N. H.)....	705
Potter <i>v.</i> Leviton (Ill.).....	625
Powelson <i>v.</i> United Traction Co. (Pa.).....	927
Railroad Commission of Louisiana, Morgan's Louisiana & T. R. & S. S. Co. <i>v.</i> (La.)	122
Randall, Atlanta Ry. Co. <i>v.</i> (Ga.).....	698
Randolph, Chicago & E. I. R. Co. <i>v.</i> (Ill.).....	632
Reagan, Texas & P. Ry. Co. <i>v.</i> (C. C. A.).....	345
Reeves, Southern Ry. Co. <i>v.</i> (Ga.).....	870
Reidy, Pennsylvania Co. <i>v.</i> (Ill.).....	562
Richmond, F. & P. R. Co., Johnson <i>v.</i> (Va.).....	498
Riddle <i>v.</i> Forty-Second St., M. & St. N. Ave. Ry. Co. (N. Y.).....	373
Ringstaff <i>v.</i> Lancaster & C. Ry. Co. (S. Car.).....	652
Roberts, Chicago, B. & Q. R. Co. <i>v.</i> (Neb.).....	277
Roberts <i>v.</i> Port Blakely Mill Co. (Wash.).....	403
Rolfs <i>v.</i> Atchison, T. & S. F. Ry. Co. (Kan.).....	920
Rouch, Metropolitan St. Ry. Co. <i>v.</i> (Kan.).....	457
Rutland R. Co., Town of Clarendon <i>v.</i> (Vt.).....	1
St. Louis, I. M. & S. Ry. Co. <i>v.</i> Leftwich (C. C. A.).....	86
St. Louis Merchants' Bridge Terminal Ry. Co., Callahan <i>v.</i> (Mo.)..	293
Saar <i>v.</i> Chicago, B. & K. C. Ry. Co. (Iowa).....	554
Sambuck <i>v.</i> Southern Pac. Co. (Cal.).....	687
San Jose Land & Water Company, Plff. in Err., <i>v.</i> San Jose Ranch Company (U. S.).....	824
San Jose Ranch Company, San Jose Land & Water Company, Plff. in Err., <i>v.</i> (U. S.) ...	824
Sankey <i>v.</i> Chicago, R. I. & P. Ry. Co. (Iowa).....	306
Savannah, F. & W. Ry. Co. <i>v.</i> Boyle (Ga.).....	430
Savannah, F. & W. Ry. Co., Boyle <i>v.</i> (Ga.).....	430
Sawdey <i>v.</i> Spokane Falls & N. Ry. Co. (Wash.).....	283
Schultz <i>v.</i> Chicago, M. & St. P. Ry. Co. (Wis.).....	343
Seaboard Air Line Ry. Co., Elmore <i>v.</i> (N. Car.).....	410
Seaboard Air Line Ry., Davis <i>v.</i> (N. Car.).....	790
Seattle & R. Ry. Co., Gilmore <i>v.</i> (Wash.).....	143
Simonson <i>v.</i> Minneapolis & St. L. R. Co. (Minn.).....	190
Slauson, Southern California Ry. Co. <i>v.</i> (Cal.)..	231
Snell <i>v.</i> Minneapolis, St. P. & S. S. M. Ry. Co. (Minn.).....	636
South Carolina & G. R. Co., Elkins <i>v.</i> (S. Car.).....	598
South Chicago City Ry. Co. <i>v.</i> Dufresne (Ill.)	137
South Covington & C. St. Ry. Co., Dierig <i>v.</i> (Ky.).....	42
Southern California Ry. Co. <i>v.</i> Slauson (Cal.).....	231
Southern Kansas Ry. Co. <i>v.</i> Oklahoma City (Okla.).....	244
Southern Pac. Co., Sambuck <i>v.</i> (Cal.).....	687
Southern Ry. Co., Bullard <i>v.</i> (Ga.).....	606

Southern Ry. Co., <i>Burns v.</i> (S. Car.).....	321
Southern Ry. Co. <i>v.</i> DeSaussure (Ga.).....	147
Southern Ry. Co. <i>v.</i> Gregg (Va.).....	808
Southern Ry., <i>Griffin v.</i> (S. Car.).....	758
Southern Ry. Co. <i>v.</i> Hill (Ga.).....	568
Southern Ry., <i>Kibler v.</i> (S. Car.).....	891
Southern Ry. Co. <i>v.</i> Lasseter (Ga.).....	146
Southern Ry. Co., <i>Mott v.</i> (N. Car.).....	444
Southern Ry. Co., <i>Nash v.</i> (Ala.).....	780
Southern Ry. Co. <i>v.</i> O'Bryan (Ga.).....	59
Southern Ry. Co. <i>v.</i> Reeves (Ga.).....	870
Southern Ry. Co., <i>Thomas v.</i> (N. Car.).....	860
Southern Ry. Co. <i>v.</i> Webb (Ga.).....	76
Southern Ry. Co., <i>Weber v.</i> (S. Car.).....	932
Southern Ry., <i>Fort v.</i> (S. Car.).....	91
Southern Ry., <i>Myers v.</i> (S. Car.).....	92
South Shore & B. St. Ry. Co., <i>Cox v.</i> (Mass.).....	461
Southwestern Telegraph & Telephone Co., Ft. Worth & R. G. Ry. Co. <i>v.</i> (Tex.).....	222
Spokane Falls & N. Ry. Co., <i>Sawdey v.</i> (Wash.).....	283
Springfield St. Ry. Co., <i>Moody v.</i> (Mass.).....	116
State, <i>Vaughan v.</i> (Ga.).....	25
State <i>ex rel.</i> Greenwood, Baltimore & O. S. W. R. Co. <i>v.</i> (Ind.)....	611
State <i>ex rel.</i> Vilter Mfg. Co. <i>v.</i> Milwaukee, B. & L. G. R. Co. (Wis.)	261
State, to Use of Roming, Baltimore & O. R. Co. <i>v.</i> (Md.).....	619
State, to Use of Shirk, Western Maryland R. Co. <i>v.</i> (Md.).....	904
Steber <i>v.</i> Chicago & N. W. Ry. Co. (Wis.).....	656
Steele, Gulf, C. & S. F. Ry. Co. <i>v.</i> (Tex.).....	492
Stevens <i>v.</i> Alabama Midland Ry. Co. (Ga.).....	568
Stevens, Alabama Midland Ry. Co. <i>v.</i> (Ga.).....	568
Sullivan, Florida Cent. & P. R. Co. <i>v.</i> (C. C. A.).....	840
Sweet <i>v.</i> Birmingham Ry. & Electric Co. (Ala.).....	784
Tacoma Railway & Power Co., <i>Lawshe v.</i> (Wash.).....	38
Texas & P. Ry. Co., <i>Beasley v.</i> (C. C. A.).....	463
Texas & P. Ry. Co., <i>Hines v.</i> (C. C. A.).....	675
Texas & P. Ry. Co. <i>v.</i> Reagan (C. C. A.).....	345
Thomas <i>v.</i> Southern Ry. Co. (N. Car.).....	860
Thweatt <i>v.</i> Houston, E. & W. T. Ry. Co. (Tex.).....	428
Timms <i>v.</i> Old Colony St. Ry. (Mass.).....	783
Town of Clarendon <i>v.</i> Rutland R. Co. (Vt.).....	1
Tynan, Northern Pac. Ry. Co. <i>v.</i> (C. C. A.).....	394
United States, <i>Holmes v.</i> (C. C. A.).....	486
United Traction Co., <i>Powelson v.</i> (Pa.).....	927
Vaughan <i>v.</i> State (Ga.).....	25
Vining, Central of Georgia Ry. Co. <i>v.</i> (Ga.).....	312
Wabash Ry. Co., <i>Logan v.</i> (Mo.).....	274
Wadsworth <i>v.</i> Boston El. Ry. Co. (Mass.).....	778
Walker, Kansas City, Ft. S. & M. Ry. Co. <i>v.</i> (Ark.).....	595
Wall <i>v.</i> Norfolk & W. R. Co. (W. Va.).....	580
Washington Water Power Co., <i>Gray v.</i> (Wash.).....	479
Watters, Mobile St. Ry. Co. <i>v.</i> (Ala.).....	184
Webb, Southern Ry. Co. <i>v.</i> (Ga.).....	76
Weber <i>v.</i> Southern Ry. Co. (S. Car.).....	932
West. Atlantic & D. Ry. Co. <i>v.</i> (Va.).....	291
Western Maryland R. Co. <i>v.</i> Landis (Md.).....	20
Western Maryland R. Co. <i>v.</i> State, to Use of Shirk (Md.).....	904
Wikle <i>v.</i> Louisville & N. R. Co. (Ga.).....	333
Wilson <i>v.</i> Atchison, T. & S. F. Ry. Co. (Kan.).....	664
Winfrey, Chicago, B. & Q. R. Co. <i>v.</i> (Neb.).....	689
Winkler <i>v.</i> Philadelphia & R. Ry. Co. (Del.).....	361
Winslow, Francis, Appt., <i>v.</i> Baltimore & Ohio Railroad Co. (U. S.)	792
Witherington <i>v.</i> Lynn & B. R. Co. (Mass.).....	838
Yazoo & M. V. R. Co. <i>v.</i> Adams, Revenue Agent (Miss.).....	519

RAILROAD REPORTS

TOWN OF CLARENDON *v.* RUTLAND R. CO.

(*Supreme Court of Vermont, Rutland, Aug. 27, 1902.*)

[52 Atl. Rep. 1057.]

Highways—Dedication—Sufficiency of Evidence.

Upon an issue as to whether a road leading from a certain farm to a main highway was a public highway at the time when a railroad was constructed across such road, there was evidence that the buildings on the farm had been there for more than 100 years; that the only way to reach them from the main highway was by the road in question; that such road was in existence before the railroad was built, and was fenced, kept open for public travel, and used by the public as there was occasion: *held*, that the jury were warranted in finding dedication by the owner of the farm.

Same—Same—Acceptance.

A railroad constructed through a town crossed a road leading from a main highway of such town to a certain farm. There was evidence of dedication by the landowner, and, upon the issue of acceptance, a witness 84 years old, who had lived all his life on a farm adjoining the one in question, testified that the house on the latter farm was old when he first saw it; that he had known the road as long as he could remember; that it was bounded by old stone walls, had always been used as a public road, and was in existence when the railroad was built; that the town selectmen gave him tax bills with directions to repair "all the roads" in his district, which he understood to include the one in question, as they "usually kept it in repair"; that under the direction of the selectmen he repaired the road the year the railroad was built; and that about 15 years thereafter the railroad company replaced the bridge it had originally been required to construct, with another bridge, which in turn the town replaced with the bridge sought to be charged against such company. Another witness, who was born on the farm in question 17 years prior to the building of the railroad, testified that the road in question existed prior to the building of the railroad, and was used as a public highway: *held* to sustain a finding that the road had been accepted by the town as a public highway.

Crossings—Duty to Maintain.

A railroad company's charter required that the road should be so constructed as not to obstruct the safe and convenient use of any highway which it should cross, and that, if it should raise or lower such highway, such alteration should be made to the satisfaction of the selectmen, etc.: *held* that the provision as to such construction as would not impede, etc., the use of such highway, imposed upon the company the duty of maintaining a proper crossing, in addition to the duty of original construction imposed.

Same—Same—Charter Obligation—Statutory Requirement.

V. S. 3844, 3846, enacted after the granting of the charter, and providing that it shall be the duty of railroad companies to maintain, repair, etc., crossings, etc., and giving a right of action against them for the cost of maintaining, repairing, etc., such crossings, in the event that the company fails to do so, did not impose any new liability on the company in question, but related to the remedy in case of default in the charter duty.

Same—Same—Police Power.

V. S. 3844, 3845, 3846, requiring a railroad company to maintain, repair, etc., crossings over its road, and giving a right of action against it for the cost of such maintenance, repair, etc., in the event of its default in this regard, is a valid police regulation, even though addi-

Town of Clarendon v. Rutland R. Co

tional obligations not imposed by the company's charter be thereby imposed.

Same—Same—Due Process of Law.

V. S. 3844 requires a railroad company to maintain, repair, etc., crossings over its road; and section 3846 provides that, in the event of a company's default in this regard, the town or party entitled to the crossing may notify such company to reconstruct or repair, and thereafter, if the company continue in default, may have the work done, and have an action against the company for the cost thereof: *held*, in an action by a town for the cost of reconstructing a crossing after due notice to defendant to reconstruct, and after default on its part, that a judgment for plaintiff based on the jury's assessment of the amount necessarily expended by plaintiff in such reconstruction was not a taking of defendant's property without due process of law.

Exceptions from Rutland county court; Start, Judge.

Action by the town of Clarendon against the Rutland Railroad Company. From a pro forma judgment for the plaintiff, the defendant brings exceptions. Affirmed.

Argued before ROWELL, C. J., and TYLER, MUNSON, WATSON, and STAFFORD, JJ.

Butler & Moloney and George E. Lawrence, for plaintiff.

Frederick H. Button and William H. Button, for defendant.

TYLER, J. Assumpsit, under V. S. 3846, to recover the amount expended by the plaintiff in building a bridge upon an alleged highway that extends across the defendant's railroad in said town. The defendant in the year 1848, under a charter granted by the legislature in the year 1843 to the Champlain & Connecticut Railroad Company, to whose franchises it succeeded, by condemnation proceedings acquired a right of way five rods wide, running in a northerly and southerly direction through the town, crossing the farm of Enoch Smith, and built its railroad upon it. On the east side of the five rods was a main highway of the town, called the "East Road," running in the same general direction with and near the railroad. The buildings upon the Smith farm were west of the railroad, which was constructed in a cut opposite said buildings, so that an overhead crossing was necessary for persons and teams to pass between the buildings and the East road, and a crossing was constructed by the railroad company for that purpose. The condemnation proceedings included the location of the crossing and the approaches to it. There was no record evidence that a highway was ever laid out or surveyed between the Smith buildings and the East road, or that the defendant or its predecessor ever took any corporate action in respect to a dedication of the premises to the public as a highway; but it appeared that the defendant maintained a crossing there until a short time before the present bridge was built, when the defendant tore it down by reason of its unsafe condition. The jury were not required to return a general verdict, but they found by special verdicts that the highway in question was a public highway when the plaintiff

Town of Clarendon v. Rutland R. Co

notified the defendant to rebuild the bridge; that it was a public highway at and before the time the railroad was built through the Smith farm; that the plaintiff's selectmen adjudged that it was necessary to rebuild the bridge, and so notified the defendant; and that the sum expended in rebuilding it was reasonable.

1. The first question presented by the exceptions is whether the plaintiff's evidence tended to show that at the time the railroad was located and built it was extended over a then existing public highway at the point in question, or whether the court should have directed a verdict as moved by the defendant. As this road was not laid out and opened in the manner provided by the statute, the question is whether there was a dedication to the public and an acceptance by the town; for it is well settled that neither a dedication of land to the public for a highway, nor the use of it as such by the public, is sufficient to impose upon a town the duty to keep it in repair, unless it has been accepted and adopted by the proper town officers. An intention to adopt the road as an existing highway must be manifested by acts of the town authorities. *Pratt v. Town of Swanton*, 15 Vt. 147; *Hyde v. Town of Jamaica*, 27 Vt. 443; *Folsom v. Town of Underhill*, 36 Vt. 580; *Tower v. Town of Rutland*, 56 Vt. 28. In *Folsom v. Town of Underhill*, the court laid down this rule: "The opening of a road by the landowners to public use, and its use by the public without interruption, and the allowance by the landowners of repairs upon it at the public expense, are facts which would tend strongly to show the intention to dedicate the land by the landowners to the use of a public highway. If this intention was unequivocally manifested, the dedication, so far as the owners of the soil were concerned, was complete; and, if the land was accepted and used by the public in the manner intended, the owner and all claiming in his right would be precluded from asserting any ownership inconsistent with such use." In the present case the court instructed the jury, in accordance with the well-established rules, that there must have been an intention by the landowner to dedicate, a manifestation of that intention by his acts, and an acceptance or adoption by a majority of the selectmen. The plaintiff's evidence tended to show that the buildings on the Smith farm had occupied the place where they now stand for more than a hundred years, that the only way of going from them to the main highway and returning was by this road, and that it was in existence before the railroad was built. These facts, and the facts that the road was fenced and kept open for public travel, and that the public used it as there was occasion, were evidence from which the jury were warranted in finding both an intention to dedicate and the act of dedication by the landowner. We think the evidence tends to show an adoption of this road by the town. The witness Crossman testified that he was 84 years old, and had lived upon a farm adjoining the

Town of Clarendon v. Rutland R. Co

Smith farm since he was two years old; that the Smith house was apparently old when he first knew it; that he had known the road as long as he could remember; that it was bounded by old stone walls, and had always been a public road; that it was in existence before the railroad was built, and that the railroad company built a trestle bridge over its track, so the public could continue to use the road; that he was highway surveyor before the railroad was built; that the selectmen gave him tax bills, with directions to repair "all the roads" in his district, which he understood included this one, because it was one that "they usually kept in repair." He had reason to remember that he repaired the road the year the railroad was built, because, as he says, it got out of repair by stone being drawn over it for use in building the railroad, and he was directed by the selectmen to lay out more money upon it than was upon the tax bill. His testimony tended to show that in the year the railroad was built, and in previous years, as highway surveyor he received tax bills from the selectmen, which included this road; that he expended money upon it, as upon other roads, and returned the tax bills to the selectmen. This evidence was properly admitted. Crossman's testimony also tended to show that in 1862 or 1863 the railroad company removed the trestle bridge, and built a new one in its place, with stone abutments, which was removed by the defendant, and replaced by the plaintiff by the bridge in controversy. Another witness, who was born in the Smith house in 1830, testified that he knew this road prior to 1847, and that it was then fenced and used as a public highway. All this evidence was properly admitted as tending to show that this road was a public highway by acceptance and adoption by the plaintiff town, and it was not error to submit the question to the jury.

2. The defendant makes the further point that its whole duty was performed when it had constructed the original crossing to the satisfaction of the selectmen, and that it did not owe the town the duty of maintaining it. This claim renders it necessary to examine the company's charter. Section 14 is as follows: "If said railroad shall cross * * * any canal, highway, or turnpike, the same shall be so constructed as not to impede or obstruct the safe and convenient use of such canal, highway, or turnpike, and said corporation may raise or lower such turnpike, highway, or private way, so that said railroad, if necessary, may pass under or over the same. And if said corporation shall raise or lower any such turnpike, highway, or private way, and shall not so raise or lower the same, as to be satisfactory to the proprietors of said turnpike, or to the selectmen of the town in which said highway or private way is situated, said proprietors, or selectmen, may require, in writing, of said corporation, such alteration or amendment as they may think necessary; and if the required amendment or alteration be reasonable

Town of Clarendon v. Rutland R. Co

and proper, and said corporation shall unnecessarily neglect to make the same, such proprietors or selectmen may make such alteration and amendment, and may prosecute to final judgment and execution, in any court proper to try the same in an action on the case against said corporation, and shall therein recover a reasonable indemnity in damages, for all expenses occasioned by making such alteration, with costs of suit. * * * While the charter provided that the railroad company should be "seised and possessed" of the lands acquired by the condemnation proceedings, the grant was made with reference to existing rights of towns through which its road passes, and with the evident intention of the legislature to protect those rights. The defendant's duty to construct an overhead crossing for the use of the public when it built its road is conceded, provided the highway was then existing. The language of the charter, requiring that the railroad should be so constructed that when it crossed any highway it should not impede or obstruct the safe and convenient use of such highway, implies the maintenance of a crossing for the use of the public in connection with the road in question. If the crossing were destroyed, travel over the highway would be impossible. The charter requires the building of the crossing in connection with the construction of the railroad. The raising or lowering of the highway, so that the railroad may pass under or over it, is made a part of the construction of the railroad, and the railroad and the crossing are to exist together so that public may continue to use the highway. The charter makes no intimation that the burden is to be shifted from the railroad company to the town in case the crossing should be destroyed or become out of repair and impassable. We hold, therefore, that it was the railroad company's duty, under its charter, to construct and maintain a crossing at the point in question. This is the only reasonable construction of section 14. V. S. 3844-3846 impose no duty upon the company beyond what the charter requires. These sections only provide a more specific remedy, when railroad companies are in default of their duty, than was provided by the charter. The later acts relate to the remedy rather than to the liability.

3. But if the charter were construed to mean that the company had performed its whole duty when it made the overhead crossing, and that the duty to rebuild was not required, the legislature had a right to impose additional burdens upon it. These sections had their origin in No. 26, Acts 1852. Section 3844 provides that when a railroad company has constructed a railroad across a public highway by passing upon, over, or under the traveled path thereof, the corporation shall keep in good and sufficient repair, and rebuild when necessary, bridges, culverts, crossings, and other constructions made for the accommodation, safety, and convenience of the public travel on the highway,

Town of Clarendon v. Rutland R. Co

over, under, or upon such railroad. By section 3845 the liability of the corporation continues, although the railroad has been abandoned, unless the selectmen of the town, in writing, consent that the company be released therefrom. V. S. 3846, reads: "If the selectmen of a town in which such crossing is located are of opinion that such bridge, culvert, crossing, or other constructions require repairing or rebuilding in order to be safe for travel thereon, they may notify the corporation, required by this chapter to repair or rebuild the same, by leaving a written notice to that effect with the president, superintendent of such road, or the clerk of said corporation. And if such corporation does not repair or rebuild the same for one month after such notice, the town may do so, and recover the expense thereof of the corporation, in an action of general assumpsit for work and labor done, with costs." It was not within the scope of legislative authority to grant to the company a right to construct and operate its road without regard to the rights of other persons and corporations. It is a settled principle that every holder of property, however absolute his title, holds it under the implied liability that his use of it shall not be injurious to the enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property is held subject to general regulations made by the legislature, under its police power, for the common good and general welfare. Cooley, Const. Lim. (6th Ed.) c. 16; Com. v. Alger, 7 Cush. 53. Redfield, C. J., said in Thorpe v. Railroad Co., 27 Vt. 140, 62 Am. Dec. 625: "By this general police power of the state, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state." In respect to impairing the obligations of contracts, he said: "All contracts and all rights * * * are subject to this power; and not only may regulations which affect them be established, * * * but all such regulations must be subject to change from time to time as the general well-being of the community may require, or as the circumstances may change. * * *" The subject of legislative control over corporations is exhaustively discussed in this opinion, and the case is often referred to by courts and law writers as a leading authority. There it is declared that the essential franchise of a railroad company is the right to operate its road and receive fare and freight; that the entire power of legislative control is reserved, unless expressly or by necessary implication restricted in the charter; that the corporation takes nothing by intendment but what is necessary to the enjoyment of what is expressly granted; and a quotation is made from Chief Justice Marshall's opinion in the Dartmouth College Case, 4 Wheat. 518, 4 L. Ed. 629,—that "a corporation is an artificial being—the mere creature of the law. It possesses only those properties which the charter of

Town of Clarendon v. Rutland R. Co

its creation confers upon it, either expressly, or as incidental to its very existence." The question in the Thorpe Case was whether the defendant was bound by the provision in the general railroad act of 1849, which required railroad companies to construct and maintain cattle guards, there being no such obligation imposed upon the defendant by its charter; and it was held that it was within the scope of the police power of the state, through the legislature, to make such requirement; that this power extends to the regulation and control of the entire business of railroads; that while the powers expressly or by necessary implication, conferred by the charter, and which are essential to the successful operation of the corporation, are inviolable, beyond this the entire power of control resides in the legislature unless such power is expressly limited. This subject is considered in 19 Am. & Eng. Enc. Law (1st Ed.) 884; and it is there said to be settled that the construction and operation of a railroad is a business "affected with a public interest," so that the state has a right to control and regulate it. Among the cases cited in the notes are *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Railroad Co. v. Cutts*, 94 U. S. 155-164, 24 L. Ed. 94; *Peik v. Railroad Co.*, 94 U. S. 164, 24 L. Ed. 97. That railroad corporations hold their property and exercise their functions subject to legislative control is beyond question. The price for transporting freight and passengers, within certain limitations, the speed of trains, the way in which they may cross or run upon highways or turnpikes, are all within the power of the legislature to regulate, although the power to alter and amend the charters has not been reversed. This was held in *People v. Railroad Co.*, 70 N. Y. 569. This is upon the ground that such corporations exercise their franchise for the public benefit, and are subject to regulation by the power that created them; that it is a part of the police power which is inherent in every government, with such limitations only as are provided by the state and federal constitutions. 19 Am. & Eng. Enc. Law (1st Ed.) 885. It was held in *Railroad Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611, that a Missouri statute making every railroad corporation in the state liable for all property injured or destroyed by fire from its locomotives was constitutional and valid, and neither violated any contract between the state and the railroad company, nor deprived the company of its property without due process of law. Statutes requiring railroad companies to keep watchmen at points where roads intersect and at other dangerous places; imposing penalties for delay in transporting goods, and for not keeping ticket offices open an hour before the departure of trains; prescribing the time that trains shall stop at certain stations and at points where roads cross each other; prohibiting the use of stoves and furnaces for heating cars; requiring the lighting of cars in certain stations; prohibiting the running of cars by steam through cities; re-

Lonaconing, etc., Ry. Co. v. Consolidation Coal Co

quiring the erection of stations and depots at certain points; and numerous other statutory regulations and requirements,—have been upheld as constitutional and not impairing the obligations of contracts. A case much in point is *Boston & M. R. Co. v. York County Com'rs*, 79 Me. 386, 10 Atl. 113, 32 Am. & Eng. R. Cas. 271, which upholds a statute requiring that the expense of maintaining so much of the highway as is within the limits of the right of way where the track is crossed at grade shall be borne by the railroad company. Upon all the authorities, and upon the principle that railroads must be run in such a manner as will be for the public benefit as well as for the interest of the companies, this statute must be held valid.

Nor can it be maintained that the action of the town was the taking of the defendant's property without due process of law. The selectmen, indeed, decide when it is necessary to rebuild or repair the crossing; but they must notify the railroad company and give it an opportunity to perform the work, and it is only upon the company's default that the town may rebuild or repair, and have an action of assumpsit to recover the amount expended. In this case the court submitted to the jury to find what amount was necessarily expended by the town in rebuilding the crossing. Every constitutional right of the defendant was fully protected.

Judgment affirmed.

LONACONING, M. & F. RY. CO. v. CONSOLIDATION COAL CO.

(Court of Appeals of Maryland, Nov. 20, 1902.)

[53 Atl. Rep. 420.]

Highway—Dedication.

Dedication of ground to the public for a highway is purely a question of intention, and any act or acts of the owner clearly manifesting such intention is sufficient.

Same—Same.

The owner of land, through which a highway ran on a curve, laid out a cut-off to serve as a substitute for a curved portion, and then closed up the curve, and included it in land leased to a driving association. In the lease the highway was referred to as a landmark. Afterwards the public constantly used the cut-off with the knowledge of the owner, and without its objection: *held*, that the cut-off was dedicated to public use.

Same—Electric Railway Not an Additional Burden.*

The construction and operation of an electric railway upon a county highway does not impose an additional burden or servitude on the fee, for which the adjoining owner is entitled to compensation. pending which he may enjoin the construction of the tracks.

Appeal from circuit court, Allegany county, in equity;
Edward Stake, Judge.

Bill by the Consolidation Coal Company against the

*See foot-note appended to *Schaaf v. Cleveland, etc., Ry. Co. (Ohio)* 4 R. R. R. 832, 27 Am. & Eng. R. Cas., N. S., 832.

Lonaconing, etc., Ry. Co. v. Consolidation Coal Co

Lonaconing, Midland & Frostburg Railway Company. From a decree for plaintiff, defendant appeals. Reversed, and bill dismissed.

Argued before McSHERRY, C. J., and BOYD, PEARCE, SCHMUCKER, and JONES, JJ.

Benjamin A. Richmond and D. J. Blackiston, for appellant.

Robert H. Gordon and Arch. A. Young, for appellee.

SCHMUCKER, J. Two questions are presented for our consideration by this appeal. The first is whether a certain road has been so dedicated to public use and accepted by the public as to constitute it a public highway. The second is whether the construction and use of an electric railway upon a portion of the bed of that road imposed a new easement thereon, not contemplated in its dedication to public use. The decree appealed from was passed by the circuit court for Allegany county, and it made permanent an injunction restraining the appellant from constructing or operating its railway on a portion of a road leading from Frostburg to Lonaconing. The material facts appearing from the record are as follows: In the year 1882 a road was opened from the legislative road at Wright's crossing, in Allegany county, to Frostburg, thus making a continuous road from that town to Lonaconing. This road, as it was opened at that time, passed through Grahamtown, and was commonly known as the "Grahamtown Road," but the entire road from Frostburg to Lonaconing was frequently called the "Legislative Road." The record does not show all of the steps of a formal condemnation and opening of the Grahamtown road as a public road, but it does appear that in the spring of 1882 the county commissioners appointed three road examiners and a surveyor to lay out a new road from Frostburg to connect with the legislative road from Lonaconing at Wright's crossing. John H. Ward, the surveyor, testified that he located and surveyed the road, and Willison, the sole survivor of the three examiners, testified that they met to lay out the road, but, owing to some objection, adjourned, with the intention of meeting again; although he was unable to remember that they met again, or ever made any report. The minutes of the proceedings of the commissioners contain the following entry: "April 19, 1882. In the matter of proposed new road from National Pike through lower part of Frostburg to the legislative road, near Wright's crossing, the report of the examiners, James Kean, A. J. Willison, and Dr. A. B. Price, was adopted, and \$600.00 ordered to be levied in June, 1882, to open same. John Johns was appointed supervisor for the work." John Johns testified that he, as supervisor, in 1882 constructed the road from Wright's crossing, in part through the appellee's land, to Frostburg, and made it ready for travel at a cost of \$900, which was paid by the county commissioners. John

Layman testified that in 1882 he helped to fence and construct the road under John Johns, the supervisor, and that it was laid out for a country road, and was stoned and ditched, and culverts and bridges were built on it wherever necessary. The Grahamtown road passed through a tract of land called "Walnut Park," owned by the appellee, and lying near Frostburg. There was a bend or curve in the line of the road, as originally laid out and used, through this tract of the appellee's land. About the year 1892 the appellee leased a portion of this land to the Frostburg Driving Park Association, which has ever since then continued to hold it as lessee. In order to enable the driving park association to construct a race track located partly on the bed of the curve in the road, the latter was straightened by substituting for the former curve a cut-off of the same width—about 30 feet—as the old road, and 500 feet long, across the appellee's land. The old curved roadbed was then closed to travel, and fenced into and made part of the lot leased to the driving park association, and the cut-off has since then been used in its stead as part of the continuous road.

The bill of complaint alleges that this cut-off was laid out and constructed by the appellee, but asserts that it was intended only for the uses of the driving park association, and for the private use of such other persons as the appellee might permit to enjoy it. The evidence shows that it was opened and fenced under the direction of A. B. Randolph, the mine superintendent of the appellee, who had charge of its real estate near Frostburg. The appellant was engaged in laying its tracks upon this cut-off when it was enjoined, and both parties conceded at the hearing of the case that its right to use that portion of the road was the real question at issue. The uncontradicted evidence of many witnesses appearing in the record establishes the fact that this entire road from Wright's crossing to Frostburg, including the curve on the appellee's land while that was in use, and since then the cut-off, has been freely and constantly used by the public as a road for the passage of pedestrians and vehicles of all kinds, without objection or interruption on the part of the owners of the soil over which it passed. The construction of the road in the manner already mentioned, and its use by the public, were too open and notorious to have been unknown to the owners of the soil under it, and the only reasonable inference to be drawn from the absence of objection on their part is that they voluntarily acquiesced in and assented to such opening and use. It affirmatively appears from the evidence that the appellee must have been aware of this public construction and use of the road, as its mine manager traveled over it almost every day. Randolph himself, the appellee's agent, under whose direction the cut-off was opened and substituted for the former curve in the road, testified without contradiction that the appellee knew of its public use ever since its opening, and

Lonaconing, etc., Ry. Co. v. Consolidation Coal Co

made no objection to it. Furthermore, the minutes of the proceedings of the county commissioners of Allegany county show that from the first opening of the Grahamtown road, in 1882, they exercised control over it as if it were a county road. They originally constructed, and from time to time repaired, it with the public moneys in their charge. These minutes also show the appointment of a supervisor for the road in each year since 1892, and annual appropriations of money for its repair during almost all, if not all, of that time. The record shows that the appellant was duly incorporated with power to construct and operate an electric railway between the two towns, and that it had obtained the written consent of the county commissioners to lay its tracks upon the road now under consideration. So long time has elapsed since the adoption, in April, 1882, by the county commissioners, of the report of the examiners to lay out the Grahamtown road, that it might well be presumed for the purposes of this collateral proceeding that the other steps requisite to its formal condemnation had been regularly taken at that time. *Tyson v. Commissioners*, 28 Md. 525. But if it was not regularly condemned and opened, the testimony to which we have already adverted, and other evidence of like tenor appearing in the record, would, in our opinion, afford ample ground for holding the road to have been dedicated by the owners of the land through which it ran to public use as a highway. Its acceptance on the part of the public is equally clear. It has been for so many years managed and cared for by the county authorities at the public expense that it has become to all interests and purposes a county road. "There is no particular form or ceremony necessary in the dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for the purposes intended by the appropriation." *City of Cincinnati v. White*, 6 Pet. 431, 440, 8 L. Ed. 452; *Morgan v. Railroad Co.*, 96 U. S. 723, 24 L. Ed. 743. This assent need not be expressed in any particular manner, but it may be implied from the conduct of the owner of the land. *Elliott, Roads & S.* § 133; *Carr v. Kolb*, 99 Ind. 53; *Noyes v. Ward*, 19 Conn. 520; *Abbott v. Mills*, 3 Vt. 527, 23 Am. Dec. 222. No conveyance of the land is necessary, nor need there be any grantee in esse to take the title, "but, if the owner of the land has done such acts in pais as amount to a dedication, he is thereby estopped from denying that the public have a right to enjoy what is thus dedicated to their use, or from revoking what he has declared by his acts." *McCormick v. Mayor, etc.*, 45 Md. 523; *Hiss v. Railway Co.*, 52 Md. 250, 36 Am. Rep. 371, 4 Am. & Eng. R. Cas. 201. Dedication is purely a question of intention, and any act or acts of the owner of the land clearly manifesting such intention is sufficient. The evidence of the intent of the appellee to dedicate to public use the cut-off portion of the road in question

is especially clear.. It leased to the driving park association a lot whose boundaries included the bend or curve in what was an existing and much-traveled road. It thereupon laid out, constructed, and fenced the cut-off so that it would serve as a substitute for the curved portion of the then existing road, and then closed up the curve, and included it in the driving park lot. Furthermore, in its lease of the driving park lot, which was a formal conveyance, signed by its president, the road now in question was mentioned as a landmark, and was called the "County Road," thus recognizing its public character. Since that time the public have constantly used the cut-off as part of the Grahamtown road, and, as the evidence shows, have done so with the knowledge of the appellee, and without objection on its part. In the case of *Prouty v. Bell*, 44 Vt. 72, the substitution of a new piece of road for portion of an old one, and the inclosure and use of the abandoned portion of the old road by the owner of the soil, were held to be unequivocal acts of dedication of the substituted road.

The question yet remaining to be considered is whether the appellee was entitled to the injunction upon the ground that the construction and operation by the appellant of an electric railway upon this county road will impose upon it an additional burden or servitude, for which the appellee, as owner of the fee, is entitled to compensation, before the road can be put to such use. The introduction of the modern street railway, on which the cars were at first drawn by horses, and have more recently been propelled by electricity or other inanimate power, has given rise to numerous cases in which this question has been the leading issue. Conflicting views have been expressed on the subject by the different courts, and opposite conclusions have been reached by them. In this state, however, it has uniformly been held that the easement acquired by the public in a street or highway was the right to use it "not only according to the then existing modes of travel and transportation, but all such other modes as may arise in the ordinary course of improvement." In *Hodges' Case*, 58 Md. 603, 1 Am. & Eng. R. Cas., N. S., 119, it was held that the use of the streets of a city by a horse passenger railway was not a new and distinct servitude. In *Peddicord's Case*, 34 Md. 463, the same doctrine was applied to the use by a horse railway company of the Frederick turnpike from Baltimore to Ellicott City. In *Hiss' Case*, 52 Md. 242, 36 Am. Rep. 371, 4 Am. & Eng. R. Cas. 201, the same thing was held of a horse railway constructed upon the bed of a suburban road. In *Koch's Case*, 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377, 50 Am. & Eng. R. Cas. 401, the same proposition was applied to the use by an electric road of the streets of a city; and in *Green's Case*, 78 Md. 306, 28 Atl. 626, 44 Am. St. Rep. 288, 1 Am. & Eng. R. Cas., N. S., 198, and *Poole's Case*, 88 Md. 533, 41 Atl. 1069, the same doctrine was applied to the location and use of an electric road, in the first case, from Baltimore to Towson on

Commonwealth v. Louisville & N. R. Co

the York turnpike, and in the other case from Baltimore to Mt. Washington on the Falls turnpike. The substantial ground upon which all of these cases were decided was that the horse or electric railroad was a new and improved method of transit, which afforded the people greater facilities in the use for which a public highway was intended. The decisions in the three last-mentioned cases held the use of a public road by electric cars to be one of its legitimate uses, but this court has at no time given countenance to the view that the electric cars could monopolize the entire roadway, or so much of it as to prevent its convenient use by persons traveling it on foot or with horses or vehicles, whose rights to the use of the road will remain the same as before. In the present case the record shows that the consent of the county commissioners to the use of the road in controversy by the appellant's railway is coupled with such conditions and stipulations as will secure the preservation and maintenance of a macadamized roadway of sufficient width for the accommodation of such persons as may continue to use it in the ordinary methods of travel. The decree appealed from will be reversed, without remanding the case.

Decree reversed, with costs, and bill dismissed.

COMMONWEALTH v. LOUISVILLE & N. R. Co.

(*Court of Appeals of Kentucky, June 12, 1902.*)

[68 S. W. Rep. 1103.]

Carriers—Discrimination in Rates—Classification of Freight.

Under Const. § 215, requiring all railroad companies to "haul, deliver and handle freight of the same class for all persons, associations or corporations from and to the same points and upon the same conditions, in the same manner and for the same charges," a railroad company may charge more for shipping to a coal dealer a high grade of coal for domestic purposes than it charges for shipping a low grade of coal to an electric light company for steam purposes.

Appeal from circuit court, Simpson county.

"Not to be officially reported."

Action by the commonwealth against the Louisville & Nashville Railroad Company to recover a penalty. Judgment for defendant, and plaintiff appeals. Affirmed.

Gerald T. Finn, Jno. E. Byars, W. P. Sandidge, L. B. Finn, and G. W. Roark, for the Commonwealth.

W. D. Hines, Edward W. Hines, J. A. Mitchell, W. F. Browder, and T. B. Harrison, Jr., for appellee.

BURNAM, J. This proceeding was instituted in the Simpson circuit court in the name of the commonwealth, by the commonwealth's attorney, to recover of the defendant, the Louisville & Nashville Railroad Company, the penalty imposed

Commonwealth v. Louisville & N. R. Co

by section 217 of the constitution for a violation of section 215. The petition, as amended, alleges that the Louisville & Nashville Railroad Company on or about the 31st of March, 1899, transported a car load of coal over its line from Bevier, Ky., to F. D. Wade, at Franklin, Ky., and charged therefor at the rate of \$1.50 per ton, and that on or about the 28th of March, 1899, the Louisville & Nashville Railroad Company transported a car load of coal from Bevier, Ky., to the Franklin Electric Light Company at the rate of \$1.50 per ton, and thereafter gave to the electric light company a rebate of 30 per cent., and failed and refused to give to Wade any rebate whatever; that both cars of coal were from the Memphis Coal & Mining Company, and were the same class of freight, and were transported to and from the same points under the same conditions. The defendant, in its answer, in addition to denying that the two shipments were of the same class, or transported under the same conditions, further pleaded that, in allowing the less rate to the electric company in pursuance of the classification set forth in its answer, it had acted under and relied upon the opinion, advice, and consent of the railroad commission, and that in no event was it guilty of a willful violation of the law. These last allegations were stricken out of the answer upon motion of the commonwealth. Upon the trial it was shown that the electric light company was engaged in the business of manufacturing and selling electricity; that the coal transported to it was a very low grade of coal, commonly known as "slack," and was used by the company for steam purposes; that Wade was a coal dealer in Franklin, and that the particular car load of coal on which this proceeding was based was the highest grade of coal, known as "lump"; that both were hauled in the same sort of cars, and unloaded in the same manner; that defendant's regular freight tariff on coal from Bevier to Franklin in March, 1899, was \$1.50 per ton, except that on coal used for steam purposes by manufacturers, which term included gas, electric light, power, and ice companies, the rate was 30 per cent. less than \$1.50 per ton. It was also shown that the electric light company, by way of experiment, had used one or two cars of coal of a grade higher than slack to generate steam, and upon which it got the rebate, and that Wade had in a few instances ordered coal of a lower grade than lump on which he received no rebate. This proof, however, did not refer to the shipments upon which the action was based. It was also shown that the electric company manufactured nothing which was transported over the line of defendants. It was also shown that coal used for steam purposes was classified by the published tariff of defendant at a net rate of 30 per cent. less than coal for domestic purposes. There is no proof that the alleged violation of the law had been knowingly or willfully committed. Upon these facts the trial court directed the jury to find for the defendant, and from the judgment rendered thereon this appeal is prosecuted.

Commonwealth v. Louisville & N. R. Co

It is admitted in brief for appellant that the only difference between this case and that of *Louisville & N. R. Co. v. Com. (Ky.)* 57 S. W. 508, is that the former case was a proceeding by indictment, whilst this is a penal action in the name of the commonwealth, and in the former case the rebate was given to a milling company, whilst in this it is to an electric light company. It has been heretofore decided by this court that proceedings to recover the penalty for a violation of section 215 could be prosecuted in either way. Therefore practically the only question left to be considered is whether there is such difference between a milling company and an electric light company as would require a change in the rule heretofore announced. In *Louisville & N. R. Co. v. Com.*, 48 S. W. 416, 43 L. R. A. 550, this court said: "A railroad company is required by section 215 to charge the same amount of compensation for transporting from and to the same point of freight of the same class or kind, not freight of different classes or kinds. * * * It is allowable and proper for a railroad company to classify freight according to its quality or character and marketable value; and discrimination in charges for carrying different classes or kinds is not only universally recognized, but plainly authorized by section 215." It is admitted in the pleadings and shown by proof that the respective car loads of coal upon which this action is founded were wholly different both as to quality and marketable value. In the second Marion county case (*Louisville & N. R. Co. v. Com.*, 57 S. W. 511) it was decided that a railroad could charge a lower rate of freight for coal transported to a manufacturing establishment than to a coal dealer not in competition with the manufacturer. The court in that case said: "It will not be contended that the conditions must be precisely the same. That could rarely happen. The application of the section is not to be denied merely because the conditions surrounding the shipments are not entirely the same. There must, on the whole, be a reasonably just and appreciable difference in the conditions, before there can be allowed a difference in the rates. There must be a difference in the conditions which addresses itself to the intelligence and business common sense of the public, and those to whom, as triors under the law, such questions are to be determined. Such a difference, we believe, has not been shown to exist in these cases." The court further says section 215 is a part of the scheme covered by sections 196 and 214. "It requires all railroads to transport in the same manner, for the same charge, and for the same method of payment, freight of the same class, for all persons, from and to the same points, and upon the same conditions. The purpose was to secure equality between shippers, and prevent injustice and unjust discrimination. It cannot be maintained that the convention contemplated that there should be no discrimination. For it was notorious that there were many discriminations not regarded

Bankers' Mutual Casualty Co. v. Minneapolis, etc., Ry. Co

as unlawful, and section 194 expressly recognized that such discriminations as are not unjust may be made. All shippers of coal were placed on an equality by appellant, and all were alike allowed to ship at the reduced rate coal for steam purposes." The decision in that case holds that domestic and steam coal were not of the same class, and directly applies to and controls this case, and takes it out of the purview of section 215 of the constitution. As the questions suggested upon this appeal have been so exhaustively considered by this court in the cases supra, we deem it unnecessary to do so again.

For reasons indicated, the judgment is affirmed. Judgment affirmed.

BANKERS' MUTUAL CASUALTY CO. v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO.

(Circuit Court of Appeals, Eighth Circuit, July 14, 1902.)

[117 Fed. Rep. 434.]

Mails—Railroads as Carrying Agents—Measure of Liability.

A railroad company carrying the United States mails, whether under contract or by virtue of the requirements of the constitution and laws, is not in respect to such service a common carrier, but is a public agent of the United States, employed in performing a governmental function and as such it is liable for its own negligence, but not for the negligence or tortious acts of its subordinates or employees in the selection of whom it has exercised ordinary care.

Same.

A complaint against a railroad company alleged that under the requirements of the constitution and laws of the United States, but without any contract therefor, it was engaged in carrying the mails between the stations on its line; that by section 713 of the postal regulations of 1893 it was required "to take the mails from, and deliver them into, all intermediate post offices and postal stations located not more than 80 rods from the nearest railroad station" at which it had an agent; that the postal agent on one of its trains delivered a mail sack to defendant's agent at an intermediate station which was within 80 rods of a post office, and that, through the negligence of defendant and its said agent, while the mail sack was in defendant's station house some persons to plaintiff unknown obtained access to it, and by means of a false key opened it, and stole therefrom a registered package containing money, to recover the value of which the action was brought: *held*, that the complaint stated no cause of action; no facts being alleged which showed any negligence or breach of duty on the part of defendant as a public agent of the United States.

In Error to the Circuit Court of the United States for the District of Minnesota. Affirmed.

H. F. Dale (William Connor, George W. Bowen, and Henry Conlin, on the brief), for plaintiff in error.

Alfred H. Bright, for defendant in error.

BURNHAM v. ALABAMA & V. RY. CO.

(Supreme Court of Mississippi, Oct. 27, 1902.)

[32 So. Rep. 912.]

Carriers—Liability for Perishable Freight—Delay from Flood—Directing Verdict.*

Verdict in an action against a carrier for damage to a car load of perishable fruit from a delay of two days, the train being side-tracked because of unprecedented rains, which overflowed and washed out the track, is properly directed for defendant, though plaintiff expresses the opinion that defendant had not sufficient cause for the delay, and though a light work train went over the road through the water a day earlier than the freight train was moved; the train dispatcher, who was not cross-examined, testifying that no train could go between the place where the train was side-tracked and the destination of the car, before the day it was moved, and that a locomotive was sent for and brought over the train as soon as it could be done, and that this was the first train run over this section after it was repaired.

Appeal from circuit court, Hinds county; Robt. Powell, Judge.

Action by D. Burnham against the Alabama & Vicksburg Railway Company. In accordance with a peremptory instruction for defendant, it had verdict and judgment, a new trial being refused. Plaintiff appeals. Affirmed.

The opinion of the court below was as follows (L. BRAME, Special Judge):

"On March 26, 1901, the plaintiff shipped from Mobile, Alabama, over the line of the Mobile & Ohio Railroad to Meridian, a car load of bananas, destined for Jackson, Mississippi, on defendant's road. The freight train of defendant to which this car was attached left Meridian on the morning of the 27th, and was brought over the defendant's road to Brandon, which is about 15 miles east of Jackson; the latter place being 95 miles from Meridian. On that day, which was Thursday, there were unprecedented rains, which caused overflows and washouts at different places on the line of defendant's road. One was at Chunkey, not far west of Meridian; one was near Bolton, west of Jackson; and the track was overflowed and washed out of line at two places east of Jackson,—that is to say, between Pearson Station and Brandon. By reason of these washouts the train of which the car of bananas was a part was put on a side track at Brandon Thursday afternoon, the 27th, and the locomotive was sent back eastward, presumably for the purpose of aiding and assisting in repairing the break at Chunkey. This train remained at Brandon from Thursday afternoon, the 27th, until Saturday, the 29th, when a locomotive was sent from Jackson, and the train was brought over, leaving Brandon at 12:40 p. m., and reached Jackson at 2 o'clock. The plaintiff's evi-

*See monograph, 1 R. R. R. 134, 24 Am. & Eng. R. Cas., N. S., 134.

Burnham v. Alabama & V. Ry. Co

dence shows that by reason of the delay the bananas, which were just turning ripe at the time of being shipped from Mobile, were injured, and he was damaged. The question in the case is whether the defendant company is liable for the damages occasioned by the delay of nearly two days.

“It is well established that a common carrier transporting freight is an insurer, and is only excused from liability for failing to transport by reason of the act of God or the public enemy, or the conduct of the shipper. In this case the plaintiff accompanied the car, and his testimony tends to show that the defendant was without sufficient excuse for delaying the transportation of the car; but manifestly his statements are based largely, if not entirely, on opinion. The evidence tends to show that the washouts or injury to the track between Pearson and Brandon were occasioned by the unprecedented floods, and that work was done on two different sections of the track that had been overflowed on Thursday and Friday. The evidence is not clear as to what time on Friday the track was put in condition for use, but it tends to show that the track was being worked on or repaired as late as Friday afternoon, though there are some inferences to show that it was repaired Friday morning. If the evidence stopped here, it would, I think, justify the inference that the defendant could reasonably have brought the car over from Brandon to Jackson late on Friday, or at least early on Saturday morning; and as the plaintiff's evidence shows, or tends to show, that his damages were increased by his not having gotten the car to Jackson Friday evening, or Saturday morning early, the plaintiff would be entitled to recover. At any rate, he would be entitled to have the case submitted to the jury; the burden of proof being upon the defendant to show that it exercised due care to transport the car within a reasonable time after the track was in proper condition, and the question as to what is a reasonable time being one of fact for the jury. But the undisputed testimony of Mr. Bonds, the train dispatcher who had control of the movements of all trains on the road, is to the effect that no train could go east of Jackson to Brandon before Saturday, and that on Saturday morning the locomotive was sent over, and brought the train to Jackson as soon as this could be done; this being the first train that was run over this section of the road after the track between Brandon and Jackson had been repaired. This witness was not cross-examined, and therefore his statement went to the jury unchallenged. It is contended by plaintiff's counsel that his statement in this regard gave merely an opinion, but I do not think so. It is well known that a train dispatcher directs and controls the movements of all trains. He is in close contact with every part of the road, and is supposed to know not only the condition of the track, but the location of locomotives and trains, and other facts which enable him to speak authoritatively in saying that a train was moved as soon as it could have been

Burnham v. Alabama & V. Ry. Co

moved. As the witness was not cross-examined, and asked as to his means of knowledge, or as to the particular facts upon which he based his statement that the car was brought to Jackson at the first opportunity, I think it must be assumed, as there is no evidence to the contrary, that his testimony as to this substantive fact is true. It is true, there is some room for contention that the testimony of men who worked on the different sections was to the effect that the track was put in repair on Friday, and that, as these men were on the ground, they knew the track as to this. But this is hardly a contradiction of the statements of the train dispatcher. His statements had relation not only to the condition of the track, but the location of cars and locomotives, the position of the different crews, and other particulars which would enable him to state as a fact that the cars were brought to Jackson as soon as possible. By cross-examination the plaintiff's counsel might have been able to show that he was mistaken as to some of these things, but as there was no cross-examination, and as the statement is not in itself unreasonable, and the witness is not contradicted, I think the court bound to assume that it is true. At any rate, the margin for dispute or controversy is so narrow that I do not think that the supreme court would permit a verdict for the plaintiff to stand if one should be rendered on the testimony in the case, and therefore it is my view that the peremptory instruction to find for the defendant was proper.

“From the fact that the work train went through from Brandon to Jackson, and another Friday morning, I do not think it can be deduced that the railroad was negligent in not sending the freight train through under similar circumstances. It was shown that it was a hazardous thing for the work trains to go through the water and over the track before the subsidence of the flood, and before the track had been put in repair. It might have been commendable for the employees of the railroad to take this risk with the work train, but I do not think that the defendant could be expected or required to take any such risk with a freight or passenger train, especially as the latter are shown to have been heavier than work trains. The question in this case is a narrow one. I am fully aware of the rule that ordinarily all questions of fact are for the jury, and that, if there is any evidence fairly tending to support the plaintiff's case, he is entitled to the judgment of twelve men; but, in view of the facts of this case, I do not believe that a verdict for the plaintiff could be permitted to stand. In *Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co.*, 35 L. R. A. 624, and note 3 (S. C. 23 C. C. A. 564, 77 Fed. 919), it is said: ‘The reasons which led to the adoption of the common-law rule that makes a carrier an insurer of the goods which it transports, except when lost by an act of God or of the public enemy, do not apply to the mere delay in transportation when the goods are actually delivered. The

Western Maryland R. Co. v. Landis

strictness of the rule which was adopted to preclude collusion between the carrier and the robbers has no application where the mere time of the carriage is concerned. Railroad Co. v. Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A. 323, 18 Am. St. Rep. 45. For delay in receiving and carrying goods the carrier is not liable as an insurer, and is bound only by the general rule of liability for a breach of his contract, or by his public duty as a carrier, and may be excused for delay in receiving the goods, or in transporting them after they have been received, whenever the delay is necessarily caused by unforeseen disaster, which human prudence cannot provide against, or by accident not caused by the negligence of the carrier, or by thieves or robbers or an uncontrollable mob. Railroad Co. v. Hollowell, 65 Ind. 188, 32 Am. Rep. 63.' I think this expresses the correct rule of law as applicable to the defendant in its duty to transport the car in question after the break, and when the track had been put in repair. Having these views, I am constrained to overrule the motion for a new trial."

Watkins & Easterling, for appellant.

J. H. Thompson, for appellee.

CALHOON, J. If on the trial there had been a verdict for plaintiff, it could not properly be sustained. In moving a large train of freight, a railway company must not chance the lives of its operatives and others on it, and the immense property interests it is transporting, to save some perishable fruit. If it had, and disaster had resulted, it would have been liable, of course, and perhaps criminally so. The fact that operatives went with an engine over the track to see to safety and repair damages is to their credit, but in no way affects the propriety of delaying the movement of the main train until the safety of such action was reasonably assured.

We approve and adopt the conclusions of law and fact arrived at in the very conservative and lucid written opinion of the special judge presiding below, and request the reporter to set it out at length in the report of this case.

Affirmed.

WESTERN MARYLAND R. CO. v. LANDIS.

(Court of Appeals of Maryland, Nov. 21, 1902.)

[53 Atl. Rep. 976.]

Carriers—Transportation of Live Stock—Injuries—Evidence.

Part of the train on which plaintiff's cattle were transported was derailed by the breaking of the axle on a foreign car, to the rear of the cars in which the cattle were loaded, and the cattle were only slightly jarred by the derailment. After the cattle reached the next transfer point, they were found to be standing, and there were no indications that any of them had been hurt by the accident; but, on reaching their destination, it was found that several had sustained injuries: *held* that, in the absence of further proof as to what the

Western Maryland R. Co. v. Landis

injuries were and as to how and where they were inflicted, plaintiff was not entitled to recover therefor against the connecting carrier, on whose line the derailment occurred.

Appeal from superior court of Baltimore city.

Action by Jacob C. Landis, as surviving partner of the firm of Shirk & Landis, against the Western Maryland Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Charles Marshall, R. E. Lee Marshall, and J. Hanson Thomas, for appellant.

Hinkley & Morris, for appellee.

McSHERRY, C. J. The injury for which this suit was brought arose out of the occurrences set forth in the case of Western Maryland R. Co. v. State, 53 Atl. 969. The present action was instituted by Jacob C. Landis, surviving partner of Jacob E. Shirk, to recover damages for injuries to the cattle shipped by them from Somerset county to Lancaster county, Pa. As stated in the preceding case, the two cars containing the cattle were delivered by the Baltimore & Ohio Railroad Company to the Western Maryland Railroad Company at Cherry Run. They were made up in a train to be hauled to Hagerstown, for delivery there to the Cumberland Valley Railroad. Before reaching Hagerstown the front axle of a gondola car, belonging to the Baltimore & Ohio Railroad Company and located in the rear of the stock cars, broke; but the cattle cars were not derailed or injured, and they were jarred but very slightly. The cattle cars and the rest of the train in front of the disabled gondola were conveyed on to Hagerstown. When they reached there all of the cattle were standing, and there were no indications that any of them had been hurt by the accident to the gondola car. The cars containing the cattle were delivered to the Cumberland Valley Railroad, which hauled them to a point where they were turned over to the Philadelphia & Reading Railroad, by which latter company they were transported to Ephrata, the place of their destination. Upon reaching there it was found that several of the cows had sustained injuries.

The defendant asked the court to rule that there was no evidence legally sufficient to show that the injury to the cows was caused by the negligence of the defendant. This request was refused, but should have been granted. There was not a particle of evidence showing what caused the injury to the cows, or how it had been caused, or indicating where it had been inflicted. The breaking of an axle under a car behind the cars in which the cattle were was not shown to have jarred or thrown them down. The only evidence as to their condition when they left the road of the defendant at Hagerstown proved that they had not been injured up to that time; and, after leaving the road of the defendant, the cattle were transported over two other roads, on either of which the injury

Louisville & N. R. Co. v. Frazee

discovered upon their reaching their destination might have happened. No evidence was offered to exclude the possibility of the injury having occurred after the cattle had passed beyond the line of the defendant's road. There was nothing whatever connecting the condition of the cattle when they reached Ephrata with the breaking of the axle 10 miles away from Hagerstown. There was, consequently, a total failure of proof to show that the breaking of the axle caused the injury, or even to show that the injury had occurred on the defendant's road; and the case should have been decided in favor of the defendant. There was absolutely nothing from which a reasonable inference could have been deduced that the injury happened while the cattle were on the road of the defendant. The undisputed evidence proved that they were uninjured when delivered to the Cumberland Valley Railroad, as far as their appearance indicated. The judgment will therefore be reversed, and, as the record discloses no ground of action against the appellant, a new trial will not be awarded.

Judgment reversed, with costs above and below, without awarding a new trial.

LOUISVILLE & N. R. Co. v. FRAZEE *et al.* (three cases).

(*Court of Appeals of Kentucky, Jan. 7, 1903.*)

[71 S. W. Rep. 437.]

Injury to Live Stock in Transit—Valuation—Evidence.

An action was brought against a carrier for injuries to certain blooded horses, in which defendant took depositions of a number of expert turfmen as to the value of the animals. Exceptions to the depositions were sustained, whereupon defendant moved for a continuance, to prevent which plaintiff agreed that the depositions might be read as the depositions of the absent witnesses: *held*, that a ruling of the court at the trial, excluding all the testimony of such witnesses concerning facts showing that their judgment as to the value of the horses was entitled to weight by reason of their experience as turfmen, was prejudicial error.

Same—Pedigree of Horse—Evidence.

In an action against a carrier for injury to and loss of blooded horses, plaintiff's private catalogue was not admissible as a book of pedigree to show the history of one of the horses.

Same—Same—Same.

Where a carrier was sued for the value of a pedigreed horse, the erroneous admission of plaintiff's catalogue to show the horse's history was prejudicial.

Same—Limiting Liability—Provisions of Bill of Lading.*

Where a shipper of pedigreed horses paid a reduced rate, and accepted a bill of lading which provided that in consideration thereof

*See *Chicago, etc., Ry. Co. v. Calumet Stock Farm* (Ill.), 1 R. R. R. 162, 24 Am. & Eng. R. Cas., N. S., 162; *Ullman v. Chicago & N. W. Ry. Co.* (Wis.), 23 Am. & Eng. R. Cas., N. S., 782, and foot-note; *Mouton v. Louisville & N. R. Co.* (Ala.), 20 Am. & Eng. R. Cas., N. S., 673; extensive note appended to *Hengstler v. Flint & P. M. R. Co.* (Mich.), 20 Am. & Eng. R. Cas., N. S., 707.

Louisville & N. R. Co. v. Frazee

the value of the horses in case of loss should be a certain sum printed in the bill, but there was no agreement, outside the bill, that the amount so stated should be treated as the value of the animals, the shipper was not limited to such amount in an action for injury to the animals, caused by the carrier's negligence.

Appeals from circuit court, Franklin county.

"Not to be officially reported."

Actions by L. D. Frazee and others against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiffs in each case, defendant appeals. Reversed.

Ira Julian and Edward W. Hines, for appellant.

Jas. Andrew Scott and John W. Ray, for appellees.

HOBSON, J. Appellees shipped over appellant's road four horses in a car from Frankfort, Ky., consigned to Memphis, Tenn. When the car reached Russellville, Ky., and was standing in the yard there, it caught fire, and by reason of this the horses were destroyed or very much damaged. This suit was brought to recover damages for the injury to the horses. The suit was brought very shortly before the term at which it was tried, and, after filing its answer, the defendant took the depositions of a number of witnesses on its behalf. The court sustained exceptions to these depositions, it seems, on the ground that they were taken during a term of court. The defendant then filed affidavit for a continuance, and on the hearing of the motion it was agreed by the plaintiffs that the depositions might be read as the testimony of the absent witnesses. But on the trial, when the depositions were offered in evidence, the court only allowed certain parts of the depositions to be read, and of this the defendant now complains. The plaintiff insisted that the horses were blooded stock, and very valuable by reason of their pedigree, as well as their intrinsic merits. The depositions taken by the defendant were given by turfmen of years' experience and actual acquaintance with the value of such stock. The value of their testimony depended almost wholly upon their means of knowledge. The court excluded all their testimony of facts showing that their judgment as to the value of these horses was entitled to weight by reason of their experience as turfmen. This was error, and it was very prejudicial. To obtain a trial at that term, the plaintiffs had consented that the depositions might be read. The statements of the witnesses showing the weight to which their judgment was entitled were of the utmost importance, for without this the jury may have given the testimony very little consideration, as the testimony of a witness on this subject, unless he is shown to be an expert, is of little value. The plaintiff was also allowed to read to the jury from his private catalogue the history of Charade, the sire of one of the horses. This was error. The witness might state the facts in regard to the history of Charade so far as they were personally known to

Louisville & N. R. Co. v. Frazee

him, or he might prove these facts by the testimony of other witnesses who had personal knowledge on the subject, but he could not read to the jury a newspaper article or other publication reciting the facts. Books of pedigree are admitted under the statute, but mere private publications of the history of horses stand on entirely different ground, and are subject to all the objections to hearsay evidence. As the value of a horse depends upon his pedigree, this incompetent evidence was prejudicial to the defendant. By the bill of lading sued on it was stipulated as follows: "This contract, entered into at the above time and place between the Louisville and Nashville Railroad Company, hereinafter called the carrier, and L. D. Frazee, hereinafter called the shipper, witnesseth, that the carrier will carry live stock at the rate established by it therefor, or, where certain risks, duties, and liabilities are assumed by the shipper, as hereinafter specified, will carry such live stock at greatly reduced rates, and (if shipped in car-load quantities) will furnish the shipper or his agent free transportation on the train with said live stock." "In the present instance the shipper elects to avail himself of the said reduced rate (if shipped in car-load quantities), free passage for himself or his agent on the train with said live stock, and has delivered on the cars of the carrier the following described live stock, to wit: Consignee, destination, etc.: L. D. Frazee, Memphis, Tenn. Description of stock: 4 horses; 1 attendant." "The carrier agrees to transport said live stock to destination if on said carrier's line of railroad, otherwise to the place where said live stock is to be received by the next connecting carrier for transportation to or towards destination, and the carrier guaranties that the freight rate thereon from point of shipment to destination shall not exceed the reduced rate of \$60.00 per car." "In consideration of all which, the shipper hereby agrees to assume the risks, duties, and liabilities hereinafter specified, and that the transportation shall be upon the following conditions, which are admitted and accepted by said shipper as just and reasonable, viz.: * * *." "Should damage occur for which the said carrier may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed, for a stallion or jack, \$150; for a horse or mule, \$75; mare and colt, together, \$100; cow and calf, together, \$35; domestic horned animals, \$30 each; calves, hogs, or sheep, \$5 each; chickens, ducks, and guinea fowl, \$1.00 per dozen; geese, \$2.00 per dozen; and turkeys, \$3.00 per dozen; other animals \$5.00 each,—which amounts, it is agreed, are as much as such animals as are herein agreed to be transported are reasonably worth."

It is earnestly argued for the appellant that there can be no recovery beyond the amounts thus specified as the value of the horses, and we are referred to a number of decisions holding that, where there is an agreed valuation of property to be

Vaughan v. State

shipped at a reduced rate, no recovery can be had beyond the valuation so fixed. But this contract, fairly construed, does not bring the case within the rule thus declared, and no opinion is intimated or expressed as to the soundness of that rule. It is apparent here that there was in fact no agreed valuation of the property made, as this is a printed form, and the amounts are all printed in it. It has often been held in this state that a carrier cannot limit his responsibility for negligence by stipulations that he shall not be liable beyond a certain amount for the loss of the property. We are urged to re-examine the subject and overrule the previous cases. This we are not inclined to do. The rule declared by the court has been made a part of the organic law of the state. See section 196, Const. And the provisions of the constitution are not to be fritted away, but must be fairly construed with a view to effect its purposes. *Orndorff v. Express Co.*, 66 Ky. 196, 96 Am. Dec. 207; *Railroad Co. v. Hedger*, 72 Ky. 650, 15 Am. Rep. 740; *Rhodes v. Railroad Co.*, 72 Ky. 691; *Railroad Co. v. Owen*, 93 Ky. 201, 19 S. W. 590; *Baughman v. Railroad Co.*, 94 Ky. 150, 21 S. W. 757; *Express Co. v. Hoeing*, 88 Ky. 373, 11 S. W. 205; *Railroad Co.'s Receiver v. Graves* (Ky.) 52 S. W. 961; *Railroad Co. v. Radford* (Ky.) 64 S. W. 511; *Railroad Co. v. Tabor*, 98 Ky. 503, 32 S. W. 168, 36 S. W. 18, 34 L. R. A. 685.

The question is not presented as to what would be the rule if the shipper practiced a fraud on the carrier and deceived him as to the value of the goods, or intentionally undervalued his goods where the carrier's charges were graduated according to the value of the property, in order to get the lower rate.

Judgment reversed, and cause remanded for a new trial and further proceedings consistent herewith.

 VAUGHAN *et al.* v. STATE.

(*Supreme Court of Georgia, Jan. 8, 1903.*)

[43 S. E. Rep. 249.]

Running Trains on Sunday—Indictment—Persons Liable.

When the statute which prevents the running of any freight train and other named trains on Sunday over any railroad in this state has been violated, only the superintendent of transportation of such railroad, or the officer having charge of the business of the transportation department of that railroad, is liable to indictment therefor.

Same—Same—Same.

An indictment preferred against the "superintendent" of the railroad and the "master of trains" of such railroad jointly, although it is alleged that such officers "had charge of the business pertaining to the running of trains" on such railroad, is defective, and should be dismissed on demurrer.

(Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Fite, Judge.

Vaughan v. State

W. A. Vaughan and W. N. Foreacre were indicted for a misdemeanor, and, a demurrer to the indictment being overruled, they bring error. Reversed.

Sanders McDaniel and I. E. Shumate, for plaintiffs in error.
Sam P. Maddox, Sol. Gen., and W. C. Martin, Sol. Gen. pro tem., for the State.

LITTLE, J. The grand jury, at the October term of Whitfield superior court, returned a special presentment charging W. A. Vaughan and W. N. Foreacre with the offense of a misdemeanor. The specific charge contained in the indictment is in the following language: "For that said W. A. Vaughan and W. N. Foreacre, on the 15th day of July, in the year 1900, in the county aforesaid, did then and there, unlawfully, and with force and arms, W. A. Vaughan being the superintendent of the Southern Railway Company, and W. N. Foreacre being the master of trains of said Southern Railway Company, and the officers having charge of the business pertaining to the running of trains on said Southern Railway, did run a freight train on said Southern Railway on the Lord's day, commonly called the Sabbath day, said trains not having one or more car loads of live stock, and said train not being a special fruit, melon, and vegetable train, the cars of which contained no other freight except perishable fruits, melons, and vegetables, fresh fish, oysters," etc. On arrangement, the defendants presented a demurrer containing several grounds, which being overruled, they excepted.

We find it necessary, in determining this case, to consider only one question, that is, whether the superintendent and master of trains of a railroad are subject to indictment for the running of a freight train over the railroad of a company of which they are officers, in violation of law, in the absence of allegations that such company had no superintendent of transportation, and that the persons indicted had charge of the transportation department of such company. The presentment was founded on Pen. Code, § 420, which, omitting certain exceptions therein named, declares that "if any freight-train * * * shall be run on any railroad on the Sabbath day, the superintendent of transportation of such railroad company, or the officer having charge of the business of that department of the railroad, shall be liable to indictment in each county through which such train shall pass, and shall be punished as for a misdemeanor." It is declared by the same Code, § 421, that, on the trial for a violation of the terms of the section just cited, it shall not be necessary to allege or prove the name of any employee engaged on such train, but it shall be sufficient to prove that the train was run. The statute was enacted, in the exercise of the police power inherent in the state, for the purpose of preventing a violation of the Sabbath day. It will be noted that it is not sought to impose a penalty on the railroad corporation for a violation of this law, but the means for enforcing the statute is by the indict-

Vaughan v. State

ment of a particular officer of the corporation. One who is merely engaged as an employee in the running and operation of the train commits no offense under the terms of the statute, and, as was ruled in the case of *Craven v. State*, 109 Ga. 266, 34 S. E. 561, the trainmaster as such is not liable to indictment for a violation of the statute. The act names the particular officer of the railroad corporation over whose line the train was run, who is liable to indictment. It declares that "the superintendent of transportation of such railroad company, or the officer having charge of the business of that department of the railroad, shall be liable," etc. Inasmuch as the statute declares which particular officer of the corporation shall be liable for a violation of the law, no other than the one so named can be lawfully convicted. It can easily be conceived that a railroad company could not easily run and operate its trains unless direct authority had been given to some officer or agent to cause the same to be done. The contemplation of the statute is that where a freight train has been run on the Sabbath day in violation of law, if the railroad company over whose line such train has been operated has a superintendent of transportation, that officer, and that officer alone, shall be liable to indictment for this infraction of the law. If, however, such company has no officer with the powers of and designated as the superintendent of transportation, then that officer of the company who has charge of the business of the transportation department of the railroad shall be liable to indictment. It is not at all contemplated that two persons occupying different relations to the company shall be equally indictable, but it is contemplated that one person shall be punished, and that person shall be the one who has general charge of the transportation department of the company. If the train was in fact not run and operated under his direction, he cannot be convicted, because in section 421 it is declared that the defendant may justify himself by proving that the employees engaged on the train acted in direct violation of his orders and rules. So that no indictment will lie under this section against any other person than the superintendent of transportation of such railroad, if there be such officer. If there be none, then that officer of the company who has charge of the business of the transportation department is subject to indictment.

It is possible, but scarcely conceivable, that there may be two persons with equal authority in charge of the transportation department. In that event, we think that the provision for indictment could properly be directed against him under whose orders the train was run. The indictment we are considering does not allege that the Southern Railway Company has no superintendent of transportation, but it places the liability for the running of the freight train on two officers having different and distinct duties,—one the superintendent, the other the master of trains. In the *Craven Case*, cited above,

Central of Georgia Ry. Co. *v.* Murphey

it appeared that the accused was a trainmaster who directed the making up of the train, the selection of the crew, etc.; under orders of a superior officer, and it was ruled that he was not subject to indictment under this statute, and, in the course of his opinion, Mr. Justice Fish said on this point: "It is quite apparent that this section means to provide a punishment for only the officer who is primarily responsible for the running of a freight train on Sunday, that is, the officer having charge of the business of the transportation department of the company, who is usually the superintendent of transportation. The various subemployees who, under the orders of such an officer, arrange for and actually engage in the running of the train, are not subject to indictment under this statute." It is, however, replied that the indictment further charges that the superintendent and master of trains named were "the officers having charge of the business pertaining to the running of trains on said Southern Railway." It will be noted, however, that the officer having charge of the business pertaining to the running of trains is not made the subject of indictment, but only the officer who has charge of the business of the transportation department of the railroad. It may fairly be assumed that many persons engaged in different capacities with a railroad company had charge of business "pertaining to the running of the trains." But it is not on them that the statutory penalty is to be imposed for a violation of the law. It is only upon that person who has charge of the business of the transportation department. To meet the requirements of the statute, if the Southern Railway, over which it was alleged the freight train was run on Sunday, had a superintendent of transportation, he, only, could be indicted. If that company did not have a superintendent of transportation, then only the officer having charge of the business of the transportation department of that railroad company was liable to indictment. If our construction of this statute is correct, it follows that no conviction of either of the persons named in the presentment could lawfully be had, and that the demurrer should have been sustained on the ground above set out.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

CENTRAL OF GEORGIA RY. CO. *v.* MURPHEY *et al.*

(*Supreme Court of Georgia, Jan. 9, 1903.*)

[43 S. E. Rep. 265.]

Connecting Carriers—Injury to Freight—Compulsory Giving of Information—Constitutionality of Statute.

Civ. Code, §§ 2317, 2318, provides: "When any freight that has been shipped, to be conveyed by two or more common carriers to its destination, where, under the contract of shipment or by law, the re-

Central of Georgia Ry. Co. v. Murphey

responsibility of each or either shall cease upon delivery to the next 'in good order,' has been lost, damaged or destroyed, it shall be the duty of the initial or any connecting carrier, upon application by the shipper, consignee, or their assigns, within thirty days after application, to trace said freight and inform said applicant, in writing, when, where, how, and by which carrier said freight was lost, damaged, or destroyed, and the names of the parties and their official position, if any, by whom the truth of the facts set out in said information can be established. If the carrier to which application is made shall fail to trace said freight and give said information in writing, within the time prescribed, then said carrier shall be liable for the value of the freight lost, damaged, or destroyed, in the same manner and to the same extent as if said loss, damage, or destruction occurred on its line": *held*, that the provisions of these sections are not unreasonable and arbitrary, either as to the substantial requirements thereof, or as to the time within which the requirements must be met. Nor are they such a regulation of interstate commerce as to be beyond the power of the state. Nor do the sections infringe "the correlative liberty of silence." Nor do they amount to "compulsory private discovery" by "statutory terror." Nor are they unconstitutional and void for any other reason set forth in the present case.

Same—Same—Same—Parties.

An action under the provisions of the statute above quoted, brought in the name of the shipper, is well brought, though it appears that the shipper is not the owner of the goods.

Same—Same—Same—Evidence.

Even if the fact that it was impossible to obtain the information required by the statute within the time specified therein would relieve the carrier from liability, the evidence offered to show that it was impossible to so obtain the information did not have this effect, and was therefore properly rejected.

New Trial.

There was no error requiring the granting of a new trial.
(Syllabus by the Court.)

Error from superior court, Pike county; E. J. Reagan, Judge.

Action by A. O. Murphey & Hunt against the Central of Georgia Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Hall & Cleveland and R. L. Berner, for plaintiff in error.
W. W. Lambdin, for defendants in error.

COBB, J. A. O. Murphey & Hunt, a partnership, brought suit against the Central of Georgia Railway Company, alleging that they had shipped over the lines of the defendant company a car load of grapes from Barnesville, Ga., consigned to Rocco Bros., Omaha, Neb.; that the shipment was under a contract which provided that the responsibility of each carrier should cease upon delivery "in good order" to the next carrier; that when the grapes reached Omaha they were in a damaged condition, the amount of the damages that the plaintiff sustained by the failure to deliver the grapes in good order at their destination being set forth in the petition; that on August 20, 1897, the plaintiffs made to the defendant an application in writing, in which they requested the company to trace the freight, and inform plaintiffs in writing when, where, how, and by which carrier the freight was damaged,

Central of Georgia Ry. Co. v. Murphey

and the names of the parties, and their official position, if any, by whom the truth of the facts could be established; that the defendant failed to trace the freight and give the information within 30 days, as required by law; and that by reason of this conduct the defendant became indebted to the plaintiffs in the amount set out in the petition. The defendant demurred to the petition, upon the following grounds: (1) Because the petition sets forth no cause of action, and under the allegations thereof the plaintiffs are not entitled to recover. (2) The contract referred to in the petition not being one for a through carriage, the petition is defective in that it does not allege that the loss or damage occurred on the defendant's road, nor is it alleged that the freight was not delivered to the next carrier in good order. (3) Because the act of the general assembly embraced in Civ. Code, §§ 2317-2318, under which the plaintiffs' action is brought, is unconstitutional and void, in that it requires the defendant to furnish evidence to the plaintiffs for the purpose of a personal, private claim or lawsuit touching the liability of another corporation, with which liability the defendant is in no wise connected either by contract or by law. (4) Because the law under which plaintiffs' action is brought imposes upon the defendant the duty of hunting evidence with which plaintiffs can make out a claim against another carrier, and, in the event such evidence is not reported within a given time, the defendant is made responsible for the act of another carrier, with which it had no connection in carrying the goods, either by contract or otherwise. "Such legislative act is not a proper classification of legislation, but is arbitrary, and is a violation of the constitution of this state." (5) Because the act under which the suit is brought impairs the obligation of the contract between plaintiffs and defendant for carrying the goods; the defendant being, under the contract, exempted from liability for damages to goods beyond its own lines. (6) Because the law in question requires the defendant to procure and report to plaintiffs certain information within a given time, and on failure to so report, then, without regard to whether such information could be obtained within the time prescribed, and without opportunity to the defendant to be heard, the act imposes upon the defendant the penalty of paying damages which were caused by another railway company with which the defendant had no connection by contract or otherwise; such law denying to the defendant "due process of law." (7) Because the law in question is in violation of the interstate commerce clause of the constitution of the United States. (8) Because such law deprives the defendant of its property without due process of law. (9) Because the act is contrary to law, the constitution, and public policy, in that it seeks to obtain information by statutory compulsion, attaching a penalty to the failure to produce information which the various railroads are entitled to withhold, if they desire to do

Central of Georgia Ry. Co. v. Murphey

so, under the correlative liberty of silence guarantied by the constitution. The demurrer was overruled, and the case proceeded to trial, and resulted in a verdict in favor of the plaintiffs. A motion for a new trial filed by the defendant was also overruled. The defendant assigns error upon the judgment overruling the demurrer and the judgment refusing to grant a new trial.

1. This suit was brought under the provisions of Civ. Code, §§ 2317-2318, which are quoted in the first headnote. The petition set forth a cause of action if the law in question is valid. In passing upon the assignment of error complaining that the court erred in overruling the demurrer, it becomes necessary to determine only one question, and that is whether this law is unconstitutional for any reason assigned in the demurrer. If it is a valid law, the other grounds of the demurrer not relating to the constitutionality of the law were not well taken. We do not think the statute is subject to any of the exceptions taken in the demurrer. It is too well settled now to admit of question that, when private property is "affected with a public interest," the owner of such property "grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good, as long as he maintains the use." *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77. It is also equally well settled that the incorporation of a railroad company by a state, and the granting to it special privileges to carry out the object of incorporation, particularly the authority to exercise the state's right of eminent domain, and the obligation assumed by the acceptance of the charter to transport all persons and merchandise upon like conditions and for reasonable rates, affect the property and employment with a public use, and thus subject the business of the company to legislative control in the interest of the public. *Banking Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377. It becomes necessary to determine in the present case whether the statute in question is of such a character as to come within the principles just referred to. A railroad company is not compelled to make a contract to forward goods beyond its own line. *Coles v. Banking Co.*, 86 Ga. 251, 12 S. E. 749, 45 Am. & Eng. R. Cas. 328. See, also, *State v. Railroad Co.*, 104 Ga. 437, 30 S. E. 891. But when it receives goods consigned to a point beyond the terminus of its own line it undertakes to transport them to their destination, and, if the goods are lost, it will be liable therefor in the absence of a contract otherwise limiting its liability. *Falvey v. Railroad Co.*, 76 Ga. 597, 2 Am. St. Rep. 58; *Central Railroad & Banking Co. v. Georgia Fruit & Vegetable Exchange*, 91 Ga. 389, 17 S. E. 904. It may, however, make a contract for the transportation of goods beyond the terminus of its own line, and stipulate in such contract that its liability shall cease when the goods are delivered to the next carrier; thus making itself liable only

Central of Georgia Ry. Co. v. Murphey

for damages or loss occurring while the goods are in its possession. *Banking Co. v. Avant*, 80 Ga. 195, 5 S. E. 78; *Railroad Co. v. Shomo*, 90 Ga. 500, 16 S. E. 220. In many instances it is to the interest, not only of the shipper, but also of the carrier, that the contract entered into should provide for a through shipment of goods to their destination over the connecting lines of the initial carrier. In order to secure business where the goods are to be transported to a distant point, it is necessary that the carrier should have traffic arrangements with its connecting lines, by which the shipper may become entitled to a through bill of lading, securing transportation over all the lines between the initial point and the point of destination. Especially is this true in regard to goods of a perishable nature. A carrier which holds itself out to carry such goods would secure little custom from shippers of that class of goods unless it were in a position to give reasonable assurances that the goods would not be subjected, at the terminus of the initial carrier's line, to the delays incident to shipments upon a bill of lading the undertaking of which is accomplished when the goods reach the terminus of the first carrier. The carrier may, under the law, refuse to issue bills of lading to points beyond its own line, but a carrier that would adopt such a rule would do little business in the transportation of goods to distant points, especially at places where there were other competing carriers who would issue through bills of lading to points beyond their own lines. It thus being often to the interest of the carrier to issue a through bill of lading in order that it may secure business, and the law allowing the carrier in such cases to limit its liability to loss or damage while on its own line, is it an unreasonable requirement, when, under such circumstances, a loss occurs beyond its own line, that the initial carrier shall, upon demand, furnish to the shipper, within a reasonable time, information as to the place at which the loss or damage occurred? If a through contract were for the sole interest of the shipper, such a requirement might be said to be unreasonable; but when such a contract is at least for the joint interest of both in all cases, and in many instances the making of such a contract would be the only means of securing the business for the carrier, it does not seem to be beyond the bounds of reason to require the carrier to furnish to the shipper information as to the point at which his goods were lost or damaged. It is much easier for the initial carrier to obtain this information than it would be for the shipper. Carriers, through business arrangements with the connecting carriers, are so intimately associated with each other, and each one is so thoroughly conversant with the systems of the others, that it is much easier for a carrier to obtain this information than a shipper. In fact, it is a practical impossibility in many instances for the shipper to obtain the information himself, and a refusal or failure on the part of the initial carrier, or one of the connecting carriers, to under-

Central of Georgia Ry. Co. v. Murphey

take to locate the point at which the loss or damage occurred, amounts practically to a denial of redress to the shipper of goods that have been lost or damaged. The well-known fact that, as a general rule, the shippers, under such contracts, were absolutely helpless where the goods were lost or damaged, was the motive which prompted the passage of the statute now under consideration. The statute is nothing more or less than a legislative declaration that, where a railroad company, in its own interest, to secure business, makes a contract to transport goods beyond its own terminus, and limits its liability to loss or damage upon its own line, in the interest of those who deal with the company, who come in contact with it as a public carrier, in the interest of shippers,—that is, in the interest of the public,—the railroad company making such a contract shall, when the goods are lost or damaged in transit, be required to furnish to the shipper such information as that he may make a legal demand upon those who are responsible for the loss or damage. The right to control by legislative enactment in the interest of the public a corporation of this character is unquestioned, and in the legislative control of the character indicated in the law now under consideration we see nothing unreasonable or arbitrary. See, in this connection, *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.* (Va.) 24 S. E. 261, 41 L. R. A. 511.

It is said, though, that, even if the statute in question is a reasonable regulation in regard to requiring the carrier to furnish the information therein mentioned, that provision is unreasonable which fixes the time within which the information is to be furnished before the effect of the statute is to impose a penalty upon the initial carrier for the failure to give the information. Of course, if an act of the general assembly imposes a penalty upon an individual or corporation for a failure to perform a given act within a given time, and it is manifest that the character of the act is such that the courts could take judicial notice that it could not be performed within the time required, then it would be the duty of the courts to declare such legislation invalid as an effort on the part of the lawmaking body to deprive a person of his property without due process of law. On the other hand, if the general assembly has a right to declare that a person shall do a given thing, and it provides that this act shall be performed within a given time, and the court cannot judicially know that it is impossible to do the thing required within the time fixed for its performance, then it is not within the power of the court to declare that the legislation is invalid upon its face. If, under the operation of such a statute in a given case, it should conclusively appear that it was impossible for a person against whom proceedings were had under the statute to perform, within the time required by the statute, the act thereby imposed, the question as to whether there would be

Central of Georgia Ry. Co. v. Murphey

any liability under the statute would arise as a matter for decision. In these days, when it is a matter of such common knowledge that the courts judicially know that railroad companies engaged in the transportation of persons and freight among the several states conduct their business with such facility by means of the telegraph and other agencies that, when it becomes necessary in their own interest to secure information in regard to the commonest details of the simplest transaction they can do so in a very short space of time, a court would stultify itself that would hold as a matter of law that 30 days was not a reasonable time for a carrier whose principal office was in Georgia to secure information as to where a car load of grapes was lost or damaged which was transported from a point in this state to Omaha, Neb. If information on any point involving the same amount of investigation were needed for its own business, it could be ascertained in a much less time than 30 days, and it is not unreasonable to require that it should use the same degree of diligence where one of its shippers is interested. The case of *Wallace v. Railway Co.*, 94 Ga. 732, 22 S. E. 579, which lays down the doctrine of "correlative liberty of silence," and that "compulsory private discovery" cannot be enforced by "statutory terror," has no application whatever to the present case. This is also true of the case of *Railway Co. v. Lackey*, 78 Ill. 55, 20 Am. Rep. 259, where it was held that an act requiring railroad companies to pay the costs of inquest and the costs of burial of all persons who died on their cars was invalid, so far as it attempted to make such companies liable where they had violated no law and had been guilty of no negligence. The same is to be said of the case of *Bielenberg v. Railroad Co.* (Mont.) 20 Pac. 314, 2 L. R. A. 813, where it was held that a statute of Montana which provided that a railroad company which damaged or killed a horse should be liable was invalid in so far as it imposed liability upon corporations that were not negligent in the act complained of. It certainly cannot be said that the statute under consideration is an impairment of the obligation of the contract made by the plaintiffs with the defendant, inasmuch as the statute was enacted long before the contract was entered into. Nor is the law under review such a regulation of commerce among the several states as to be violative of that clause of the constitution of the United States which grants to congress the exclusive right to regulate commerce among the several states. While a regulation of the character set forth in the statute under consideration might, in some remote degree, bear upon the matter of interstate commerce, it is in no sense such a regulation of that commerce as that the state would be inhibited from making it. In a broad sense, any regulation which touches at all persons or instrumentalities engaged in interstate commerce would be a regulation of that commerce.

Central of Georgia Ry. Co. v. Murphey

Still many such statutes have been held not to encroach upon the right of congress to control the matter of commerce among the several states. See, in this connection, *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819; *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508, 33 Am. & Eng. R. Cas. 425; *Railroad Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.*, 169 U. S. 311, 18 Sup. Ct. 335, 42 L. Ed. 759; *Railroad Co. v. Palmer (Neb.)* 56 N. W. 957, 22 L. R. A. 335; *Hart v. Railroad Co.*, 69 Iowa, 485, 29 N. W. 597, 27 Am. & Eng. R. Cas. 59; *Railroad Co. v. Crossland (Tex. Civ. App.)* 33 S. W. 290; *Williams v. Fears*, 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 685, affirmed in 179 U. S. 270, 21 Sup. Ct. 128, 45 L. Ed. 186.

2. Having reached the conclusion that the demurrer was properly overruled, it becomes necessary to determine whether the court erred in refusing to grant a new trial. Complaint is made that the court erred in excluding the evidence of the plaintiff Murphey to the effect that the fruit shipped belonged to his wife. There was no error in excluding this evidence. The plaintiffs were the shippers. They were the persons with whom the contract of affreightment was made. They were the consignors; and it is well settled that the shipper or consignor can bring an action against the carrier for a breach of the contract of affreightment, without reference to whether the shipper has any property, either general or special, in the goods shipped. See *Carter v. Railway Co.*, 111 Ga. 38, 36 S. E. 308, 50 L. R. A. 354. In *Lockhart v. Railroad Co.*, 73 Ga. 472, 54 Am. Rep. 883, the plaintiff was not only not the shipper, but had no interest whatever in the goods. The act under which this suit is brought gives the right of action in terms to the shipper, and provides that the carrier shall be liable for the value of the goods lost or damaged in the same manner and to the same extent as if the loss or damage occurred on its own line. As the shipper had the right, in the event of loss or damage on its own line, to bring an action against the carrier under the contract, under the statute the shipper had a right to bring an action against the initial carrier upon its failure to comply with the terms of the statute. Of course, when the shipper recovers, he will hold the recovery in trust for the true owner, and there can be no additional recovery by the owner under this statute.

3. It is contended further that the court erred in rejecting certain evidence, consisting of correspondence between the claim agent of the defendant and officers and agents of the lines over which the grapes were transported from Barnesville, Ga., to Omaha, Neb., the correspondence consisting of letters and telegrams; and also the evidence of the claim agent that he had charge of the tracing of the freight in controversy; that he instituted the search asked for by the plaintiffs; that he offered them the information which he had obtained just

Central of Georgia Ry. Co. v. Murphey

one day after the expiration of the thirty days required by the law, and that it was utterly impossible to have sooner obtained the information. While the evidence offered showed a mass of correspondence by wire and by mail, we cannot say that the evidence would have authorized a finding that it was impossible for the defendant to have obtained the information within 30 days. The company seems to have obtained the information, or at least a portion of it, within 31 days, and it would, indeed, be a strain to say that it was a matter of impossibility to have obtained it earlier than this. In these days, when so much can be accomplished in so short a time, and when those in charge of the affairs of the great railways of the country are in thorough communication with each other by the use of their own lines of telegraph as well as the lines of regular telegraph companies, it does seem to us to be an extraordinary claim to be made in behalf of such companies that it is an impossibility, with all of the means at their command, to locate the place at which a car load of freight was lost or damaged in transit from Georgia to Nebraska, when such car can be transported between the two points within four or five days. If such impossibility exists, it is evidence only that those in charge of the affairs of the company have either not sufficient employees to transact the business required of the companies, or the system by which they operate is defective at some point. We have reached the conclusion that the statute is a reasonable regulation, and the companies who are amenable to it must adopt some system by which the statute can be complied with. Especially so when there can be no question that it is within the power of the company to adopt a system by which the information can be obtained within the time fixed by law. It may be said that the ruling we now make imposes a very great burden upon railroad companies. Railroad companies are not required to issue through bills of lading beyond their own lines, and, if they do not desire to bear the burden incident to through bills of lading of this kind, the remedy is in their own hands. If a case could arise where it appeared that it was really impossible for the initial carrier to secure the information within the time fixed by the statute, another and quite a different question from the one now before us would be presented. The evidence offered in the present case did not make out a case of impossibility under any view of it. It simply demonstrated that the system of the defendant was inadequate; and railroad companies, like every one else, must adapt their systems of business to the law of the land.

4. The foregoing discussion disposes of all of the grounds of the motion for a new trial that requires special notice. The requests to charge were properly refused, and the portions of the charge complained of were not erroneous for any of the reasons set forth in the motion. Counsel stated in the argument that they did not raise any question as to the amount of

Illinois Cent. R. Co. v. Crady

the verdict, nor is there anything in their briefs in reference to this subject. We find no error which would have required the judge to grant a new trial.

Judgment affirmed. All the justices concurring, except SIMMONS, C. J., disqualified, and LUMPKIN, P. J., absent on account of sickness.

ILLINOIS CENT. R. CO. v. CRADY.

(*Court of Appeals of Kentucky, Sept. 24, 1902.*)

[69 S. W. Rep. 706.]

Carriers—Passenger on Freight Train—Injury from Sudden Starting of Train—Question for Jury.*

Where plaintiff, a passenger on a freight train, whose duty it was, as defendant knew, to look after a car of live stock, started out of the caboose, when the train stopped at a station, to inspect the stock, and, having his hand on the doorknob, had his thumb mashed by the shutting of the door, caused by a sudden jerk of the train, it was a question for the jury whether the jerk was an extraordinary one, and therefore one the risk of which plaintiff had not assumed, and whether plaintiff was in the exercise of due care.

Appeal from circuit court, Larue county.

“Not to be officially reported.”

Action by B. R. Crady against the Illinois Central Railroad Company to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

J. M. Dickinson, W. H. Marriott, Twyman & Handley, and Pirtle & Trabue, for appellant.

McCandless & James, for appellee.

WHITE, J. The appellee, Crady, while riding on a freight train, accompanying a car of live stock, was injured by the sudden slamming of the door of the caboose, and his thumb mashed off. For this injury this action is brought to recover damages. The cause of action is stated to be the negligence of the agents and employees in suddenly, violently, and unnecessarily stopping the train with a jerk and jar, so as to cause the door to shut with great force and violence, whereby appellee's thumb was caught and injured. It is alleged that at the time of this injury appellee was in the act of opening the door, intending to go out and see about his stock in the car, which he attended, and that in so doing he was in the exercise of due care. The answer admitted that appellee was a passenger, denied negligence on the part of its employees, and pleaded contributory negligence. By reply contributory negligence was denied. A trial resulted in a verdict and judg-

*As to the care due passengers on freight trains, see monograph appended to *West Chicago St. R. Co. v. Tuerk* (Ill.), 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1.

As to the liability of carriers for injuries to passengers by jerks and jolts of trains or cars, see monograph attached to *Freeman v. Metropolitan St. Ry. Co.* (Mo.), 3 R. R. R. 582, 26 Am. & Eng. R. Cas., N. S., 582.

Lawshe v. Tacoma Railway & Power Co

ment for \$350, and, after appellant's motion for new trial had been overruled, it prosecutes this appeal.

The principal question argued by counsel in his brief is that the evidence is not sufficient to sustain the verdict and judgment. He argues that, because of a lack of evidence to sustain appellee's cause of action, the trial court should have given a peremptory instruction to find for defendant, and, failing in that, the court should have set the verdict aside. It is next insisted that the evidence shows that appellee was guilty of such negligence contributing to his injury as precluded a recovery. In our opinion, the evidence of appellee, if true, is sufficient to authorize a verdict in his favor. He was a passenger on the freight train, and it was his duty, and so known to the appellant, to look after the condition of the car of live stock. To attend to this duty it was necessary to go out of the caboose and make an inspection of the stock in the car. According to appellee, when the train stopped at West Point, he put his hand on the doorknob to open it, and when he had done so the sudden and unusual jerk came and shut the door, and mashed his thumb. If this be true (a question for the jury to determine), appellee was in the exercise of care, and his injury was caused by some act of negligence on the part of the appellant's servants. The court instructed the jury that in riding on a freight train appellee assumed the ordinary dangers and discomforts of that mode of travel, and that, to entitle him to recover, the sudden stopping and jerking must have been more than the usual jerks and jars of such trains,—must have been extraordinary. While this testimony of appellee is contradicted by appellant's witnesses, it was not the province of the court to pass on the conflict in the evidence, but to submit that to the jury. It has been repeatedly held that, if there is evidence tending to show a right of recovery, the case must go to the jury, and a peremptory instruction should be refused. *Miller v. Howard* (Ky.) 39 S. W. 37; *Richards v. Railroad Co.* (Ky.) 49 S. W. 419, and cases cited. We do not feel authorized to say that the verdict is flagrantly against the evidence, and, unless that be the case, we will not reverse a judgment on account of failure of testimony. The instructions given fairly presented the law of this case. There appears no error in the record prejudicial to the substantial rights of the appellant.

The judgment is affirmed, with damages.

LAWSHE v. TACOMA RAILWAY & POWER CO.

(Supreme Court of Washington, Sept. 15, 1902.)

[70 Pac. Rep. 118.]

Carriers—Street Railways—Transfers—Mistake of Agent—Substantial Damages.

A passenger on a street car line on which the company issued transfers to its various connecting lines received from the conductor

Lawshe v. Tacoma Railway & Power Co

a transfer to a line other than the one to which he had requested one. Not noticing the mistake, he presented it to the conductor on the line to which he had requested a transfer, who refused to accept it. The passenger declined to pay further fare, and was ejected: *held*, that since the passenger was under no obligation to make a technical examination of the transfer slip, and since the company was responsible for the mistake of its agent, it was liable in substantial damages for the breach of contract occasioned thereby, though the conductor called upon to correct the mistake was not the one who had made it.

Appeal from superior court, Pierce county; W. H. Snell, Judge.

Action by Henry Lawshe against the Tacoma Railway & Power Company. From a judgment for defendant, plaintiff appeals. Reversed.

Hudson & Holt, for appellant.

B. S. Grosscup and A. G. Avery, for respondent.

DUNBAR, J. Defendant, as a common carrier of passengers, operates in Tacoma a street car line on Pacific avenue, and issues transfers to various connecting lines also operated by it. Plaintiff became a passenger upon the Pacific avenue line, and requested a transfer to the I street line. By a mistake of the conductor, instead of being given this transfer he was given a transfer to another line. Not noticing the mistake, plaintiff presented this transfer to the conductor of the I street car, who refused to accept it and demanded fare. Plaintiff declined to pay fare, and was put off the car. He now sues for damages on account of the ejection. The complaint, which, in substance, embodied the statement made above, was demurred to on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, judgment was entered, and from such judgment plaintiff appeals.

It is insisted by the respondent (defendant) that the carrier of passengers has a right to make reasonable rules and regulations for the conduct of its business, and that it is a reasonable regulation to require a passenger to procure and exhibit to the conductor a ticket evidencing his right to ride; that he must make his contract known to the conductor, and it can be so made known only by exhibiting the proper ticket; that if he fails to exhibit the proper ticket, although his failure is due to a mistake of an employee of the company, and he has in fact contracted for passage, still he may be ejected; and that his only remedy is to sue for the recovery of his fare. On this subject there seems to be a wide divergence of opinion, as indicated by the decisions. Respondent asserts that there is not an irreconcilable conflict of authority upon this subject; that the fundamental rules and the reasons underlying them support the doctrine that the appellant cannot recover under the circumstances of this case; and it is insisted that the appellant does not cite a single case exactly in point upon its facts with the case at bar. An examination of the authorities

Lawshe v. Tacoma Railway & Power Co

satisfies us that not only is there an irreconcilable conflict in the authorities, but that the weight of authority and the better reason sustain the appellant's right to recover; that, while the circumstances of the cases cited by appellant in most instances differ slightly from the circumstances of this case, the principle governing is identical. It is true that the company has a right to make regulations governing its traffic; but those regulations are for the benefit of the company, they are to a certain extent technical, and are understood only by the officers of the company and by travelers who are exceedingly familiar with them. In *Hufford v. Railroad Co.*, 64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859, which it is claimed overruled some of the earlier cases holding to the opposite doctrine, and which we think, in substance, does overrule them, it was held that plaintiff had a right to rely upon the agent's statements, and that the ticket so delivered by him was the evidence agreed upon by the parties by which the defendant should thereafter recognize the rights of the plaintiff in the contract thus made with the agent, and was conclusive upon the subject, and that passengers were not required to know the rules and regulations made by the directors of a railroad company for the control of the action of its agents and the management of its affairs. In passing upon the question, the court said: "There seems to be no question but that the plaintiff purchased his ticket of an agent of the company who had the right to sell the same and receive the plaintiff's money therefor; that the ticket covered the distance between the two stations, and was purchased by the plaintiff in perfect good faith; that the ticket was genuine, and was issued by the company, and was one which its agents had a right to sell to passengers. The plaintiff had a right to rely upon the statements of the agent that it was good and entitled him to a ride between the two stations. It was a contract for a ride between the two stations, that the defendant's agent had a right to make, and did make, with the plaintiff. The ticket given by the agent to the plaintiff was the evidence agreed upon by the parties by which the defendant should thereafter recognize the rights of plaintiff in his contract; and neither the company, nor any of its agents, could thereafter be permitted to say the ticket was not such evidence, and conclusive upon the subject. Passengers are not interested in the internal affairs of the companies whose coaches they ride in, nor are they required to know the rules and regulations made by the directors of the company for the control of the action of its agents and the management of its affairs." In this case the ticket was represented by the conductor to carry the passenger to a certain place, but was not in fact a ticket which would entitle a passenger to ride to such place. In further speaking of the right of the plaintiff to rely upon the representations of the conductor, the court said: "All sorts of people travel upon the cars; and the regulations and manage-

Lawshe v. Tacoma Railway & Power Co

ment of the company's business and trains which would not protect the educated and uneducated, the wise and the ignorant, alike, would be unreasonable indeed." In *Sloane v. Railway Co.*, 111 Cal. 668, 44 Pac. 320, 4 Am. & Eng. R. Cas., N. S., 182, 32 L. R. A. 193. It was held that, for the purpose of a right of action for the tort of a railroad company, it is not material that different acts of tort were committed by different agents of the railroad company; and the liability of the railroad company is the same where one conductor took up the ticket of the passenger, and required a change of cars, without giving to the passenger any evidence of the right of passage, and the conductor upon the other train excluded the passenger for failure to exhibit such evidence, as if both acts had been done by one conductor. The circumstances of the case were exactly parallel with the circumstances of the case at bar, excepting that in the former instance the passenger had no evidence of the contract, while in the case at bar the evidence was defective. A case exactly in point is *O'Rourke v. Railway Co.* (Tenn. Sup.) 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639, where it was held that a passenger who was ejected from a street car to which he had transferred from another car, because his transfer checks were improperly punched by the conductor of the first car, can recover therefor, where, on the refusal of the second conductor to accept the transfer checks, and before he was ejected, he made a statement to the conductor showing that the fault in the tickets was due to the negligence of the first conductor. In this case the authorities are collated on both sides of the proposition, a great majority being cited in favor of sustaining the right of recovery; and the court, in the course of its remarks, very pertinently said: "We concur in the latter view, and hold that a person who makes a valid contract is entitled to passage according to its terms, though the face of the ticket furnished him may not in any true sense express the contract. It is the contract, and not the ticket, that gives the right to transportation. The ticket is but an evidence of the contract, made out and furnished by the carrier; and, if it fail to disclose the true contract, the fault is with the carrier, and it is responsible for the natural consequences of the variance." To the same effect are *Railway Co. v. Rather* (Tex. Civ. App.) 21 S. W. 951; *Same v. Copeland* (Tex. Civ. App.) 42 S. W. 239.

But outside of all authority, it seems to us that in accordance with the general principles of law the appellant should recover. It is too plain for argument that only the right to sue for the recovery of the fare or a portion of the fare received by the company will be totally inadequate, and, through the plain, everyday law governing agency, the company is responsible for the acts of its agent and for his mistakes. This mistake it was the duty of the company to correct. It must necessarily correct it through its agents. It makes no

Dierig v. South Covington, etc., Ry. Co

difference, in reason, that the agent who was called upon to correct the mistake was another and different agent from the one who made the mistake. They were both agents of the company, and the act of the first conductor was in effect the act of the second conductor, because the acts of both were the acts of the company; the company having, for its own convenience, intrusted its business to two agents instead of one. The contract was made when the passenger paid the fare, and it was a contract not with any particular agent of the company, but with the company through its agents. The first conductor, who made the mistake, was not the agent of the passenger, but was the agent of the company, and his mistake was therefore the mistake of the company. If any other rule prevailed, the result would be that the company would be allowed to deprive the passenger of part of the benefit of his contract on account of the mistake made by the company, and for which he was in no wise to blame, for he had a right to assume that the conductor furnished him with the transportation for which he asked and for which he paid; it being absolutely impracticable for passengers to make technical examination of the transfer slips which they receive. And he ought to have redress for the company's violation of the obligation which it assumed.

The cause will be reversed, with instructions to the lower court to overrule the demurrer to the complaint.

REAVIS, C. J., and ANDERS, HADLEY, and WHITE, JJ., concur.

DIERIG v. SOUTH COVINGTON & C. ST. RY. CO.

(Court of Appeals of Kentucky, March 4, 1903.)

[72 S. W. Rep. 355.]

Carriers of Passengers—Refusal to Carry—Pleading.

A complaint against a street railway company alleged that, by contract between the carrier and two certain towns, the carrier was bound to transport passengers from a certain city to either of such towns for one five-cent fare, and that, plaintiff having taken passage on a car of defendants, the conductor refused to accept the five-cent fare offered for a continuous ride from the city to one of the towns: *held*, that the allegation did not amount to a statement that defendant refused to carry plaintiff.

Same—Refusal to Accept Fare—Arrest*—Liability.

In an action against a railway company, the complaint alleged that defendant, by an agent, called the police to arrest plaintiff, and that the police illegally placed plaintiff under arrest, and wrongfully held him as a prisoner: *held* that, in the absence of an allegation that it was done maliciously and without probable cause, the complaint stated no cause of action for false imprisonment.

Sufficiency of Complaint.

A complaint against a railway company alleged that, by contract between the carrier and two certain towns, the carrier was bound to transport passengers from a certain city to either of such towns for

*As to the liability of carriers for the wrongful arrest of passengers, see next case post.

Dierig v. South Covington, etc., Ry. Co

one five-cent fare, and that, plaintiff having taken passage on a car of defendants, the conductor refused to accept the five-cent fare offered for a continuous ride from the city to one of the towns, and that defendant, by an agent, called on the police to arrest plaintiff, and that they illegally placed plaintiff under arrest, and wrongfully held him as a prisoner: *held*, that the complaint did not state a cause of action for false arrest and imprisonment.

Complaint—Separate Causes of Action.

If plaintiff intended to endeavor to recover for violation of the contract, and also for illegal arrest, the complaint stated two separate and distinct causes of action.

Appeal from circuit court, Campbell county.

“Not to be officially reported.”

Action by Herman Dierig against the South Covington & Cincinnati Street Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Geisler & Lockhart, for appellant.

L. J. Crawford, for appellee.

PAYNTER, J. The petition in this case reads as follows: “The plaintiff says that the South Covington & Cincinnati Street Railway Company is a corporation incorporated under the laws of the state of Kentucky for the purpose of maintaining and operating street railways, and for the carrying of passengers upon said street railways; having the capacity to sue and to be sued. Plaintiff says that by contract made and entered into by and between the cities of Bellevue and Dayton, in the county of Campbell, Kentucky, with the defendant herein, in the year 1892, the defendant, among other things, bound itself to transport passengers on one continuous ride from Bellevue and Dayton, in Campbell county, Kentucky, to Fountain Square, in the city of Cincinnati, Ohio, and from said Fountain Square, or any intermediate point, to the cities of Bellevue and Dayton, Kentucky, for one five-cent fare, and no more. Plaintiff says that on the ——— day of ———, 1901, he entered a Bellevue and Dayton car of the defendant in the city of Cincinnati, Ohio, as a passenger, for the purpose of being carried from said city of Cincinnati to the city of Dayton, Campbell county, Kentucky. Plaintiff says that he offered to pay to the conductor of said car five cents for a continuous ride from the said city of Cincinnati to the said city of Dayton. Plaintiff says that the conductor refused to accept said five-cent fare offered him by the plaintiff for said continuous ride as aforesaid, but plaintiff says that the defendant, in disregard and in violation of its contract as herein stated, did, upon the arrival of the plaintiff on the car of the said defendant in Newport, Kentucky, by its agent, to wit, an inspector of the cars of said defendant corporation, call upon the police of the city of Newport, Kentucky, to arrest him (the plaintiff), and that at the instance and by the procurement of the said defendant the said police did violently lay hands upon the said plaintiff, and did wrongfully and

Dierig v. South Covington, etc., Ry. Co

illegally put him under arrest, and take him from said car, and compel him to go with them to the office of the police of the city of Newport, where he (the plaintiff) was held wrongfully and illegally and against his will as a prisoner for trial, and that at said trial the plaintiff was dismissed. Plaintiff says that by said act or acts of the defendant, and in violation of its contract hereinbefore cited, he was caused by the aforesaid acts of the defendant great mental and physical suffering and anguish; that he was thereby greatly damaged, and ought to recover damages in the sum of \$5,000." On motion, the court below ruled that the plaintiff had stated or attempted to state two causes of action, and therefore required him to paragraph his petition, which he accordingly did. The plaintiff paragraphed his petition so that the first paragraph would consist of the averments of the petition which preceded and included the language in the petition, to wit, "refused to accept said five-cent fare offered him by the plaintiff for said continuous ride aforesaid." The balance of the petition after the word "but," following the above quotation, was designated as the second paragraph of the petition, to which the court sustained a demurrer. The plaintiff failing to plead further, the court dismissed the petition.

Neither the petition, nor either of its paragraphs, states a cause of action. As to the first paragraph, there is no averment that the appellee refused to carry the appellant as a passenger on a Bellevue and Dayton car from Cincinnati to Dayton, Ky. It is averred that he tendered the conductor a five-cent fare for the continuous ride, but the conductor refused to receive same. From the averments of the petition, the court is unable to tell whether the conductor wanted him to pay more for the continuous ride, or that he desired to carry him free. In the second paragraph it is averred that the agent of the appellee called upon the police of the city of Newport to arrest the appellant, and that, upon his procurement, he was wrongfully and illegally arrested and taken from the car to the office of the police of the city of Newport, and there wrongfully and illegally detained, and that he was tried and dismissed. It is not averred in this paragraph of the petition for what reason he was arrested, or upon what charge. It is not averred that it was done maliciously and without probable cause. If the second paragraph of the petition stated a cause of action in other respects, it failed to do so because there was no averment that the procurement of his arrest was done maliciously and without probable cause. It is unnecessary to cite authorities upon this question, because the necessity of such averments is so universally recognized as being essential. If the averments of the first paragraph were added to those of the second paragraph, then the second paragraph would not state a cause of action for false arrest and imprisonment. Neither would the addition of the averments in the second paragraph to those of the first paragraph constitute the

Brunswick & W. R. Co. v. Ponder

essential averments of a cause of action. If the plaintiff was endeavoring to recover upon the grounds that the company refused to carry him from Cincinnati to Dayton for one fare, and put him off the car because he did not pay more, he should have made the necessary averments. If he was endeavoring to recover because he was wrongfully arrested on some charge, then he should have made the necessary averments to enable him to maintain an action. If he was endeavoring to recover for violation of a contract, and also for illegal arrest, then they were separate and distinct causes of action.

The judgment is affirmed.

BRUNSWICK & W. R. CO. v. PONDER.

(Supreme Court of Georgia, Feb. 7, 1903.)

[43 S. E. Rep. 430.]

Protection of Passenger—Arrest by Officers.*

A railroad company is bound to use extraordinary diligence to protect a passenger, while in transit, from violence or injury by third persons; but, where the passenger is arrested by officers of the law, the company is under no duty to inquire into the legality of the arrest.

Same—Same.

Where such arrest by officers of the law is illegal, but the railroad company has no notice of that fact, the company is not liable to the passenger for a failure to interfere with the officers and prevent the arrest, or for stopping the train to allow the officers to remove their prisoner therefrom.

Same—Same.

In such a case the company is under no duty to see that the officers use only such force as is necessary to make the arrest.

(Syllabus by the Court.)

Error from city court of Waycross; J. C. Reynolds, Judge.

Action by John Ponder against the Brunswick & Western Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

W. E. Kay, S. W. Hitch, and J. C. McDonald, for plaintiff in error.

John T. Myers, for defendant in error.

SIMMONS, C. J. Some time in June, 1901, Ponder boarded a passenger train of the Brunswick & Western Railroad Company at Fairfax, Ga. He paid his fare to Waycross. When the train stopped at Waresboro, a station intermediate between Fairfax and Waycross, three men boarded the train, assaulted Ponder, and removed him from the train. After settling for a small sum his claims against the individuals who assaulted him, Ponder brought suit against the railroad company for its failure to protect him. The jury returned a verdict for the plaintiff for \$500. The company moved for

*As to the liability of carriers for the wrongful arrest of passengers, see notes at end of case.

Brunswick & W. R. Co. v. Ponder

a new trial, the judge overruled the motion, and the company excepted. The evidence shows that when the train stopped at Waresboro the conductor stepped off to assist the passengers who were getting on or off. While he was so engaged, three men boarded the train to arrest Ponder; entering the train at a point other than that at which the conductor was standing. One of these men was marshal of the town of Waresboro, another was the deputy marshal, and the third was specially deputed by the marshal to assist in making the arrest. They had no warrant, and seem to have arrested Ponder for having failed to pay one of them a debt. They ordered him to get off of the train with them, and, upon his refusal, began to strike and beat him. At this juncture the conductor came in, and discovered, for the first time, that the officers were on the train, making an arrest. He took hold of one of them, and remonstrated with them all; suggesting that they go on to Waycross, the train having already started. This they refused to do, ordering the conductor to stop the train. The conductor, when he came in, had heard Ponder tell the officers that he had paid them all he owed them; but the conductor made no investigation as to the charge against Ponder, and did not try to ascertain whether the officers had a warrant. He knew that the officers were such, and they had on former occasions arrested persons on his train, and taken them off. Upon their demand, he had the train stopped before it had left the corporate limits of the town. The officers and Ponder then left the train. The motion for new trial complains that the verdict is contrary to the evidence and without evidence to support it, and that the court erred in certain charges and refusals to charge. Our idea of the law of the case, as given below, covers these assignments of error, and we will not deal with them separately.

1. A railroad company is bound to use extraordinary care and diligence to protect its passengers, while in transit, from violence or injury by third persons. If a third person boards the train and assaults a passenger, it is the duty of the railroad company to use extraordinary care to protect the passenger, and in this state the conductor of a train carrying passengers is invested with all the powers of a police officer. Pen. Code, § 902. At the same time, a conductor would not be justified in interfering with the lawful arrest of one who happened to be a passenger on his train. This much is clear. The present case, however, falls within an intermediate class. The arrest of Ponder was not a lawful one, but of this fact the officers of the railroad company had no notice. The arrest was made by officers of the law, acting under color of their office, and we think the company was under no duty to inquire into the legality of the arrest. The arrest was apparently regular, and, in the absence of any knowledge or notice to the contrary, the officers and agents of the company could assume that it was lawful. The conductor knew that the men making

Brunswick & W. R. Co. v. Ponder

the arrest were officers, and he had previously had passengers on his train arrested by them and removed from the train. While the officers were attempting to arrest Ponder, the latter told them, in the hearing of the conductor, that he had paid them all he owed them. This was not of itself sufficient to put the conductor on notice that the arrest was for a debt. So far as he knew, it was a claim by Ponder that he had restored all of the money which he had acquired by the commission of some crime with which he was charged, or that he had attempted illegally to settle some criminal prosecution. The arresting officers had no warrant, but in this state an officer may arrest, without warrant, an offender who is attempting to escape. Further than this, the conductor did not know of the absence of a warrant, and Ponder did not raise that question, or represent to the conductor that the arrest was unlawful or unauthorized.

2. The conductor made a decided effort to quiet the disturbance on the train and to stop the assaults on Ponder. One of the plaintiff's witnesses testified that the conductor did all that he could have done. However this may be, we think the failure of the conductor to interfere with the officers and prevent the arrest did not give Ponder any cause of action against the company. It is essential to the maintenance of the law that its processes should be promptly executed, and its officers allowed to proceed without interference, except in cases where such interference is clearly justified. It would never do to allow a railroad conductor to interfere with officers of the law, and prevent arrest by them, merely because he did not know whether or not they were acting within their power and authority. If the conductor had knowledge that the arrest was unlawful, then it would be his duty to use extraordinary diligence to prevent it and protect the passenger, but even in that case the company would not be an insurer against such arrest. If the conductor had notice that the arrest was wrongful, it would be his duty to make inquiry into the matter. But where the arrest is by officers of the law, and is apparently regular, and there is nothing to put the company on notice that the arrest is illegal, the company cannot be held liable for a failure to interfere with the officers and prevent the arrest. It was argued that the conductor had also actively aided in the arrest by stopping his train to enable the officers to remove their prisoner. This is answered by what has been said above. The conductor was ordered to stop the train, and, as he had a right to presume that the arrest was legal, his obeying the command of the officers was no breach of duty to the passenger. An officer may stop a train to make an arrest of a person thereon. *St. Johnsbury, etc., R. Co. v. Hunt*, 60 Vt. 588, 15 Atl. 186, 18 L. R. A. 189, 6 Am. St. Rep. 138. And certainly an officer may, after having made the arrest, stop the train to remove his prisoner. It would have been an interference with the officers to have carried them on out of their town while they were endeavor-

Notes

ing to make an arrest within it. In this particular case it further appears that, at the time the train stopped upon the command of the officers, Ponder had ceased resisting, and agreed to get off.

3. One other question remains: Was the railroad company liable for allowing the arresting officers to use more force than was necessary to make the arrest? Ponder appears to have been considerably beaten and bruised, and the evidence would warrant a finding that more force was used to make the arrest than was necessary, and that this was evident to the conductor, or to any one else who was present. It was argued that, even if the company was under no duty to prevent the arrest, it was still liable for not seeing to it that no unnecessary force was used. In the first place, the conductor seems to have done what he could to prevent this, and but little force was used after he arrived upon the scene; the violent assaults having occurred before he discovered what was going on, or had time to take part. Nor is there any evidence of negligence on the part of the company's agents in not sooner discovering that the officers were on the train, endeavoring to arrest Ponder. Then, too, if our conclusion be correct, that the conductor could assume that the arrest was a lawful one, and was under no duty to prevent it, we think the company cannot be held liable for the excessive force used. Ponder became the prisoner of the officers as soon as they laid hold on him, and before he was removed from the train. He was taken out from under the protection of the conductor, as against the officers of the law. He was then in the custody of the law, and, whether or not the conductor or any one else was authorized to prevent the use of unnecessary force in making the arrest, the railroad company was in this regard no longer under any duty to him as a passenger. See, in this connection, *Jardine v. Cornell*, 50 N. J. Law, 485, 14 Atl. 590.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

NOTES.

CARRIERS OF PASSENGERS—LIABILITY FOR FALSE IMPRISONMENT AND ARREST OF PASSENGER BY SERVANTS.

- I. General Rule.
- II. What Constitutes False Imprisonment.
 - A. In General.
 - B. The Detention or Restraint.
 - C. The Unlawfulness of the Detention or Restraint.
 1. In General.
 2. Detention to Enforce Payment of Fare.
 3. Arrest without Warrant.
 4. What Constitutes Probable Cause.

I. GENERAL RULE.

A carrier of passengers is liable for the false imprisonment and arrest of a passenger which is made, or caused to be made, by a

Notes

servant when acting in the line of his duties or scope of his employment.

California.—Trabing *v.* California Navigation, etc., Co., 121 Cal. 137, 53 Pac. 644, 8 Am. & Eng. Corp. Cas., N. S., 695.

Kansas.—Atchison, etc., R. Co. *v.* Henry, 55 Kan. 715, 41 Pac. 952, 2 Am. & Eng. R. Cas., N. S., 418, 29 L. R. A. 465.

New York.—Palmeri *v.* Manhattan R. Co., 133 N. Y. 261, 30 N. E. 1001, 44 N. Y. St. R. 894, 53 Am. & Eng. R. Cas. 56, 28 Am. St. Rep. 632, 16 L. R. A. 136, affirming 60 Hun (N. Y.) 579, 39 N. Y. St. Rep. 23, 14 N. Y. Supp. 468; Shea *v.* Manhattan R. Co., 29 N. Y. St. R. 313, 8 N. Y. Supp. 332; Hamel *v.* Brooklyn, etc., Ferry Co., 25 N. Y. St. R. 153, 53 Hun (N. Y.) 634, 6 N. Y. Supp. 102, affirmed, without opinion, in 125 N. Y. 707, 26 N. E. 753.

Texas.—Galveston, etc., R. Co. *v.* Donahoe, 56 Tex. 162, 9 Am. & Eng. R. Cas. 287.

Virginia.—Norfolk, etc., R. Co. *v.* Galliher, 89 Va. 639, 16 S. E. 935.

West Virginia.—Gillingham *v.* Ohio, etc., R. Co., 35 W. Va. 588, 14 S. E. 243, 51 Am. & Eng. R. Cas. 222, 29 Am. St. Rep. 827, 14 L. R. A. 798.

And, while there are few decisions to that effect, it seems that, in the absence of ratification by the carrier, he is liable only when the servant, in effecting the wrongful arrest, is acting within the scope of his employment. Lezinsky *v.* Metropolitan, etc., R. Co., 88 Fed. 437, 59 U. S. App. 588, 12 Am. & Eng. R. Cas., N. S., 55; Laffitte *v.* New Orleans, etc., R. Co., 43 La. Ann. 34, 8 So. 701, 47 Am. & Eng. R. Cas. 645, 12 L. R. A. 337; Cunningham *v.* Seattle Electric R., etc., Co., 3 Wash. 471, 28 Pac. 745, 52 Am. & Eng. R. Cas. 588. But see St. Louis, etc., R. Co. *v.* Franklin (Tex. Civ. App. 1898), 44 S. W. 701, an action by a passenger for damages for false imprisonment, in which the court, answering defendant's proposition that a master is not responsible for the wrongful act of his servant not done in the scope of his employment, said: "The principle is sound, but without any application in cases like this. To one who is a passenger of a carrier, the latter is liable for injury inflicted upon him by its servant, in whatever capacity the servant may be employed." If the arrest of the passenger is within the scope of the servant's employment the carrier is liable, although the servant may have exceeded his authority (Duggan *v.* Baltimore, etc., R. Co., 159 Pa. St. 248, 28 Atl. 182, 59 Am. & Eng. R. Cas. 627, 39 Am. St. Rep. 672, in which it was held that where a railroad company employs a person to act for it as a detective officer, and his authority includes, expressly or by general usage or consent, the power to make an arrest in the company's behalf, it will be liable if he wrongfully makes an arrest without a warrant, although he has not been authorized to make arrests without warrants. Eichengreen *v.* Louisville, etc., R. Co., 96 Tenn. 229, 34 S. W. 219, 3 Am. & Eng. R. Cas., N. S., 453, 31 L. R. A. 702), or even though he may have acted directly contrary to his instructions. Thus, where the conductor of a train caused the arrest of one of the passengers, whom he erroneously believed to be the person who had previously committed an assault upon him, it was held that the company was liable, although, when the occurrence of the assault upon the conductor had been reported to the management of the road, he had been instructed not to make any arrest for the assault. Gulf, etc., R. Co. *v.* Conder (Tex. Civ. App. 1900), 58 S. W. 58. According to the present state of the authorities, the rule governing the carrier's liability for the wrongful arrest or imprisonment of passengers by his servants, is, then, the same as that which governs the carrier's liability for the negligence of servants (see note to Louisville, etc., R. Co. *v.* Steenberger, 5 R. R. R. 384, 28 Am. & Eng. R. Cas., N. S., 384); the liability of the carrier depends, not upon whether the arrest was authorized, nor even upon whether it was forbidden, by the carrier, but upon whether the servant

Notes

was, at the time, acting within the line of his duties or the scope of his employment.

II. WHAT CONSTITUTES FALSE IMPRISONMENT.**A. IN GENERAL.**

The constituent elements of false imprisonment are, first, the detention or restraint, and, secondly, the unlawfulness of the detention or restraint.

B. THE DETENTION OR RESTRAINT.

In order to charge a carrier of passengers with liability to a passenger for a false imprisonment, there must be a detention against the will of the passenger (see *Sullivan v. Old Colony R. Co.*, 148 Mass. 119, 18 N. E. 678, 1 L. R. A. 513), and the detention must be by, or at the instance of, the carrier or his servants. If the arrest of the passenger is not made by the carrier, or his servants, but by the police authorities, the carrier cannot, of course, be liable in an action for false imprisonment. *Oppenheimer v. Manhattan R. Co.*, 18 N. Y. Supp. 411. See *Cunningham v. Seattle Electric R., etc., Co.*, 3 Wash. St. 471, 28 Pac. 745, 52 Am. & Eng. R. Cas. 588. Thus if the police authorities, having information that a passenger on a railroad train is violating the law, enter the train and arrest him, the carrier is not liable. *Claiborne v. Chesapeake, etc., R. Co.*, 46 W. Va. 363, 33 S. E. 262, 14 Am. & Eng. R. Cas., N. S., 217. The conductor of a train is not required to enter into a contest with officers of the law, by inquiring into their authority and asserting his own in opposition (*Duggan v. Baltimore, etc., R. Co.*, 159 Pa. St. 248, 28 Atl. 182, 59 Am. & Eng. R. Cas. 627, 39 Am. St. Rep. 672), and, therefore, that the arrest of a passenger upon his train is made without authority or probable cause does not make the railroad company liable for the false imprisonment. *Owens v. Wilmington, etc., R. Co.*, 126 N. Car. 139, 35 S. E. 259, 78 Am. St. Rep. 642. Nor is the carrier liable for the wrongful arrest of a passenger merely because the conductor points him out to an officer who is in search of him. *Owens v. Wilmington, etc., R. Co.*, 126 N. Car. 139, 35 S. E. 259. But the carrier may be liable if the conductor takes part in the unlawful arrest. Thus, if the conductor of a train, who has received telegraphic orders from one of the company's detectives to arrest one of the passengers, participates in the unlawful arrest of the passenger by officers who have been called for the purpose, the company is liable. *Duggan v. Baltimore, etc., R. Co.*, 159 Pa. St. 248, 28 Atl. 182, 59 Am. & Eng. R. Cas. 627, 39 Am. St. Rep. 672. And the carrier may be liable if his agent procures the arrest of a passenger, or sets in motion the machinery by which the arrest is made, although it is not expressly ordered or directed. Thus, where a detective employed by a railroad company, who was present when plaintiff tendered a counterfeit bill to pay for a ticket, telegraphed ahead to another station, relating the occurrence, and directing the operator to tell the police authorities to be at the station, then boarded the same train with plaintiff, and, upon reaching the station, pointed plaintiff out to the officers, as did also the conductor, it was held that his arrest by the officers was procured by an agent of the company. *Eichengreen v. Louisville, etc., R. Co.*, 96 Tenn. 229, 34 S. W. 219, 3 Am. & Eng. R. Cas., N. S., 453, 31 L. R. A. 702.

C. THE UNLAWFULNESS OF THE DETENTION OR RESTRAINT.**1. In General.**

In order to charge a carrier of passengers with liability to a passenger for false imprisonment, there must not only be a detention of the passenger, but the detention must be unlawful. Conversely, if the detention is wrongful, it is no defense to an action for false imprisonment against the carrier that servant acts in good faith in making the arrest (*Jacobs v. Third Avenue R. Co.*, 75 N. Y. Supp.

Notes

679, reversing 34 Misc. [N. Y.] 512, 69 N. Y. Supp. 981), or that the arrest resulted from the passenger's own obstinate and unreasonable conduct. The fact that a passenger's arrest, on a false charge of fraudulently evading the payment of fare, is induced by the passenger's conduct in refusing to identify himself as the person to whom the ticket which he presents was issued, is not a justification and does not relieve the carrier of liability for the false arrest. *Palmer v. Maine, etc., R. Co.*, 92 Me. 399, 42 Atl. 800, 44 L. R. A. 673. A railroad company is, of course, liable in damages in an action for false imprisonment brought by a passenger whom it causes to be arrested for alighting from a moving train, under a statute which denounces a penalty for getting on or off a moving train, but especially excepts passengers and train employees from its operation. *Alabama, etc., R. Co. v. Kuhn*, 78 Miss. 114, 28 So. 797, 19 Am. & Eng. R. Cas., N. S., 466.

2. Detention to Enforce Payment of Fare.

The right to arrest a passenger for evading payment of fare has sometimes been given by statute. For example, see Mass. Pub. Stat. c. 103, §§ 18, 19; c. 112, § 197. But in the absence of legislation upon the subject, the detention of a passenger to enforce the payment of fare constitutes a false imprisonment. *Chilton v. London, etc., R. Co.*, 16 M. & W. 212; *Smith v. State*, 7 Humph. (Tenn.) 43. Where a passenger upon an elevated railroad train, who had lost his ticket before reaching his destination, was not permitted by the gate-keeper to pass from the station platform to the street without producing his ticket or paying his fare, although he explained that he had lost his ticket, and, on his insisting upon his right to pass, was arrested by a police officer at the instance of the gate-keeper, it was held that the carrier was liable for false imprisonment. In the opinion of the court it was said that defendant had no right to detain and imprison plaintiff until he should produce a ticket or pay his fare. "At most the plaintiff was a debtor to the defendant for the amount of his fare, and that debt could be enforced against him by the same remedies which any creditor has against his debtor. If the defendant had the right to detain him to enforce payment of the fare for ten minutes, it could detain him for one hour, or a day, or a year, or for any other time until compliance with its demand. That would be arbitrary imprisonment by a creditor without process or trial, to continue during his will until his debt should be paid. Even if a reasonable detention may be justified to enable the carrier to inquire into the circumstances, it cannot be to compel payment of fare. The detention here was not to enable the gate-keeper to make any inquiry, but simply to compel payment. He was absolutely informed that he could not pass out without producing a ticket or paying his fare." *Lynch v. Metropolitan, etc., R. Co.*, 90 N. Y. 77, 12 Am. & Eng. R. Cas. 119, 43 Am. Rep. 141. But a passenger who fails to present a ticket or pay fare may be detained a reasonable time for the purpose of enquiring into the circumstances. Thus, where a passenger on a steamboat who knew, or has reason to know, that he would be required to present and surrender his ticket upon disembarking, failed either to do so or to pay his fare, it was held that his detention for a reasonable time for the purpose of investigating the circumstances of the case, did not subject the carrier to liability for false imprisonment. *Standish v. Narragansett Steamship Co.*, 111 Mass. 512, 15 Am. Rep. 66.

3. Arrest without Warrant.

While it has been said that if there is probable cause for concluding that a passenger has either committed a felony, or is about to do so, his arrest by a servant of the carrier is excusable, even though the suspicion was unfounded (*Newman v. New York, etc., R. Co.*, 54 Hun [N. Y.] 335, 7 N. Y. Supp. 560), there is no authority to that effect. That may be the rule by which to determine the lawfulness of an arrest which is made by a servant who is invested, by statute

Notes

or special appointment, with the authority of a peace officer, and who acts as a peace officer in making the arrest. But there can be little doubt that the legality of arrests by servants who are not clothed with the authority of a police officer must be governed by the rules which determine the legality of arrests by any private individuals. In that case, to justify the arrest of a passenger by the carrier's servant, without a warrant, for an offense which was not committed in his presence, it must appear, in some jurisdictions, that a felony had been committed, and that there were reasonable grounds for believing that the passenger was guilty, in other jurisdiction, that a felony had been committed, and that the passenger was actually guilty.

The arrest of a passenger for a misdemeanor, which amounts to a breach of the peace, by the carrier's servant, without a warrant, does not constitute false imprisonment. Where the conductor of a train, who was unable to control disorderly passengers or to suppress the disorder which they created, and felt powerless to eject them because of their threatened resistance, telegraphed to a station ahead for a policeman, and when the train reached the station pointed them out to the officer and had them arrested, it was held that the arrest was lawful, although made without a warrant, and that the company was not liable in an action for false imprisonment brought by one of the passengers arrested. The decision was upon the theory that the disorderly conduct amounted to a breach of the peace, for which the conductor, as a private individual, would have been authorized to arrest had he been physically able to do so, and that "the act of the conductor in telegraphing for a policeman, and in a short space of time thereafter turning the plaintiff over to the officer, was in no respect different from a formal arrest by the conductor in the midst of the riot and disorder." *Baltimore, etc., R. Co. v. Cain*, 81 Md. 87, 31 Atl. 801, 28 L. R. A. 688.

Where the common-law rule that a private person cannot lawfully arrest another for a misdemeanor, which does not amount to a breach of the peace, without a warrant, obtains, a carrier is liable for the arrest of a passenger, without a warrant, for a misdemeanor, which does not amount to a breach of the peace, by a peace officer, who was not present when the offense was committed, at the instance of a servant who acts in good faith, without malice, and upon a belief of guilt founded upon reasonable grounds. Thus, a railroad company is liable for the arrest of a passenger, at the instance of a conductor, by an officer, without a warrant, for the statutory offense of fraudulently evading the payment of fare. *Palmer v. Maine, etc., R. Co.*, 92 Me. 399, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673; *Krulevitz v. Eastern R. Co.*, 140 Mass. 573, 5 N. E. 500, 143 Mass. 228, 9 N. E. 613, 26 Am. & Eng. R. Cas. 118, wherein it was held that the arrest was illegal, although the conductor was empowered by statute to make the arrest himself, if the conductor, in turning the passenger over to an officer, did not act in the capacity of an officer, but in that of conductor.

4. What Constitutes Probable Cause.

It cannot be said that there is probable cause when the servant causing the arrest of a passenger does not believe that the offense with which the passenger is charged has been committed. *Krulevitz v. Eastern R. Co.*, 140 Mass. 573, 5 N. E. 500, 143 Mass. 228, 9 N. E. 613, 26 Am. & Eng. R. Cas. 118. Where a passenger on a street car deposited a counterfeit coin in the fare box, and refused to redeem it unless it should be returned to him, although he was told by the driver that he could not open the box, but that the coin could be had by calling at the office of the company, it was held that there was probable cause for his arrest upon a charge of passing counterfeit money. *Central R. Co. v. Brewer*, 78 Md. 394, 28 Atl. 615, 59 Am. & Eng. R. Cas. 639, 27 L. R. A. 63. It appearing that plaintiff, when arrested by a detective in the employ of defendant carrier, while

Minor v. Erie R. Co

awaiting a train for which he had a ticket, had on a rubber suit, and a hood, part of which came down upon his face, with holes for eyes, wore a false beard, and had in his possession a paper box which contained bottles of liquid substances, rags in an oily condition, and eight or ten wax tapers, it was held that the question as to whether there was probable cause for his arrest was for the jury. *Newman v. New York, etc., R. Co.*, 54 Hun (N. Y.) 335, 7 N. Y. Supp. 560.

THEODOR MEGAARDEN.

MINOR v. ERIE R. CO.

(*Court of Appeals of New York, June 27, 1902.*)

[64 N. E. Rep. 454.]

Railroads—Mileage Book Act—Constitutional Law.

The mileage book act (Laws 1895, c. 1027) is constitutional, as to a railroad corporation thereafter reorganized, and incorporated under Laws 1892, c. 688, providing for the reorganization of corporations on the sale of corporate property and franchises, though the corporation succeeded to the rights of an old company, which had, under section 3 of such law, the right to charge a specified fare, since the new corporation acquired the rights of the old corporation, subject to the liabilities imposed by law on railroad corporations.

Cullen and Gray, JJ., dissenting.

Appeal from supreme court, appellate division, Fourth department.

Action by George H. Minor against the Erie Railroad Company. From a judgment of the appellate division (76 N. Y. Supp. 513) reversing a judgment for defendant entered on a dismissal of the complaint, and directing judgment for plaintiff, defendant appeals. Affirmed.

Adelbert Moot, George F. Brownell, and William L. Marcy, for appellant.

Charles B. Wheeler, for respondent.

PARKER, C. J. In *Beardsley v. Railroad Co.*, 162 N. Y. 230, 56 N. E. 488, 17 Am. & Eng. R. Cas., N. S., 149, in obedience to the decision of the supreme court of the United States in *Railroad Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858, we held that the mileage book act (chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896), in so far as it purported to affect the rights of the defendant as receivers of a railroad corporation existing at the time of its enactment, offended against that part of the constitution of the United States which forbids the taking of property without due process of law, and hence was inoperative; and we reversed the judgment and directed a dismissal of the complaint. *Purdy v. Railroad Co.*, 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669, was an action to recover a penalty under that act against the reorganized corporation. This incorporation was effected November 14, 1895, while the mileage book act went into effect June 15, 1895. We decided in that case that the record did not advise us of the history of

Minor v. Erie R. Co

the Erie Railroad corporation, other than that its certificate of incorporation shows it to have been duly organized and incorporated after the passage of the act of 1895, and hence as to it the mileage book act could not offend against that provision of the constitution which was effectively invoked in the Beardsley Case, and so we affirmed the judgment. The judgment under review awards to plaintiff one penalty against the same corporation under the mileage book act, and the record shows the antecedent history of the present corporation, from which it appears that a predecessor corporation, as to a portion of its property, was incorporated by chapter 224 of the Laws of 1832; that thereafter and in the year 1878 such proceedings were had as that a reorganized corporation, known as the New York, Lake Erie & Western Railroad Company, became vested with all the property, rights, and franchises of the predecessor corporation, which on the 5th day of October, 1878, it mortgaged to the Farmers' Loan & Trust Company as trustee for bondholders; that subsequently such mortgage was foreclosed, and the property duly sold to the representatives of a majority of those interested as bondholders or stockholders of the property; that almost immediately thereafter, and on the 14th day of November, 1895, the certificate of incorporation was duly filed, and the property sold at the foreclosure sale was conveyed to it. The question up for decision, therefore, is whether the new corporation holds unimpaired all the rights and privileges which belonged to its predecessor corporation, or whether, in receiving from the state the privileges and benefits of a new incorporation, the new company and the property acquired by it became subject to the existing general provisions of the statutes of the state affecting such corporations.

Prior to the transfer of the railroad property, rights, and franchises to this defendant, the right either of the corporation or the receivers to charge the rate of fare authorized by the statute under which the original corporation came into existence could not be impaired by statutes of the character of the mileage book acts; and if those interested as the holders of securities representing the property had continued the operation of the property under the old corporation, or by receivers thereof, or in any other way which did not require further aid from the state, the management would not have been obliged to obey the mileage book acts. But those interested in the property were not content to manage the property without securing from the state a further privilege, to wit, formation of a new corporation to manage the property. This privilege the state stood ready to grant to all corporations needing it, upon certain conditions, imposed upon all alike. The statute under which defendant was incorporated was section 3 of chapter 688 of the Laws of 1892, which provides, among other things, that the purchaser or purchasers of such corporate property and their associates may incorporate

Minor v. Erie R. Co

by filing a certificate stating certain matters. Subdivision 4 provides that "such corporation shall be vested with and be entitled to exercise and enjoy all the rights, privileges and franchises, which at the time of such sale belonged to or were vested in the corporation last owning the property sold, or its receiver, and shall be subject to all the provisions, duties and liabilities imposed by law on such corporations." When the defendant availed itself of the permission of this statute it became, I think, vested with all the "rights, privileges and franchises" of the old corporation, except in so far as the enjoyment of such privileges by railroad corporation may have been limited by general law enacted subsequently to the creation of defendant's predecessor corporation. The statute speaks in all instances as of the time of the creation of the new corporation, and the language employed would seem to indicate that it was the legislative intent, in order to keep the body of the law harmonious upon the subject of corporations, to provide that, when those interested in the property of an old corporation desire the aid of a new charter, they may receive it, but subject, nevertheless, to such duties and liabilities as the law of the time imposes on similar corporations. It cannot be questioned but the legislature has the right, as one of the conditions of authorizing incorporation, and the conferring of the rights, privileges, and franchises of an old corporation, to require the new corporation to subject itself to the existing law affecting similar corporations, although the effect may be to curtail to some extent the rights and privileges enjoyed by the old corporation, and which otherwise would pass unimpaired to it.

In *Schurz v. Cook*, 148 U. S. 397, 13 Sup. Ct. 645, 37 L. Ed. 498, the purchasers at a foreclosure sale of a railroad undertook to organize a corporation to receive and hold the purchased property; but shortly prior thereto an act had been passed providing for the imposition of a tax upon incorporation, which in that case amounted to \$18,000. The secretary of state refusing to file the certificate of incorporation without the payment of that sum, application for a mandamus was made to the special term in this state to compel him to file it, which motion was denied. The decision was affirmed in the general term (*People v. Cook*, 47 Hun, 467) and in the court of appeals (*Id.*, 110 N. Y. 443, 18 N. E. 113). It was said in the court of appeals (Peckham, J., writing): "We think it is also plain that, under the reorganization acts above mentioned, when the purchaser at the foreclosure sale undertook to reorganize under those acts, and for that purpose filed in the secretary's office a certificate, upon the filing of which they became a body politic and corporate, the corporation thus formed is a new and an entirely different one from that whose property and franchises the purchasers may have bought under the foreclosure proceedings. It is true that the corporation about to be formed by the filing of the certificate has,

Minor v. Erie R. Co

by force of the statute, when formed, all the rights, franchises, powers, privileges, and immunities which were possessed before such sale by the corporation whose property was sold; but that does not make the corporation the same by any means. The right to be a corporation, which the old corporation had, was not mortgaged, and was not sold, and did not pass to the purchasers; and they only obtained such a right upon filing the certificate mentioned, and they then obtained it by direct grant from the state, and not in any degree by the sale and purchase of the franchises, etc., of the old corporation." This language was quoted with approval by the supreme court of the United States when that case reached it, and it further said: "There is no provision of law under which they made their purchase requiring them to become incorporated; but, desiring corporate capacity, they demanded the grant of a new charter under which to exercise the franchise so acquired, * * * and the right therein conferred [referring to the statute under which the original charter was secured] upon purchasers of corporate properties and franchises sold under foreclosure of mortgages thereon, to reorganize and become a new corporation, is subject to the laws of the state existing or in force at the time of such reorganization, and the grant of a new charter of incorporation." It is established, therefore, by authority, that the purchasers of the property, rights, franchises, powers, and privileges of the railroad in question did not acquire the right to continue the old corporation, nor to have one precisely like it, and that the state can regulate the terms and provide the conditions upon which it shall grant a new charter. This the state has done by this statute, which permits such purchasers to apply for the grant of a new charter if they desire it, and at the same time imposes certain conditions.

The only question, therefore, open for decision, is whether it is the purpose or the provision of the statute under consideration to require those asking for the assistance of the state by way of a new incorporation, under which to operate old properties, to become subject to those general laws which experience has shown to be for the best interest of the state. Now, while there is opportunity for controversy about it, it would seem as if the statute was not only fairly capable of such a construction, but, further, that it ought, in reason, to be accorded to it. If the legislature had intended that the new corporation should be subject only to the same duties and liabilities as were imposed on the old corporation, the section would have read, "and shall be subject to all the provisions, duties and liabilities imposed by law on such corporation." The legislature, however, did not employ that language, but said that it should be subject to the duties, etc., imposed by law upon "such corporations," thereby indicating a purpose to subject it to all the general provisions of law governing railroad corporations. It cannot be urged that such use of the

Minor v. Erie R. Co

plural in the last line was inadvertent, for the section is very carefully drawn, and provides that "such corporation [the new corporation] shall be vested with * * * the rights, privileges and franchises * * * vested in the corporation last owning the property sold, or its receiver, and shall be subject to all the provisions * * * imposed by law on such corporations." Giving to the language employed its natural and ordinary meaning, as we must, the conclusion necessarily follows that the legislature intended to impose upon each new corporation created for the purpose of taking over the property, rights, and franchises of an old corporation, as a condition of its creation, that it should be subject to the general provisions of law applicable to other corporations of like character. But if it were doubtful whether that construction or a different one should be adopted, the same conclusion would result from the application of the general rule stated by Mr. Justice Harlan in *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 561, 12 Sup. Ct. 689, 36 L. Ed. 537, namely, that, when either of two constructions of a statute be possible, "the interpretation must be adopted which is most favorable to the state."

The judgment should be affirmed, with costs.

CULLEN, J. (dissenting). I agree with the Chief Judge that this appeal presents only the question of the proper construction of our statutory provisions which authorize the purchasers, on a sale of the property and franchises of a domestic corporation, to reorganize and become a corporation. Laws 1892, c. 688, § 3. This concession, however, is made only on the assumption that the following remark contained in the opinion of this court in *Parker v. Railroad Co.*, 165 N. Y. 275, 59 N. E. 81, 10 Am. & Eng. R. Cas., N. S., 614. "While it is doubtless true that natural persons cannot exercise the franchises which the state has conferred upon railroad corporations, there is no reason why they cannot be the conduit for transmitting them to another corporation in the manner provided by law," does not state the existing state of legislation on the subject, and that individuals can, under the laws of this state, acquire, maintain, and operate a railroad, which they may purchase on the foreclosure of a mortgage, which is my own judgment. For, if this assumption is erroneous, and does not truly state the position of the majority of the court on the question, then it seems to me plain that the application of the mileage book laws, as to this defendant, would be unconstitutional. The supreme court of the United States held in *Railroad Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858, that a similar statute of the state of Michigan was not valid as an exercise of the police power of the state to establish maximum fares, but an invasion of the property rights of the company. To this decision we gave effect in *Beardsley v. Railroad Co.*, 162 N. Y. 230, 56 N. E. 488, 17 Am. & Eng. R. Cas., N. S., 149. The present defendant is the

Minor v. Erie R. Co

successor in interest of the defendant in the case last cited. It acquired its railroad from the purchaser at a sale on the foreclosure of a mortgage of the property of the earlier corporation. The state authorized that corporation to mortgage its road and franchise, and it is clear that it could not by subsequent legislation deprive the bondholders or mortgagees of their security, or prevent them, after their acquisition of the road on a foreclosure, from exercising their franchises unimpaired. If, therefore, the state forbade the purchasers from operating and running the railroad without forming a corporation, it could not require, as a condition of their incorporation, that they should surrender part of the franchises which they had acquired under the mortgage. On the assumption, however, which I have stated, I admit that the state might say to the purchasers of any railroad: "Hold and operate the railroad you have bought as tenants in common or as partners. That is your right. But if you wish to become incorporated, that is a privilege which we will accord to you only on condition that you give up a part of your franchise." The question then is, is that the effect of our legislation?

The statute reads: "Such [the new] corporation shall be vested with and be entitled to exercise and enjoy all the rights, privileges and franchises which at the time of such sale belonged to, or were vested in the corporation last owning the property sold, or its receivers, and shall be subject to all the provisions, duties and liabilities imposed by law on such corporations." It is doubtless true that, under these provisions, a franchise, personal to the old corporation, such as an exemption from taxation, an exemption from the exercise of the police power to prescribe maximum fares, and the like, would not pass. But the right which the defendant must have surrendered in this case, if it is held subject to the mileage book act, was not of that character, but was pro tanto a part of the franchise connected with the property itself. This distinction should be clearly apprehended. It lies at the foundation of a line of authorities found in the Reports of the Supreme Court of the United States. *Shields v. Ohio*, 93 U. S. 319, 24 L. Ed. 357; *Maine Cent. R. Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836; *Atlantic & Gulf R. Co. v. Georgia*, 98 U. S. 359, 25 L. Ed. 185; *Norfolk & W. R. Co. v. Pendleton*, 156 U. S. 667, 15 Sup. Ct. 413, 39 L. Ed. 574; *Railroad Co. v. Adams*, 180 U. S. 1, 21 Sup. Ct. 240, 45 L. Ed. 395. Speaking of franchises or privileges of the first class, it is said in the *Yazoo R. Co. Case* that: "Exemptions from taxation are not favored by law, and will not be sustained unless such clearly appears to have been the intent of the legislature. Public policy in all the states has almost necessarily exempted from the scope of the taxing power large amounts of property used for religious, educational and municipal purposes, but this list ought not to be extended except for very substantial reasons; and while, as we have held in many cases,

Southern Ry. Co. v. O'Bryan

legislatures may, in the interest of the public, contract for the exemption of other property, such contracts should receive a strict interpretation, and every reasonable doubt be resolved in favor of the taxing power. Indeed, it is not too much to say that courts are astute to seize upon evidence tending to show either that such exemptions were not originally intended, or that they have become inoperative by changes in the original constitution of the companies." But these considerations have no application to the case before us. While, as I have said, natural persons may hold and operate a railroad in this state, I think it has plainly been the public policy of the state to have them operated by corporations. Nearly all the statutory regulations for the operation of railroads are in terms confined to corporations. The same is the case with almost all imposed duties. It is only a corporation that is required when its road is intersected by a new railroad to unite with the corporation owning the new railroad in forming the necessary intersections and connections,—an obligation that we are enforcing by a decision made this day. It is not necessary to dilate on this subject. I think it may be safely said that nearly every statutory provision in this state ignores the possibility, or at least the probability, that a railroad will be run by natural persons, except in the case of receivers of the company owning or leasing the road. Therefore the state was equally interested with the purchasers in having such purchasers incorporate. It is hardly probable that in such a situation the state intended to exact from the purchasers a partial surrender of their franchise, as a condition for becoming a corporation and complying with state policy. Nor does it seem to me that the statute requires such result. The mileage book act, though a general act, is of but very limited application, and confined to new railroads. The intent of the statutory provision for consolidation was to subject the reorganized company to all duties and liabilities which the legislature might lawfully impose on corporations as a class, but not to require of it a loss of the property and franchises of the old corporation, all of which the statute says the new company shall be entitled to enjoy and possess.

The order granting a new trial should be reversed, and the judgment of the trial term should be affirmed, with costs.

O'BRIEN, HAIGHT, VANN, and WERNER, JJ., concur with PARKER, C. J. GRAY, J., concurs with CULLEN, J.

Judgment affirmed.

SOUTHERN RY. CO. v. O'BRYAN.

(*Supreme Court of Georgia, June 7, 1902.*)

[42 S. E. Rep. 42.]

Comparative Weight of Positive and Negative Testimony—Instruction.

A charge to the effect that the testimony of a witness testifying positively is entitled to more weight than that of one who testifies

Southern Ry. Co. *v.* O'Bryan

negatively is open to serious criticism unless it embraces an instruction that the jury, in weighing the testimony of such witnesses, should consider and pass upon the question of their credibility.

Instructions.

Instructions presenting issues not made by the pleadings or evidence should not be given.

Conductors—Duty to Announce Station.*

A railway conductor is not bound to personally enter a car upon its arrival at a station to inform passengers for that station that they have reached their destination. It is sufficient if the name of the station is duly announced by any employee of the railway company whom it may select to perform this duty.

Issues.

All material questions now presented for decision here are recovered by the rulings above announced.

(Syllabus by the Court.)

Error from city court of Floyd county; John H. Reece, Judge.

Action by S. M. O'Bryan against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Shumate & Maddox and Harris, Chamlee & Harris, for plaintiff in error.

McHenry & Maddox and Fouche & Fouche, for defendant in error.

LUMPKIN, P. J. This case was here at the October term, 1900, when a new trial was ordered because of errors committed by the presiding judge. See 112 Ga. 127, 37 S. E. 161. Subsequently the case was again tried, and resulted in a verdict against the railway company, which is again before this court complaining of a judgment denying it a second new trial. We are constrained to reverse this judgment, and order yet another hearing of the case.

1. Exception is taken to the following charge: "I charge you that the existence of a fact testified to by one positive witness is to be believed, rather than such fact did not exist, because many witnesses, who had the same opportunity of observation, swore they did not see or know of its having transpired." This charge was clearly erroneous. In *Humphries v. State*, 100 Ga. 263, 28 S. E. 25, Mr. Justice Cobb took occasion to remark that a charge with respect to the relative weight of positive and negative testimony was open to criticism if it failed to instruct the jury that in passing upon such testimony they "should consider the question as to whether the witnesses were of equal credibility." And in *Railway Co. v. Bigham*, 105 Ga. 498, 30 S. E. 934, it was distinctly ruled by this court that: "The general rule as to the probative value of positive and negative testimony is subject to the qualification that other things are equal, and the witnesses are of equal credibility." The error just pointed out

*See monograph attached to *Phillips v. St. Charles St. R. Co.* (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

Mayne v. Chicago, etc., Ry. Co

requires a new trial, for the record discloses that the plaintiff depended almost, if not entirely, upon her own testimony, as showing a right to recover, and that there was testimony in behalf of the railway company which tended very strongly to establish nonliability on its part.

2, 3. There was no evidence, nor any contention on the part of the plaintiff, that the train upon which she was a passenger failed to stop at Rome, the station at which she wished to alight. Nevertheless, the court charged the jury that: "If the plaintiff purchased a ticket at Lindale, or paid her fare to go to Rome, and got aboard the train, if they failed to stop the train,—if the conductor failed to come into the car or stop the car according to contract at Rome,—she would be entitled to nominal damages, if that was brought about by no fault on her part." This charge was erroneous for two reasons: (1) It left to the determination of the jury as an open question whether or not the train stopped at Rome, when no such issue was involved in the case; and (2) it imposed upon the conductor the duty of entering the car at Rome, when no such duty rested upon him, either as matter of law or of fact. The plaintiff certainly knew that her destination was Rome, and all the duty the company owed to her as a passenger was to have the station called out so that she might be put on notice to alight; and the company was at liberty to select any of its employees it saw fit to perform for it this duty.

4. While complaint is made in the motion for a new trial of other charges, we do not deem it necessary to specifically deal with them. Suffice it to say that such of them as are not covered by the rulings above announced are not, when taken in connection with the entire charge, open to the objections made to them, and therefore did not operate to the prejudice of the company.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

MAYNE v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Oklahoma, July 18, 1902.)

[69 Pac. Rep. 933.]

Injury to Intending Passenger—Obstructing Trains at Depot.

It is negligence for a railway company to allow a freight train on a side track to block the crossing or passageway over such side track to the depot of the company at a time when a passenger train of the company is due at the station, so that persons desiring to take passage on such passenger train cannot reach the depot in time to purchase tickets and get aboard such train.

Same—Same—Proximate Cause.

In case a railway company is guilty of negligence in blocking with a freight train the usual crossing to the depot, thereby compelling persons desiring to take passage on the train of the defendant company to choose some other route in order to get to the depot, and

Mayne v. Chicago, etc., Ry. Co

such person sustains an injury while on the way to the depot, such railway company is not liable to the person injured, unless the negligence on the part of such railway company is the proximate cause of the injury, and the injury is the natural and probable consequence of the negligence of the company in allowing the crossing to be blocked, and the injury ought to have been foreseen in the light of the attending circumstances.

Same—Duty to Keep Depot Premises in Safe Condition.*

A railway company, having a station at a given point, by implication invites persons to come upon the premises for business, and it is the duty of the company to be reasonably sure that it is not inviting them into danger, and to that end the company must use care and prudence to render the premises safe for the visit.

Same.

Even though a railroad company holds out such invitation, and a person desiring to take passage on the train of the defendant company accepts such invitation, the company is not liable for an injury to such person unless it is shown that the premises were not safe for the visit, and that it ought to have been foreseen that a person attempting to reach the depot of the company was liable to be injured.

Negligence—Pleading.

In an action against a railway company to recover damages for injuries received, the petition must show that the injury was the natural and probable consequence of the negligent and wrongful act of the defendant company, and that the defendant company ought to have foreseen such injury in the light of the attending circumstances; and a petition which fails to show such facts by proper averments does not state a cause of action, and an objection to the introduction of evidence on the ground that the petition does not state facts sufficient to constitute a cause of action will be sustained.

(Syllabus by the Court.)

Error from district court, Grant county; before Justice John L. McAtee.

Action by Ella J. Mayne against the Chicago, Rock Island & Pacific Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

This is an action brought in the district court of Grant county by the plaintiff in error against the defendant in error to recover damages in the sum of \$4,000, alleged to have been sustained by reason of the negligence of the defendant in error, the material facts in relation to such alleged negligence being stated in the petition as follows: "That on the morning of June 28, 1900, this plaintiff desired to take the passenger train of the defendant railway company as a passenger on the north and east bound train, and for that purpose had her preparations made, and was ready to start to the depot of the defendant railway company to await the arrival of said train; that she was ready to go to said depot so as to arrive there a few minutes in advance of the time scheduled for the arrival of said train; that she only had a short distance to go, having stopped the night previous at a house only a short distance from said depot, on the street used as the principal

*See monograph appended to *Muhlhouse v. Monongahela St. Ry. Co.* (Pa.), 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131.

business thoroughfare of said town of Renfrow; that when she was ready to start for said depot there was a freight train of the defendant railway company switching on said side track aforesaid, and running the engine and cars thereon, and plaintiff did not attempt to cross said track at that time, believing it to be dangerous, and believing that the defendant company would cause said freight train to stop switching and running said cars and engine up and down said track before the time for the arrival of the passenger train, and would clear a passageway for persons desiring to go to said depot for the purpose of taking said passenger train; that plaintiff waited for the purpose of seeing if said train would stop switching or a passageway would be cleared until the time was close for the arrival of said train, and she could see the smoke from the engine of said passenger train as it approached in the distance from the south. Thereupon plaintiff started to go over to said depot, to see if she could get to said depot, and believing that when she got near said depot that a passageway would be opened up so that she could pass through, and get to said depot; that she went over toward said depot over and by the path used by persons generally going to said depot on foot, and leading to the north end of said depot; that when she came near to said freight train on said side track said train had been stopped, and said train closed up, making a solid continuous train of cars completely blocking said pathway, so that she could not get to the depot by that route; thereupon she started to go to the south to take the way or route of getting to the depot usually used by teams and wagons in going to and from said depot, as hereinbefore set out, but learned that it was also blocked by said freight train, and she could not pass that way; and plaintiff alleges the fact to be that said freight train was a solid, continuous train of cars extending a long distance each way both above and below said depot, and between her and said depot, and completely shutting off access to said depot by any of the usually traveled or used ways or routes; that the only way by which plaintiff could then get to said depot was to go around said freight train, and for this purpose she started to the north, said freight train being headed north, and the engine of said train being near the north end of said side track, and about at the south end of the stock pens of the defendant railway company at said station; that plaintiff went north and around said engine and train, and started south to go to the depot; that by this time the passenger train of the defendant railway company, and upon which the plaintiff desired to take passage, was rapidly approaching said station, coming north; that plaintiff hastened to get to said depot, walking rapidly down the right of way of the defendant railway company, and that by reason of the proximity of said approaching passenger train plaintiff's attention was directed to it; that between plaintiff

Mayne v. Chicago, etc., Ry. Co

and the depot of defendant were two mail catchers, or cranes, erected and maintained on the west side of the main track of defendant's railway; that said cranes or mail catchers were situated a few feet out from the track, and heavy beams or ties extended from the base of said cranes or catchers to said track, said beams being similar in size to the ties used in the road bed of the railway; that said beams or ties were about 6 or 8 inches in height from the ground, and about eight inches wide at the top; that the space in between said beams or ties was vacant, and not filled up with dirt; that, in order to get to the depot, plaintiff attempted and was compelled to pass over said beams or ties projecting between said mail cranes or catchers and the main track; that plaintiff is a large, heavy, fleshy woman, and as she went to pass over said ties or beams aforesaid in some manner she tripped, and fell heavily upon said ties or beams; that she was walking as carefully as she could under the circumstances, and that said fall was not caused by any fault or negligence upon her part; that she struck her face and nose violently upon one of said ties, or some hard substance there at the time, bruising her face badly, and causing her nose to bleed profusely; that she struck her right hand and shoulder upon said ties, or the rail of the railroad track, or some hard substance, in such a manner as to violently wrench and strain the muscles and tendons of her hand and arm, and to bruise her shoulder, and cause her hand, arm, and shoulder to become inflamed and swell, and be very painful; that plaintiff struck her knee in falling upon same hard substance, badly bruising it, and causing it to swell and become greatly discolored, and injuring the kneecap; that by said fall plaintiff sustained an injury in the chest and spine, and to the muscles of the back, and she suffers almost continual pain from said injury." An answer was filed to the petition, the case came on for trial, a jury was impaneled and sworn, and a statement on behalf of the plaintiff was made to the jury. The plaintiff was called as a witness in her own behalf, and, after one or two preliminary questions had been asked, the defendant objected to the introduction of any evidence under the petition upon the ground that the petition did not state a cause of action, and also moved for judgment on the statement of counsel for plaintiff to the jury. These objections were sustained by the court, and the jury was discharged. Judgment was rendered in favor of the defendant for costs, motion for new trial was overruled, and plaintiff appealed to this court.

Mackey & Simons, for plaintiff in error.

M. A. Low, W. F. Evans, C. O. Blake, and E. E. Blake, for defendant in error.

PANCOAST, J. (after stating the facts). We shall consider this case in the light of the objection to the introduction

Mayne v. Chicago, etc., Ry. Co

of evidence under the petition upon the ground that the same did not state a cause of action, rather than from the standpoint of the objection to the statement of counsel to the jury, as we doubt the propriety of sustaining an objection to the introduction of evidence, and rendering judgment because the statement of counsel to the jury does not make out a prima facie case. Elaborate briefs have been filed in this case by both parties, and numerous cases cited, yet no case is cited directly in point, or which lays down sufficient general principles upon which a decision can be based in this case. Indeed, counsel for defendant in error admit that the cases in point are few. We have been unable to find any case containing some of the material points in the case at bar, yet numerous cases are to be found which lay down principles which are applicable here. There is one grave defect in the petition in that it fails to state that the freight train occupying the side track and blocking the main crossing to the depot continued to so block the way until the passenger train arrived, or until a time so near the arrival of the passenger train that persons desiring to take passage could not have reached the depot in time to purchase tickets, check their baggage, etc. The nearest that the petition comes to a statement of that kind is that the plaintiff waited "until the time was close for the arrival of said passenger train, and she could see the smoke from the engine of said passenger train as it approached in the distance from the south. Thereupon plaintiff started to go over to said depot, to see if she could get to said depot, and believing that when she got near said depot that a passageway would be opened up so that she could pass through and get to said depot; that she went over toward said depot over and by the path used by persons generally going to said depot on foot, and leading to the north end of said depot; that when she came near to said freight train on said side track said train had been stopped, and said train closed up, making a solid continuous train of cars completely blocking said pathway, so that she could not get to the depot by that route." Thereupon she started to go south, and, learning that the south crossing was blocked, and she could not pass that way, she reversed her steps, and went north. How long a time this was before the passenger train reached the depot cannot be determined from the petition; or whether or not the freight train did open up a way for passengers to cross the side track between that time and the time of the arrival of the passenger train is not stated, and cannot be determined from the petition. This, we think, is material, in order to show negligence in the first instance upon the part of the defendant. But conceding that the defendant railway company was negligent in blocking the usual way to the depot, was such negligence the proximate cause of the injury sustained? It is not sufficient that the defendant was negligent, but such negligence must have been the proximate

cause of the injury, for no negligence can furnish the foundation of an action for damages unless it was the proximate cause of the injury. 1 Thomp. Neg. § 44. And in order that an act of negligence shall be deemed the proximate cause of the injury it must be such that a person of ordinary intelligence would have foreseen that the accident was liable to be produced thereby. A proximate cause is, therefore, probable cause; or, in other words, that the circumstances were such that the injuries resulting might have been foreseen as likely to result from the wrongful act, or was the natural and probable consequence of the wrongful act. *Atkinson v. Transportation Co.* (Wis.) 18 N. W. 764, 50 Am. Rep. 352; *Armil v. Railroad Co.* (Iowa) 28 Am. & Eng. R. Cas. 467, 30 N. W. 42. As stated by Mr. Justice Strong in *Railroad Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256: "But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." Can we say that the injury in this case ought to have been foreseen by the defendant company when the company negligently blocked the usual pathway to the depot building? If not, then the injury was not the natural and probable consequence of the negligence or wrongful act. It may be conceded that it should have been foreseen that a person wishing to take passage upon the train of the defendant company, finding the usual pathway to the depot blocked by a freight train, would seek some other mode of ingress to the depot; and it may be conceded that the only other ingress to the depot in this case was that sought by the plaintiff in going around the engine and between the two tracks, but it does not appear that the route so taken was not a reasonably safe one, or that it should have been foreseen by a person using ordinary care that the accident was liable to occur. So far as can be ascertained from the averments in the petition, we think the immediate and proximate cause of the injury in this case was the tripping of the plaintiff at the point where she attempted to cross the ties which extended beyond the rails for the purpose of supporting the cranes or mail catchers. It was not negligence on the part of the defendant company to have these ties in place at that point. There must have been a considerable space between the main track and the side track. There is no statement in the petition to lead one to believe that the route taken along near the main track over these ties was the only one that could have been taken by the plaintiff. For aught that appears, except the statement that there was some brush or other obstructions near that point, the balance of the space may have been entirely open and smooth. Nor can we tell, from the allegations of the petition, how the plaintiff came to fall or trip. It

Mayne v. Chicago, etc., Ry. Co

does not seem that those ties, which were several feet apart, and not to exceed eight inches square, were really dangerous to a person traveling on foot in daylight, or that an injury might have been anticipated if one should attempt to reach the depot by the route. We do not think that any person using ordinary caution would have apprehended danger in traveling along that point; nor can we believe that a person using ordinary care and caution would have been injured. What is usual the law requires a person doing a wrong to anticipate and provide against, but the law does not require that even a wrongdoer shall anticipate and provide against the unusual.

Special attention is called by the defendant to the case of *Bennett v. Railroad Co.*, 102 U. S. 577, 26 L. Ed. 235. The facts in that case, however, are so entirely different from the facts in the case at bar that the rule laid down there is not, and cannot be, followed as the rule here. In that case the company negligently left open a hatchway in a building through which the passengers had to pass in order to reach the place for taking passage, and a passenger traveling along what was the usual route and the way prepared by the company to reach the point of passage, in the nighttime, there being no lights provided to enable him to choose his way, coming to the open hatchway, fell into the same. Here there was not only negligence on the part of the company, but that negligence was the immediate, proximate cause of the injury, and the injured person was using due care in passing over the route prepared by the defendant company for reaching its trains and boats. It is true, in that case, as in this, the company did, by implication, invite the parties to come upon the premises for business, and it was the duty of the company to be reasonably sure that it was not inviting them into danger, and to that end the company must use care and prudence to render the premises safe for the visit. Can we say in the case at bar that the path by which the plaintiff undertook to reach the depot was not safe for a person traveling in the daytime? If it had been after dark, a different condition would have existed. The element of negligence would have been there. The plaintiff would, perhaps, have had the same right to attempt to reach the depot by the route taken, and it might be conceded that there would have been no reasonable ground to believe that there was danger; yet on account of the darkness, no light being established, it ought to have been foreseen or expected that a person would stumble over the ties which had been laid for the foundation of the crane, or that it ought to have been foreseen that the plaintiff might fall into any dangerous place, if there was one. But that would not have been this case, because there are elements entering into such a case that do not exist here. The petition does not show that the injury was the natural and probable consequence of the wrongful act of the defendant company, and that it ought

Georgia R. Co. v. Baldoni

to have been foreseen in the light of the attending circumstances. We therefore conclude that the petition does not state a cause of action, and that the court did not err in sustaining the objection to the introduction of evidence under it.

The judgment is affirmed, all the justices concurring, except IRWIN, J., absent.

GEORGIA R. CO. v. BALDONI.

(Supreme Court of Georgia, July 22, 1902.)

[42 S. E. Rep. 364.]

Ejection of Passenger—Use of Ticket on Day of Sale—Notice—Evidence—Placard in Ticket Office.

A placard or notice posted by a railroad company at its ticket office, announcing that tickets of a certain class must be used on the day of sale, is not admissible in evidence in favor of the company in a suit against it by a passenger for an alleged wrongful ejection from a train on the ground that the ticket had expired, unless it be shown that the passenger had read the placard or had notice of its contents.

Same—Defense—Shipping Merchandise as Baggage.

Where such a passenger had procured his trunk to be checked two days before he undertook to use the ticket, and, when he attempted to use it, was ejected on the ground that the ticket had expired, and long subsequently it was ascertained that his trunk contained merchandise instead of baggage, it was not error for the trial judge to refuse to charge the jury that on account of this fraud the company had a right to cancel the contract, and could not be held liable for ejecting the passenger.

Excessive Verdict.

Under the evidence disclosed by the record, the verdict was so excessive as to indicate bias and prejudice on the part of the jury.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Action by Peter Baldoni against the Georgia Railroad Company. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Jos. B. & Bryan Cumming, Hardeman Davis, and Turner & Jones, for plaintiff in error.

M. R. Freeman, Minter Wimberly, and Roland Ellis, for defendant in error.

SIMMONS, C. J. Baldoni, a peddler of balloons and confetti, bought a ticket over the Georgia Railroad from Macon to Augusta. He did not take the train on the day the ticket was purchased, but two days thereafter started on his journey. When, a few miles from Macon, Baldoni presented his ticket to the conductor, the latter informed him that the time within which the ticket could be used had expired, that the rules of the company limited the use of the ticket to the day on which it was purchased, and that therefore he could not ride upon it. Baldoni had no notice of this rule of the company, and there was no limitation expressed on the ticket.

Georgia R. Co. v. Baldoni

Baldoni insisted that he had paid his money and was entitled to ride. After some further conversation, the conductor informed him that they were approaching the first station outside of Macon, and that he must get off of the train. When the station was reached, Baldoni objected to leaving the train, but obeyed the orders of the conductor and alighted. The conductor seems to have called the agent at the station, and told him of putting Baldoni off, and requested him to flag the incoming train, so that Baldoni could return to Macon. This Baldoni denied, claiming that he had to alight hurriedly in the darkness and find his way to the agent. At any rate, the incoming train was stopped, and Baldoni, paying a few cents for his fare, returned to Macon. He reached Macon before 10 o'clock in the evening, having been absent therefrom but two or three hours. Baldoni then attempted, at several different boarding houses, to get lodging for the night, but was refused. He did not go to a hotel, because he was not sufficiently well dressed, and was afraid the rates would be too high. He finally slept in the city park on some straw. He became quite cold during the night, and early in the morning warmed himself in the station of another railroad company. The ejection from the train was on Saturday night. Baldoni remained in Macon all day Sunday, purchased another ticket from the Georgia Railroad Company, and, just 24 hours after his first attempt to make the trip, boarded a train for Augusta, which place he reached on Monday morning. He thus lost one day (Sunday) on account of the action of the conductor. At times Baldoni's business netted him as much as \$100 per day, and at other times nothing. Augusta was not at that time a good place for his business. He brought suit against the company for damages, and the jury awarded him \$1,250. The defendant moved for a new trial, and the motion was overruled. The defendant excepted.

1. On the trial the defendant offered in evidence a placard or notice, printed in very large type and addressed to the public, in which, among other things, it was stated that "all one-way tickets will be limited to date of sale." A copy of this placard was posted at the ticket office in the depot, and another near the entrance to the depot. The ticket sold to Baldoni had no limitation expressed upon it, and this placard was offered to show that Baldoni had notice of the regulation of the company requiring such tickets to be used on the day of sale. There was no proof that the plaintiff could read, or that he had read this notice or knew of its contents. There is nothing to show that his attention was in any way directed to this placard. We think that a placard of this character is not sufficient of itself to put a passenger on notice of the rules and regulations of the company in regard to the time limit of their tickets. In these days of hurry and bustle, passengers have little time to give to reading the notices exposed to their gaze in ticket offices and stations. Very few passengers, if any,

Georgia R. Co. v. Baldoni

stop to read such notices. Their usual object is to purchase their tickets, and, boarding the train, to depart upon their journeys. It would not do to charge them with notice of the rules and regulations of the company simply because a copy of such rules or regulations was posted at the ticket office. Notice of the rule or regulation must be in some way brought home to a passenger before he can be charged with it. The court was therefore right in rejecting this evidence.

2. Pending the trial it was ascertained that the plaintiff had checked his trunks over the road of the defendant by virtue of his ticket, which he showed to the baggage master, two days before he attempted to use his ticket for passage, and that the trunks contained balloons, confetti, and other merchandise in which plaintiff dealt. The court was requested by counsel for the defendant to charge the jury that this was a fraud upon the company, and gave it the right to cancel the contract of carriage with Baldoni, and that therefore it could not be held liable for ejecting him from the train. The court refused to so charge, but charged to the contrary. In this the court did not err. The contract made with the railroad company was to transport the purchaser and his baggage. The fact that the purchaser had put merchandise as well as baggage in his trunk would not authorize the company to eject him from its train. The company could have refused to carry the trunks unless the passenger had paid the freight charges on the merchandise in them. After the trunks were checked, it might have had the right to notify the passenger that he would not be carried unless the freight was paid; this notice being accompanied by an offer to return what money was due him. After the trunks had reached their destination the company might have refused to deliver them until the proper freight charges had been paid. If the character of their contents was not discovered until after delivery, the passenger was still liable to the company in an action for the freight charges. The company did none of these things. We think that a passenger's ticket is not avoided and rendered worthless by the mere fact that he has checked in his trunk articles which are not baggage, any more than if such trunks should happen to weigh more than the company allows to be carried as baggage. Moreover, it appears from the plaintiff's evidence that the company, by its agents, did not undertake to treat the contract as canceled, but ejected plaintiff on the ground that the time limit of his ticket had expired. Having ejected him on this ground, it is doubtful if the company could set up fraud in the procurement of the contract, or a violation of the contract, as a justification of the illegal ejection. Be this as it may, the company did not pursue any of the remedies it had, and cannot rely upon the nature of the contents of the plaintiff's trunks as a justification of his ejection.

3. One ground of the motion for new trial complains that

Central of Georgia Ry. Co. v. McKinney

the verdict is excessive.' We think this ground well taken. While it is true that the conductor of the train had no legal right to eject the plaintiff because of the expiration of the time limit put upon his ticket by rules of the company of which the plaintiff had no notice, the evidence of three witnesses for the defendant showed that there was no force used, but that the plaintiff obeyed the order of the conductor and alighted at the station. The plaintiff himself testified that the conductor took hold of him and got the best of him, and he surrendered, but even then it does not appear that he was in any way injured or hurt physically. He did not lose any time from the sale of his goods by reason of the delay, the day lost being Sunday. He slept in the park in Macon because, according to his testimony, the boarding house keepers refused to entertain him, and he was not sufficiently well dressed to go to a hotel. According to his testimony, there was but one other passenger in the coach from which he was ejected. Under these facts, we think the verdict for \$1,250 was so excessive as to show bias and prejudice in the minds of the jury. While railroad companies should be held to strict accountability for a violation of the rights of their passengers, we think that juries should not be allowed to run wild in the assessment of damages in cases like the present. Taking into consideration all the facts and circumstances disclosed by the evidence, we think the verdict was far in excess of what it should have been.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

CENTRAL OF GEORGIA RY. CO. v. MCKINNEY.

(Supreme Court of Georgia, July 23, 1902.)

[42 S. E. Rep. 229.]

Injury to Passenger Alighting from Train—Evidence.

Evidence of particular acts of the defendant at the time at which it was alleged that plaintiff sustained injuries by alighting from a train is admissible, when such evidence tends to illustrate the manner in which the plaintiff claimed he was injured, although a statement of these acts is not set out in detail in the petition.

Same—Negligence—Question for Jury.

Whether the commission of, or omission to do, particular acts by a railroad company, was negligence as to one who has been injured by the running and operation of a train of cars, must, as a general rule, be determined by a jury; and it is error for the judge, on the trial of a case brought to recover damages for such injuries, to charge the jury that the omission to do a certain act was negligence, when not expressly made so by law.

Instructions.

The charge complained of in the fourth ground of the amended motion for a new trial was not erroneous for any of the reasons assigned.

(Syllabus by the Court.)

Central of Georgia Ry. Co. v. McKinney

Error from superior court, Clayton county; Jno. S. Candler, Judge.

Action by L. T. D. McKinney against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

A. L. Berner and Hall & Cleveland, for plaintiff in error. Arnold & Arnold, for defendant in error.

LITTLE, J. An action was instituted against the railway company by McKinney, to recover damages for personal injuries which the plaintiff alleged he sustained by reason of the negligence of the agents of the company in the running and operation of its cars.

It appears that the plaintiff was a passenger on one of the cars of the defendant, for the purpose of being transported to Lovejoy, and it is alleged that he was injured in attempting to alight from the train after it had arrived at that place. The specific acts of negligence with which the defendant was charged were that it negligently failed to stop the train a sufficient time for the plaintiff to alight safely; that it negligently started the train while the plaintiff was in the act of alighting; and before he had completely and safely reached the ground the car was negligently started with a sudden jerk. The evidence in relation to the manner and circumstances under which the plaintiff alighted from the car was in direct conflict. The plaintiff himself testified, among other things, that "when the train got to Lovejoy they were running very rapidly. They ran through the station, and went past the regular depot some distance, and I went to get out of the train, and stepped on the step like, and the conductor told me to make haste. The track is on a fill there like, and I couldn't reach the ground hardly, and I slid down with this hand holding the hand brake, and had an umbrella in that hand, and I kinder sat down on the lower step, and slid off, and caught on the ground; couldn't touch it by stepping down, one foot up here and the other one on the ground; just kinder sat down on the step like; and as I slid off the train snatched off, and jerked me back, and some part of it struck me out a piece from the train." He further testified that when the conductor called out the station he was sitting about the middle of the coach; that he got up and walked to the front end of the car, and stepped out; that the train was slowing up, and the conductor called to him to make haste, and as he stepped down on the steps the conductor was standing on the opposite side of the platform; that he hurried as much as he could; that the train stopped only a little while,—merely stopped, and then commenced running again; that when he first went to get off it had stopped, but by the time he got his foot on the ground it had started off, and did not stop long enough for him to get to the ground. It was a dark, cloudy, rainy night, and there was a fill at the place

Central of Georgia Ry. Co. v. McKinney

where he got off. There was other evidence which, in some measure at least, tended to corroborate a part of the evidence of the plaintiff. On the other hand, the conductor testified that the stop at Lovejoy was from 2 to 2½ minutes; that there were other passengers for the station, and they got off; that ample time was given, and the plaintiff was the last one to get off; that he had called the attention of the plaintiff to the fact when he got to Lovejoy, and everybody got out of the car but him; that plaintiff stood for some time, after they had got to Lovejoy, talking to a lady; that he kept calling the station, and, seeing that plaintiff was making no start to get off, he started his train; that when plaintiff came to the door he ran to him, and put his hand on his shoulder, and told him to hold on, and let him stop the train; that, just as he did that, the plaintiff jumped off the platform to the ground, etc. There was much other evidence tending to corroborate the conductor as to the manner in which the plaintiff left the car. The plaintiff also introduced evidence as to the extent of his injuries. Other evidence was also introduced, but it is not necessary that it be reported here in order that the points made and decided shall be understood. The case was submitted to the jury, and a verdict in favor of the plaintiff for \$1,500 was rendered. The defendant submitted a motion for a new trial, which was overruled, and it excepted. The motion complains that the verdict was contrary to law, to the evidence, and without evidence to support it; and that the verdict was against certain distinct portions of the charge of the court. As the case is to be tried again, it would be profitless to separately consider those grounds which alleged that the verdict was contrary to the charge of the court in certain particulars, as these grounds mean nothing more than that the verdict was contrary to law. It is to be presumed that the court charged the jury on all the theories which arose from the evidence in the case; and the fact, if it be one, that the verdict was not in accord with the instructions given under one theory, affords no reason that it was not properly returned under another portion of the charge, given under a different theory of the case as made by the evidence. With this reference to these grounds of the motion, we take up the others in the order in which they are set out.

1. Complaint is made that the court erred in admitting the following evidence of the plaintiff: "When the train got to Lovejoy, they were running very rapidly. They ran through the station, and went past the regular depot some distance." The objections were that there was nothing in the petition alleging that the train ran beyond the regular stopping place, and put the plaintiff off at the wrong place; that this evidence sought to charge the defendant company with negligence in running past the depot; that it did not illustrate the issues raised by the pleadings; and that it tended to prejudice the jury against the defendant. None of the objections are,

Central of Georgia Ry. Co. v. McKinney

in our opinion, good, and we think that the evidence was properly admitted. The plaintiff had charged that he was injured while alighting from the train at Lovejoy, and we do not understand this evidence to mean that he was injured in attempting to alight from the train at any other place than Lovejoy. It was not necessary, in order for this evidence to have been admissible, that the petition should have alleged that he attempted to alight at any particular place at Lovejoy. The evidence related to mere matters of description, and having alleged injury sustained by alighting from the train at Lovejoy, and that this injury was occasioned by the negligence of the defendant, evidence of any act tending to show how, and the manner in which, the negligence injured him, was admissible.

2. It is alleged that the court erred, after charging the jury, in effect, that it was a disputed question of fact, in the case, whether or not the train was stopped long enough at Lovejoy to allow the passenger to have alighted safely, and that question was one for the jury to determine, in further charging as follows: "If you believe the train did not stop long enough to allow this passenger to alight in safety, that would be, upon the part of the company, negligence." The specific ground of error assigned is that the court charged that a certain act was negligence, which it had no right to do. We are constrained to rule that this ground of the motion was well taken. The question is not an open one in this state. If it were, so far as I am concerned, the ruling on this point would be different. In the case of *Railway Co. v. Bryant*, 110 Ga. 247, 34 S. E. 350, it was ruled that "it is error for the judge, on the trial of an action to recover damages against a railroad company for personal injuries occasioned by the running and operation of its trains, to charge the jury that acts not falling within the class below indicated constitute negligence. Only the commission of those acts which are prohibited by the statute, or the omission of those things which are prescribed by statute, constitutes, under such circumstances, negligence per se. Whether the commission of acts other than those so inhibited, or the omission to perform those required, constitutes negligence, is a question of fact, and must be determined by the jury, and not by the judge;" for which proposition the following authorities are cited: *Wright v. Banking Co.*, 34 Ga. 330; *Railroad Co. v. Wyly*, 65 Ga. 120; *Harris v. Railroad Co.*, 78 Ga. 525, 3 S. E. 355; 30 Am. & Eng. R. Cas. 581; *Railroad Co. v. Mozely*, 79 Ga. 463, 4 S. E. 324; *Railroad Co. v. Kane*, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315; *Railroad Co. v. Bussey*, 95 Ga. 584, 23 S. E. 207; *City of Columbus v. Ogle-tree*, 96 Ga. 177, 22 S. E. 709; *Railroad Co. v. Gibson*, 97 Ga. 489, 25 S. E. 484. For a complete collection of the cases in which the same ruling has been made by this court, see *Hopk. Pers. Inj.* §§ 25, 26. The instruction in this case was that, if the train did not stop long enough to allow the plaintiff to

Central of Georgia Ry. Co. v. McKinney

alight in safety, the failure to do so would be negligence upon the part of the company. We know of no law which prescribes that a train shall stop at a station any given time, nor are we aware of any statute which declares that an omission on the part of the company to stop at a station any particular length of time, or for any purpose, is negligence. Hence the rule above stated is controlling on this point; and under these authorities the question to be submitted to the jury on this particular point was whether the railroad company was, under the evidence, guilty of negligence in not stopping at Lovejoy a sufficient length of time to allow the plaintiff to safely alight.

3. Complaint is made that the judge erred in certain charges made as explanatory of the provisions of the law incorporated in Civ. Code, § 2322. In effect, these explanations were that if the company had been guilty of slight negligence towards the complainant, and if he also, in the opinion of the jury, had been guilty of negligence, and negligence which would not amount to a lack of ordinary care on his part, then he might recover, but the jury must fix the proportion; that they could see how much negligence one was guilty of, and how much the other, and apportion the damages as they might apportion the negligence. In other words, if the plaintiff was not guilty of such negligence as would bar his recovery, then the jury should apportion his damages, just as they apportion the amount of negligence each had been guilty of, to reduce the amount of damages that plaintiff would otherwise be entitled to recover. The objections made to this charge are that it does not state the law of contributory negligence correctly; that the rule of law does not apportion the damages as the jury apportions the negligence; that it was not proper to charge the jury the principle that the plaintiff could not recover if the injury was the result of his negligence, in connection with the law of contributory negligence, as such charge was calculated to confuse the minds of the jury in their application of the facts to the different principles of the case. Substantially, the charge was correct as far as it went. The principle of law which was being discussed by the judge in this portion of the charge might have been extended further, in this: that, if the railroad company and the petitioner were equally at fault, there could be no recovery. But the want of such extension is not complained of. Looking to the objections urged by the movant to this charge, we are of opinion that such objections are without merit. Each of the propositions of law which were charged is contained in the same section of the Code. Each of them was applicable to the contentions and evidence in the present case. That they were joined in the same portion of the charge is not, in our opinion, objectionable; and, as stated, the proposition that the damages should be proportioned as the negligence had been apportioned by the jury, conceding that each of the

Southern Ry. Co. v. Webb

parties had been guilty of negligence, does not seem to be erroneous. The judgment of the trial judge is reversed because of the error in charging as set out in the second division of this opinion.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

SOUTHERN RY. CO. v. WEBB.

(Supreme Court of Georgia, Aug. 7, 1902.)

[42 S. E. Rep. 395.]

Injury to Passenger—Proximate Cause—Intervening Act.

While the general rule is that if, subsequently to an original wrongful or negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the misfortune, the former must be considered as too remote, still if the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such as its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrongdoer, the causal connection is not broken, and the original wrongdoer is responsible for all of the consequences resulting from the intervening act.

Sufficiency of Evidence.

There was no error in any of the rulings complained of which required the granting of a new trial. The evidence authorized the verdict, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Richmond county; W. F. Eve, Judge.

Action by Louis Webb against the Southern Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Jos. B. & Bryan Cumming, for plaintiff in error.

H. C. Hammond and C. H. Cohen, for defendant in error.

COBB, J. This was an action by the father of John W. Webb against the Southern Railway Company for damages alleged to have been sustained by the plaintiff on account of the homicide of his son. The trial resulted in a verdict in favor of the plaintiff, and the defendant complained that the court erred in refusing to grant it a new trial.

I. The petition alleged that John W. Webb was a passenger on one of the trains of the defendant; that while in one of the cars of the train, in the exercise of all ordinary care and diligence, and just as he was about to take a seat near the rear door of the car, the train was negligently, suddenly, forcibly, and with great violence jerked, jarred, and jolted, and as a result Webb was suddenly and without fault on his part thrown through the rear door of the car, and fell across the platform at the end of the car onto the track on a bridge over which the train was passing at the time the jolt took place; that he

Southern Ry. Co. v. Webb

was stunned by the fall, and rendered insensible; and that while upon the track in a stunned, insensible, and injured condition, and unable to walk or protect himself, he was negligently run over and killed by another engine passing along the track over the bridge. There was evidence authorizing the jury to find that Webb was a passenger upon a train of the defendant, and that while this train was going over a bridge a sudden and violent jolt occurred, sufficient to throw one from his feet who was standing in the train, and which had the effect of jostling the passengers and throwing down bundles from the racks of the car; that Webb was seen upon the train just before this jolt occurred, and he was then near the rear door of the car; that he was not seen afterwards by any one who was in the car; that shortly after the train upon which he was last seen had passed over the bridge an engine belonging to the Georgia Railroad Company ran over and killed Webb, who was lying across the track on the bridge just at the point where the train was when the jolt occurred; that, while the defendant had no control over this engine, the engines of the Georgia Railroad Company had a right to use this track, and it was known to the defendant that the engines of that company might pass along the track at any time when it was not otherwise in use. While the evidence was conflicting as to some of the points above referred to, there was ample evidence authorizing the jury to find all of the facts above stated. It is contended by the counsel for the plaintiff that from this evidence the jury could have inferred that Webb was thrown from the rear door of the car upon the track, and was there in a stunned condition at the time the engine ran over him. Counsel for the railway company contends that the jury were not authorized to draw any such inferences, and that the plaintiff has failed to establish the case made in the petition, but that, even if this position is not correct, and the jury were authorized to infer, from the facts above referred to, that Webb was thrown from the inside of the car through the rear door of the same upon the track, and stunned by the fall, still the plaintiff could not recover, for the reason that the negligence of the defendant which resulted in Webb's being hurled upon the track was not the proximate cause of his death, but that the immediate cause of his death was the intervention of another independent agency,—that is, the running of the engine of the Georgia Railroad Company upon the tracks at that point.

As we have reached the conclusion, for the reasons which will be hereafter stated, that the jury were authorized to infer, from the facts above detailed, that Webb was negligently thrown from the inside of the car through the rear door upon the track, it becomes necessary to determine whether this negligence on the part of the defendant was so far the proximate cause of the death of Webb that the defendant would be liable, notwithstanding the death was not actually brought

Southern Ry. Co. *v.* Webb

about by the fall from the train, but by the running of the engine which ran over and killed him while he was lying in an insensible condition upon the track. See, in this connection, Hopkins, Pers. Inj. §§ 14-16. "No branch of the subject of personal injuries presents greater difficulty than the determination of liability for a specific loss, with reference to its naturalness and proximity as a consequence of the wrongful act complained of." Watson, Pers. Inj. § 25. As was said by Elbert, J., in *Car Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89: "What is the proximate cause of an injury in a legal sense is often an embarrassing question, involved in metaphysical distinctions and subtleties difficult of satisfactory application in the varied and practical affairs of life." Chief Justice Shaw, in *Marble v. City of Worcester*, 4 Gray, 397, said: "The whole doctrine of causation, considered in itself metaphysically, is of profound difficulty, even if it may not be said of mystery." In *Scott v. Hunter*, 46 Pa. 195, 84 Am. Dec. 542, Strong, J., said: "Indeed, it is impossible by any general rule to draw a line between those injurious causes of damage which the law regards as sufficiently proximate and those which are too remote to be the foundation of an action." In *Smith v. Telegraph Co.*, 83 Ky. 114, 4 Am. St. Rep. 126, Judge Holt remarked: "The line between proximate and remote damages is exceedingly shadowy; so much so that the one fades away into the other, rendering it often very difficult to determine whether there is such a connection between the wrong alleged and the resulting injury as to place them, in contemplation of law, in the relation of cause and effect." It has been said that, notwithstanding the maze of doubt and difficulty with which this subject seems to be involved, still it is impossible to take a more practical and simpler view than the observations of learned jurists would indicate; that the practical administration of justice prefers to disregard the intricacies of metaphysical distinctions and subtleties of causation, and to hold that the inquiry as to natural and proximate cause and consequence is to be answered in accordance with common sense and common understanding. Watson, Pers. Inj. § 28. From the author just cited we quote the following: "A natural consequence is one which has followed from the original act complained of in the usual, ordinary, and experienced course of events; a result, therefore, which might reasonably have been anticipated or expected. Natural consequences, however, do not necessarily include all such as, upon a calculation of chances, would be found possible of occurrence, or such as extreme prudence might anticipate, but only those which ensue from the original act, without any such extraordinary coincidence or conjunction of circumstances as that the usual course of nature should seem to have been departed from." Section 33. "From the very outset the practical distinction between causes and consequences should be borne in mind in this par-

Southern Ry. Co. v. Webb

ticular: a consequence of an original cause may, in turn, become the cause of succeeding consequences. But such a cause should not, manifestly, be regarded as an intervening cause, which will relieve from liability the author of the original cause, but rather as only a consequence along with the other consequences. A tortious act may have several consequences, concurrent or successive, for all of which the first tortfeasor is responsible. It is not intervening consequences, but intervening causes, which relieve. The test is to be found, it has been said, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the original wrong as a result which might reasonably have been foreseen as probable, legal liability continues." Section 58. "Some authorities have formulated rules on this subject designed for general application,—as that the defendant is not responsible where there has intervened the willful wrong of a third person, or is liable where such act is of a negligent character merely. But the better doctrine is believed to be that whether or not the intervening act of a third person will render the earlier act too remote depends simply upon whether the concurrence of such intervening act might reasonably have been anticipated by the defendant." Section 71. In *Railway Co. v. Taylor*, 104 Pa. 315, 49 Am. Rep. 580, Mr. Justice Paxson said: "In determining what is approximate cause the true rule is that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act." In *Lane v. Atlantic Works*, 111 Mass. 139, Colt, J., said: "The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise." In *Seale v. Railway Co.*, 65 Tex. 278, 57 Am. Rep 602, Chief Justice Willie said: "What character of intervening act will break the causal connection between the original wrongful act and the subsequent injury is also left in doubt by the decisions. If the intervening cause and its probable or reasonable consequences be such as could reasonably have been anticipated by the original wrongdoer, the current of authority seems to be that the connection is not broken." See, also, *Investment Co. v. Rees* (Colo. Sup.) 42

Southern Ry. Co. v. Webb

Pac. 42, 45; 21 Am. & Eng. Enc. Law (2d Ed.) p. 486 et seq.

Treating it as established in the present case that Webb was upon the track of the defendant in an insensible condition as a result of the negligence of the defendant, is it reasonable or unreasonable to hold that the defendant should have apprehended that a person in this condition, in such a place, might be injured or killed by the running of an engine upon the track? Was the defendant bound to anticipate that injury or death might result to a person in such a condition in such a place? The track was under the control of the defendant, and, if Webb had been killed by an engine of the defendant which came along the track after the train from which Webb was thrown had passed, the defendant would have been liable, although the employees in charge of the engine had been wholly free from negligence. *Railroad Co. v. Nix*, 68 Ga. 572. In that case Mr. Chief Justice Jackson said: "Suppose there had been a prosecution for murder, who would be found guilty thereof,—the conductor of the train who did the deed of throwing him off and under, or the conductor of the other train who ran unconsciously over him? Clearly, he who did the intentionally wrongful act, and whose act caused his death." The principle upon which the ruling in the *Nix* Case is founded is that a railway company is bound to know that its tracks may be used at any time by the engines and trains of the company, and is bound to anticipate and apprehend any consequence that may result to one who, on account of its negligence, is left in a condition in which and in a place where he is liable to be injured by the running of such trains. If a railway company is bound to anticipate and apprehend that one left in a helpless condition in a perilous place upon its tracks through its negligence may be injured by one of its own engines or trains running thereon, is it not equally bound to so anticipate and apprehend any injury which might result to such a person from an engine of another company, which the first company knew had a right to and did actually use the tracks from time to time? It would, indeed, bring about a curious result if the defendant would be liable in such a case only when the second engine or train was owned by it. It must be kept in mind that in such cases no negligence is claimed against the persons in charge of the second train or engine. They are blameless. If there is any liability, it results from the negligence of those in charge of the train which left the person killed in a perilous situation upon the track. It would seem that ownership of the second engine or train would be entirely immaterial, and the only question to be considered would be whether the first company knew, or ought to have known, that the second engine or train, no matter by whom owned, had a right to, or did actually from time to time, use the track at the place at which the person was killed. When a railway company negligently leaves a person upon its track in a helpless condition,

Southern Ry. Co. v. Webb

it will certainly be held liable for any injurious consequences which may result to such a person growing out of the running of trains along the track, without regard to the ownership of such trains, if the company knew or ought to have apprehended that the trains would pass along the track at that point. The present case is very similar to the case of *Byrne v. Wilson*, 15 Ir. C. L. 332. That was a case brought in 1862, under Lord Campbell's act, by William Byrne, as administrator of Mary Byrne, against a person who was alleged to be the proprietor of certain omnibuses, and as such engaged in the business of a common carrier of passengers. Mary Byrne was a passenger in one of the omnibuses, and through the negligence of the servants of the defendant the omnibus was precipitated into the lock of a canal, and Mary Byrne was there in an insensible condition, when the keeper of the lock turned the water therein, and she was drowned. It was held that, although the death of Mary Byrne was not caused immediately by the act of the defendant, it was such a consequential result of that act as entitled her representative to maintain an action. Lefroy, C. J., said (page 340): "It was not the negligence of the defendant that was the immediate occasion of her death, but it was the negligence of the defendant that put her into a position by which she lost her life, as a consequential injury resulting from that negligence; and although that death was not caused immediately by the act of the defendant, nor was the immediate and instantaneous result of his negligence, yet it was the consequential result of the defendant's act, and enables her representative to maintain this action." The defendant knew that the Georgia Railroad Company had a right to use these tracks. It also knew that it might use them at any time. When, therefore, Webb was negligently thrown upon the tracks, and left there in a helpless condition, the defendant was bound to apprehend and anticipate that injurious consequences would likely result to him from the use of the track by the servants and agents of the Georgia Railroad Company in charge of its engines and trains. This being so, the negligence of the defendant which resulted in leaving Webb helpless upon its tracks was in law the proximate cause of his death, notwithstanding his death was actually brought about by another agency.

We do not think this ruling is in conflict with any of the cases cited in the brief of counsel for the plaintiff in error. In *Perry v. Railroad Co.*, 66 Ga. 746, the plaintiff had deposited his luggage in a car of the defendant, intending to go upon the train as a passenger, and left the car, and engaged in conversation with another person in the depot. While so engaged, his attention was called to the fact that the train had moved off, and he ran until he reached the end of the car shed. While passing through the gateway of the car shed, he came in contact with the engine of another company, which was coming into the shed, and as a consequence re-

Southern Ry. Co. v. Webb

ceived serious injuries. It was held that the negligence of the railroad company in starting its train without giving a signal was not the proximate cause of the injury which the plaintiff subsequently received by running against the engine of another train in his effort to catch the defendant's train. The defendant could not have foreseen, nor was it bound to anticipate or apprehend, that, as a result of its negligence in starting its train without a signal, a passenger would, in attempting to catch the train, run against the engine of another train, and receive serious injuries. In the case of *Mayor, etc., v. Dykes*, 103 Ga. 847, 31 S. E. 443, a street car company had negligently constructed its track so that the rails were above the surface of the street. The plaintiff, while driving a horse attached to a two-wheel road cart, attempted to drive across the track at an angle of about 45 degrees. The wheels of his cart came in contact with the iron rails of the track, slipped along the track, and made a scraping noise, which caused the horse to take fright and run away. The cart collided with a wagon, and plaintiff was thrown to the ground and seriously injured. Although the street car company may have been negligent in the way it constructed its track, it certainly could not have foreseen that, as a result of this negligence, a scraping noise would be made, and that this noise would frighten a horse, and the horse would run away, and the vehicle to which he was hitched would collide with a wagon, and the plaintiff would, as a result, be injured. Of course, if the car had been overturned as a result of the tracks being built too high above the surface of the street, and injury had resulted from an accident of this character, the case would have been different. In *Railroad Co. v. Price*, 106 Ga. 176, 32 S. E. 77, 43 L. R. A. 402, 71 Am. St. Rep. 246, the plaintiff was a passenger who had been carried wrongfully beyond her station, and when this fact was discovered she was requested to alight at another station, which she did, and was carried to a hotel by the conductor. While at the hotel a lamp in her room exploded, and as a consequence she sustained damage. It was held that the railway company was not liable for the injury thus sustained. The defendant could not have foreseen, apprehended, or anticipated that the plaintiff would suffer injuries of the character received by her at the hotel; and hence its negligent act in carrying her beyond her station could not be said to be the proximate cause of the injuries thus received. In *Railway Co. v. Edwards*, 111 Ga. 528, 36 S. E. 810, the plaintiff was a brakeman on a freight train, and was ordered by the conductor to jump off the train for the purpose of changing the switch. In obedience to this order, the plaintiff jumped from the car on which he was standing, and, being unable to see the ground beneath him, his right foot was caught in a frog of the switch, the frog not having been blocked so as to prevent such an accident, and the wheels of the car ran over and crushed his foot. The dis-

Southern Ry. Co. v. Webb

inction between that case and the present will be apparent when the following language of Mr. Justice Little in the opinion in that case is considered: "The direct and proximate cause of the injury which the plaintiff sustained was his jumping from the train, and, if he is entitled to recover damages from the defendant company therefor, it is because of some negligence on the part of said company which caused the jump from which the injury resulted, or negligence in not protecting the place where in fact he did jump. As we have seen, it is not charged in the petition that the railroad company was, through its conductor, negligent in directing the plaintiff to jump from the car at the time he did." It was held that the failure to block the switch was not an act of negligence.

In the determination of the question just presented we have been very much aided by the carefully prepared brief of counsel for the defendant in error. The brief shows not only laborious research, but ability and power of discrimination, and we take occasion to express our appreciation of the valuable aid thus brought to us in the decision of this puzzling question.

2. The motion for a new trial contains numerous assignments of error on rulings upon the admissibility of evidence. Several grounds complain that the court erred in not allowing testimony to be offered for the purpose of impeachment, which related to matters which were immaterial and irrelevant. While the judge seems to have permitted the cross-examination of different witnesses laying the foundation for impeachment to take a very wide range, we cannot say that any evidence he admitted was altogether irrelevant. But, even if it was, the error thus committed would not be sufficient to have required the granting of a new trial. The defendant offered in evidence a chain of title showing that the South Carolina & Georgia Railroad Company was the proprietor of the tracks at the point where the injury occurred and the yards adjacent thereto, and also offered a contract between the city council of Augusta and this railroad company; the purpose in offering this evidence being to show that the engine of the Georgia Railroad Company was upon the tracks at the point where Webb was injured, not by permission of the defendant, but in its own right under a contract made with the city council and the predecessor in title of the South Carolina & Georgia Railroad Company. This evidence was rejected, and error is assigned upon this ruling. It was immaterial who owned the tracks and the yards adjacent thereto. The defendant was shown to be in control of the tracks at the place where the injury occurred, and also the adjacent yards in the state of South Carolina. It was immaterial whether the Georgia Railroad Company ran its engine over the track by its own right or by permission of the defendant. It did not matter under whose authority the engine was operated upon the track.

Southern Ry. Co. v. Webb

The only material question was whether the defendant knew or should have known that the Georgia Railroad Company was in the habit of using the tracks at that point. There was evidence authorizing the jury to find that such was the case. What has just been said disposes of that ground of the motion which complains that the court erred in allowing a witness, who was an employee in charge of the Georgia Railroad engine, to testify, in effect, that the engine was on the tracks by permission of the defendant. Even if the judge committed any error in any of the rulings complained of in the motion for a new trial, we do not think, after a careful examination of the motion for a new trial and the entire record in the case, that there should be a reversal of the judgment for any of the reasons assigned in the motion.

It remains only to dispose of that assignment of error which complains that the verdict was not warranted by the evidence. It was earnestly argued by counsel for the plaintiff in error that there was no evidence authorizing a finding for the plaintiff. It was contended that, as the petition alleged that Webb was thrown through the rear door of the car across the platform at the end of the car and onto the tracks, and, as a result, was stunned and rendered insensible, the plaintiff cannot recover upon a general presumption of negligence against the company, but his recovery must be based upon evidence authorizing the jury to find that he was injured in the manner described in the petition; that is, by being thrown from the inside of the car through the door across the platform onto the tracks. Under the view we have taken of the case, it is unnecessary to determine whether a recovery could be had if the evidence failed to show to the satisfaction of the jury that Webb was thrown from the car in the manner described in the petition. There was abundant evidence authorizing the jury to find that Webb was upon the train as a passenger, and that while he was upon the train there was a jolt of the train, which was sudden, unusual, and violent, its character being such that the passengers were jolted in their seats, bundles were thrown from the seats and racks, and a person in the aisle of the car would probably have been thrown from his feet. There was no one who saw Webb actually thrown through the door to the platform and upon the track. The last that was seen of him, which was just before the jolt came, he was making his way towards the rear of the car, looking for a seat, and had reached a point near the door of the car. Nothing more was seen of him until he was found in a mangled condition by the employees in charge of the railroad engine which had run over him. All of the evidence in the record which bears upon the question as to whether Webb was thrown from the car as described in the petition is contained in the testimony of the witness Shinall, and we quote the exact language of this testimony: "We got on at Broad street together. John Webb got on the first step

Southern Ry. Co. v. Webb

between the coaches, and I got on the next one, and he was on the platform; and I turned and went towards the back end of the car, and had a couple of bundles in my hand. As I was going along, Mr. Pardue asked me what I was doing there, and I sat on the side of the car, and was talking to him, when John Webb came through the train and passed by us, and went on toward the rear of the train. At or about that time the train stopped inside of the bridge all at once. I mean, by stopping all at once, it was going along ten or fifteen miles an hour, and all at once it stopped. It was a hard jerk. It would have jerked a man down if he had been standing on his feet. That occurred right immediately after I saw Mr. Webb standing up near the rear of the train. It was not more than a minute, or something like that. I was talking to Mr. Pardue, and then the jerk came, and people was making remarks about the jerk coming, and still I did not pay no attention to him. I did not know anything was the matter with him at that time. I did not find out for certain what had become of him until the next morning. After I got off at Bath, I asked for him, but nobody had seen him. I don't think I changed my position on that seat after I saw him. It is just a short run from Augusta to Bath, and I sat there talking to Mr. Pardue. The reason I didn't look around for John Webb, I was talking, and never put my mind on it. I thought maybe he was sitting behind us." To sustain the verdict it is not necessary for us to hold that this testimony of Shinall required a finding that Webb was hurled through the rear door of the car by the jerk of the train. If the jury could legitimately infer from this testimony that such was the case, we have no right to disturb their verdict after it has been approved by the trial judge. The able and learned counsel for the plaintiff in error presented the case to us in such a way that, if we had been sitting as a jury, or even as a court of appeals, with power to pass upon the weight of testimony, we would probably have decided with him at the close of his argument. It is, however, not within our province to pass upon cases like a jury, nor have we any desire to do so. Our authority extends simply to determining whether, under a given state of facts, the jury could legitimately arrive at a given result. While we do not think it is probable that Webb was thrown through the door of the car in the manner claimed, still it is possible that this took place, and under the evidence disclosed by the record we think the jury were authorized to so find. There is some mystery about the case, but, as was said by Mr. Chief Justice Bleckley in *Railroad Co. v. Rouse*, 77 Ga. 407, 3 S. E. 308, "juries have no more important function than to solve mysteries." The jury have solved this mystery to their own satisfaction. The trial judge has approved their solution, and we have no authority to interfere.

The judgment must be affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

ST. LOUIS, I. M. & S. RY. CO. v. LEFTWICH.

(Circuit Court of Appeals, Eighth Circuit, August 11, 1901.)

[117 Fed. Rep. 127.]

Carriers—Injury to Passenger—Contributory Negligence—When Question for Jury—Instance.

The question whether or not a passenger who had just boarded the smoking car, and was passing through that car, over the platform, to the next coach in the rear, where he intended to ride, was guilty of contributory negligence because he turned aside, grasped the railings on both sides of the steps of the platform of the car, and stepped down upon the upper step for the purpose of expectorating and throwing the contents of his mouth clear of the train, was a question for the jury, and not for the court.

Same—Jury.

It is only when all reasonable men, in the honest exercise of a fair and impartial judgment, would draw the same conclusion from the facts which condition the issue of negligence or contributory negligence, that it is the duty of the court to withdraw that question from the jury; and it is not clear that all reasonable men would agree that there was any lack of ordinary care in the act of the plaintiff in this case.

Same—Riding in Place Not Designed for Passengers.*

A passenger who, without any reasonable cause or excuse, rides on a platform or on the steps of a railway car, or on an engine, or on a hand car, or on a freight or baggage car, or in any other place not designed for the carriage of passengers, is guilty of negligence which may bar his recovery of damages resulting from the concurring negligence of the railway company.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

George E. Dodge and B. S. Johnson, for plaintiff in error.

William G. Whipple and Durand Whipple, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge. This is an action for damages for a personal injury, and it resulted in a judgment for the plaintiff.

The chief, if not the only, reason why this judgment is assailed by counsel for the railway company, is that, in their opinion, the court below should have instructed the jury as a matter of law that the plaintiff, Leftwich, was guilty of contributory negligence which barred his right to a recovery of the damages he claimed. At the time the injury was inflicted, Leftwich was a young man about 29 years of age. He had served as a switchman and as a brakeman. On the occasion of his injury, he was a passenger on the train of the railway company, which contained two passenger coaches. The for-

*See foot-note appended to *Southern Ry. Co. v. Roebuck* (Ala.), 2 R. R. R. 204, 25 Am. & Eng. R. Cas., N. S., 204.

St. Louis, etc., Ry. Co. v. Leftwich

ward coach was a combination car divided by a partition into a forward and a rear compartment. The forward compartment was set apart for colored passengers, and the rear compartment was a smoking room. The next coach was a ladies' car. The plaintiff was a white man, and he had the right to ride in the smoking car or in the ladies' car as he chose. The train stopped but one or two minutes at the station where he boarded it, so that it was necessary for him to take it at once when it arrived. It was more convenient for him to ascend the steps at the front end of the smoking car when the train arrived at the station. He did so, and then passed back through this car, and out upon the platform between the two passenger coaches, on his way to the rear coach, where he intended to ride. When he was near the partition in the combination car, the train started. On his way back he coughed up some phlegm, and as he arrived upon the platform of the rear car he turned aside, grasped the railings on each side of the steps, and stepped down upon the upper step for the purpose of so expectorating that he might throw the phlegm clear of the train. As he stepped down upon this step, his foot fell upon a mass of woolen rags or waste saturated with oil, used to pack the boxes and oil the bearings of the wheels of railway cars, and commonly called "dope." As his foot struck this dope, he slipped, fell to the ground, and was injured. There was a spittoon in the coach in which he might have deposited the contents of his mouth. The facts which have been recited are undisputed, and they are all the facts material to the questions presented in this case.

The platforms and steps of railway cars propelled by steam are dangerous places for passengers to ride. They are not provided for that purpose, and passenger coaches generally carry on their doors, or in other conspicuous places, notices that the rules of railway companies forbid the passengers to occupy these places for the purpose of riding upon the trains. Moreover, it is a general rule of law that a passenger who, without any reasonable cause or excuse, rides on a platform or on the steps of a railway car, or on an engine, or on a hand car, or on a freight or baggage car, or in any other place not designed for the carriage of passengers, is guilty of negligence which, if it contributes to an injury that he sustains, will bar his recovery of damages therefor on account of the concurring negligence of the railway company. *Purple v. Railroad Co.* (C. C. A.) 114 Fed. 123, 129; *Railway Co. v. Salinger*, 46 Ark. 528, 536; *Hickey v. Railroad Co.*, 14 Allen, 429; *Quinn v. Railroad Co.*, 51 Ill. 495; *Paterson v. Railroad Co.*, 85 Ga. 653, 657, 11 S. E. 872; *Bon v. Assurance Co.*, 56 Iowa, 664, 667, 668, 10 N. W. 225, 41 Am. Rep. 127; *Railway Co. v. Roach* (Va.) 5 S. E. 175; *Robertson v. Railroad Co.*, 22 Barb. 91; *Eaton v. Railroad Co.*, 57 N. Y. 382, 384, 15 Am. Rep. 513; *Railroad Co. v. Langdon*, 1 Am. & Eng. R. Cas. 87; *Powers v. Railroad Co.*, 153 Mass. 188, 191, 192, 26

St. Louis, etc., Ry. Co. v. Leftwich

N. E. 446; *Flower v. Railroad Co.*, 69 Pa. 210, 8 Am. Rep. 251; *Ecliff v. Railway Co.*, 64 Mich. 196, 31 N. W. 180. But the platforms and steps of passenger coaches are provided for the entrance and exit of passengers, and to enable them to pass from that part of the train on which they enter to the coach where they desire and are entitled to ride. The plaintiff rightfully entered upon this train, and immediately passed back across the platform between the cars on his way to the coach where he intended, and had the right, to ride to his destination. In all this there was no misuse of train or platform, no want of ordinary and reasonable care. But, as he passed across the platform of the last car he grasped the rails on both sides of the steps, and stepped down one step, in order to free his mouth of its troublesome burden, and to throw it clear of the train. Was this an act of which a man of ordinary prudence, in the exercise of reasonable care, would not have been guilty? Was it an act of negligence? The court below submitted this issue to the jury, and the question which that ruling presents to this court is, would all reasonable men, in the exercise of a fair and impartial judgment, draw the conclusion that, under all the circumstances of this particular case, the plaintiff failed to exercise the care which a man of ordinary prudence would have exercised when he turned aside from the door of his car, and stepped down one step, to relieve his mouth and send its contents away from the train? *Railroad Co. v. Jarvi*, 3 C. C. A. 433, 53 Fed. 65; *Pyle v. Clark*, 25 C. C. A. 190, 192, 79 Fed. 744, 746; *Railroad Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213. This question must be answered in the negative. The situation, circumstances, and surroundings of the actor always condition the answer to the question whether or not he has exercised ordinary care. It would undoubtedly have been negligence for one without necessity or reason to have placed himself upon one of the steps of this car while the train was in motion. On the other hand, if the train had started just after one had boarded a lower step of the platform it would not have been negligence for him to have placed his feet upon the higher steps to climb upon the platform and enter the car. The case in hand is on the debatable ground between the two cases supposed, and it is by no means clear that all reasonable men would agree that plaintiff's act evidenced any want of ordinary care under the peculiar circumstances of his case. Indeed, it is by no means certain that there are not some reasonably prudent and careful men who would have been guilty of the same act under the same circumstances. The question which has been considered is the only one argued by counsel for the plaintiff in error, but at the close of their brief they state that, if it was not the duty of the court below to instruct the jury that the plaintiff was guilty of contributory negligence, still that court was in

Birmingham Ry., Light & Power Co. v. Nolan

error because it failed to give to the jury 10 separate instructions which they requested it to submit. These requests have been carefully read, considered, and compared with the charge of the court. So far as the rules of law which they contain were sound, pertinent, and material to the issues presented, they were fairly given in the general charge, so that there was no error in the refusal to give them in the words of the counsel for the plaintiff. Moreover, they present no question of law which is not involved in, and decided by, the conclusion that the question of contributory negligence in this case was for the jury, and not for the court.

There was no error in the trial of the case, and the judgment below is affirmed.

BIRMINGHAM RY., LIGHT & POWER CO. v. NOLAN.

(Supreme Court of Alabama, June 28, 1902.)

[32 So. Rep. 715.]

Carriers—Punitive Damages.*

Punitive damages may be recovered of a carrier by a passenger, where through willfulness or gross negligence of the conductor the passenger was carried by the place at which, when paying her fare, she told the conductor she wanted to get off.

Appeal from city court of Bessemer; B. C. Jones, Judge.

Action by Mrs. Alpho Nolan against the Birmingham Railway, Light & Power Company. Judgment for plaintiff. Defendant appeals. Affirmed.

This action was brought to recover damages sustained by the plaintiff as the result of being carried beyond the destination while riding on one of the defendant's electric cars and being put off at another station and in failing and refusing to put the plaintiff off where she had notified the conductor she wanted to get off. There were verdict and judgment for the plaintiff, assessing her damages at \$150.

Walker, Tillman, Campbell & Porter, for appellant.
Estes & Smith, for appellee.

HARALSON, J. The complaint contained besides counts for simple negligence, one for having recklessly, willfully or wantonly, refused to put plaintiff off at Twenty-Fifth street in Bessemer, to which point she had paid her fare, and where the conductor, at the time she paid it to him, agreed to put her off. The case was tried on the plea of the general issue.

The proof, on plaintiff's part, tended to show, that she paid the conductor her fare to her destination,—Twenty-Fifth street,—and when she paid it, she told him that she desired to get off at that street, and he said "All right;" that the

*See foot-note appended to *Yazoo & M. V. R. Co. v. Faust* (Miss.), 3 R. R. R. 818, 26 Am. & Eng. R. Cas., N. S., 818.

Birmingham Ry., Light & Power Co. v. Nolan

train did not stop to let her off, when it reached her destination, but the bell cord was pulled by a gentleman for plaintiff, which attracted the attention of the conductor, who was told that the plaintiff desired to get off, and he replied, that "the train does not stop at 25th street, and the lady will have to go to the next station," and, thereupon, he gave the signal to the engineer to go ahead, which he did, and plaintiff was carried to Woodward's crossing,—about three-quarters of a mile from Twenty-Fifth street,—where she got off and had to walk back; that it was windy and cold, and the ground wet and sloppy from snow that had fallen; that she got her feet wet and was taken sick, and had been sick nearly ever since, and that she required the attention of a physician, who paid her several visits.

The evidence of the defendant tended to show, that the conductor did not undertake to put plaintiff off at Twenty-Fifth street, when she paid him her fare, and that he was not guilty of reckless or wanton conduct in the matter; that Twenty-Fifth street had been, for a year or more, discontinued as a stopping place or station on the road, but there was no evidence that plaintiff knew that fact. That conductor testified, that he had authority, as conductor, to stop a train at any station.

Errors are assigned alone for the refusal to give the charges requested by defendant.

The court was requested by the defendant, to charge the jury that they could not award punitive damages in the case; that they could award no more than nominal damages, and that if they believed the evidence, they must find for the defendant.

To authorize punitive damages, the act complained of must be willful, or the result of reckless indifference to the rights of others, which is equivalent to an intentional violation of them, or "where the injury has been wanton, or malicious, or gross." *Wilkinson v. Searcy*, 76 Ala. 181.

It is settled, that the infliction of actual damage is not essential to the imposition of exemplary damages. *Railroad Co. v. Sellers*, 93 Ala. 9, 9 South. 375, 30 Am. St. Rep. 17. If, then, in this case, the negligence of the conductor was so gross as to evince an entire want of care, and was sufficient in the minds of the jury, to raise the inference, that being cognizant of the probable consequences, he was indifferent to them, it was in their province to award exemplary damages. *Railroad Co. v. Arnold*, 80 Ala. 601, 2 South. 337. We must hold, that under the evidence, apart from the charge of wantonness or willfulness, it was open to the jury to infer gross negligence on the part of the conductor. The court was not authorized, therefore, to take this question from them. There was no error in refusing the charges requested by defendant.

Fort v. Southern Ry

A motion was made for a new trial on the ground, among others, that the damages awarded were excessive. It was refused. We do not feel authorized, under the facts of the case, to set the judgment aside on that ground.

Affirmed.

FORT v. SOUTHERN RY.

(*Supreme Court of South Carolina, July 18, 1902.*)

[42 S. E. Rep. 196.]

Carriers—Liability to Passenger—Exemplary Damages.*

Plaintiff purchased a ticket, and boarded a mixed train, and was carried near his destination, when the conductor received orders to take the engine back, which he did. Before it returned, plaintiff walked about a mile to his destination: *held* that, there being no proof of willfulness, wantonness, or rudeness, plaintiff was not entitled to exemplary damages.

Appeal from common pleas circuit court of Lexington county; Buchanan, Judge.

Action by James C. Fort against the Southern Railway. From judgment of nonsuit, plaintiff appeals. Affirmed.

G. T. Graham and P. H. Nelson, for appellant.

B. L. Abney and E. M. Thomson, for appellee.

JONES, J. The appeal herein is from an order of nonsuit. The plaintiff, having purchased of defendant a ticket as passenger on the morning of June 28, 1901, boarded defendant's train at Pelion for Columbia. The train was a freight train, with a combination passenger, baggage, and express car attached. When the train reached Cayce, a station about two miles from Columbia, the conductor received orders from the company to take the engine back to Perry's on some emergency, the nature of which was not disclosed in plaintiff's evidence. Upon receiving this order, the conductor side-tracked his train at Cayce, and told plaintiff and another passenger that they would have to get off and take another train to Columbia, as he had to go back. Plaintiff, being informed that the other train would not go to Columbia until about 5 o'clock that afternoon, requested to be taken back to Pelion, which the conductor declined to do, as he was only taking back the engine. Plaintiff applied to the station agent or operator at Cayce, but he did not make any effort to procure a conveyance for plaintiff to Columbia, and plaintiff failed in his effort to hire a conveyance. Thereupon plaintiff, with the other passenger, walked from Cayce to the bridge at Brookland, about one and a half miles, riding, however, about a half mile of that distance in a wagon going that way, and after crossing Brookland bridge took the Columbia street car. The weather was warm, and the plaintiff, unused to walking much, was made tired by his walk of about a mile, and was worried

*See preceding case and foot-note.

Myers v. Southern Ry

and annoyed by the failure of defendant to transport him to Columbia. The said train reached Columbia later in the day, and plaintiff returned home on defendant's train that afternoon. There was some evidence tending to show that when the engine was ordered back to Perry's from Cayce the railroad authorities were informed that there were two passengers on board for Columbia. There was no evidence whatever of any rudeness or insult to plaintiff by defendant's agents. Upon this evidence nonsuit was granted on the ground that the action was for willful tort, and that there was no evidence to show any wantonness or willfulness in the conduct of defendant. The exceptions relate solely to the question whether there was any evidence tending to show a willful tort.

We think the nonsuit was proper. One who boards as passenger a mixed freight and passenger train takes passage subject to the delays incident to that mode of conveyance. For any unreasonable delay considering that mode of conveyance, the passenger has redress for the actual damages occasioned thereby; and, if the conduct of the defendant company is such as to show a wanton or willful disregard of duty to such passenger, exemplary damages may be awarded. In this case the only question being as to exemplary damages, and there being no evidence tending to show any wanton or willful disregard of defendant's duty to plaintiff, the nonsuit was proper.

The judgment of the circuit court is affirmed.

MYERS v. SOUTHERN RY.

(*Supreme Court of South Carolina, Oct. 10, 1902.*)

[42 S. E. Rep. 598.]

Expiration of Ticket—Threats of Expulsion—Exemplary Damages.*

Where a passenger bought a limited ticket, but missed the connecting train at a junction, and took the next train after the time limit had expired, there is sufficient evidence to go to the jury on the question of exemplary damages, where the conductor, after full explanation, collected fare on threats of expulsion.

Same—Same.

Where, on threats of expulsion, a passenger pays a fare, but does not leave the car, it is error to submit the question of expulsion to the jury in an action against the railroad company for damages.

Appeal from common pleas circuit court of Barnwell county; Benet, Judge.

Action by Essie Myers, by her guardian, T. S. Myers, against the Southern Railway. From judgment for plaintiff, defendant appeals. Reversed.

B. L. Abney, Joseph W. Barnwell, and Robert Aldrich, for appellant.

Davis & Best, for respondent.

*As to when punitive damages may be recovered for acts of carrier's employees injuring passengers, see preceding case and footnote.

Myers v. Southern Ry

JONES, J. The plaintiff, a young woman between 14 and 18 years old, bought a ticket for passage over the defendant's railroad from Allendale to Orangeburg by way of Blackville and Branchville, limited by its terms to 12 p. m. on the 3d day of February, 1901. When she reached Blackville, the connecting train at that point between Augusta and Branchville had left, and the plaintiff stayed at Blackville with a friend, without expense, the night of the 3d day of February. The next morning, after expiration of the time limit, she boarded the first train to Branchville. When she presented said ticket, the conductor refused to receive it, saying that, if the plaintiff did not pay the fare, he would have to put her off; and when she explained the circumstances under which she had failed to use the ticket before its expiration, as stated above, the conductor replied that he could not help that. Thereupon she paid the fare demanded from Blackville to Branchville, and on boarding the train from Branchville to Orangeburg was compelled to pay the fare between said points, both fares amounting to about \$2. The complaint was for both actual and exemplary damages, and, after alleging facts substantially as above set forth, charged that the action of the defendant company was willful, wanton, and malicious, and that by reason of the aforesaid facts the plaintiff had been greatly outraged, humiliated in her feelings, and caused to suffer great mental anxiety, to her damage \$1,500. The jury rendered a verdict for \$237.50. The defendant offered no testimony, and in open court, before the jury were instructed, admitted liability for actual damages to the amount of \$2, the car fares paid to the conductor as stated.

The appellant's exceptions are to the charge of the court to the jury, and relate to the question of exemplary damages, as follows: "(1) That it is respectfully submitted that his honor the presiding judge erred in instructing the jury, as requested in part by plaintiff: 'That if the jury believe that if the plaintiff presented her ticket to the conductor while traveling on the aforesaid train for Orangeburg, and the conductor refused to receive it, and demanded additional fare to Orangeburg, threatened to eject plaintiff unless such additional fare was paid, then, in that case, in addition to actual damages, plaintiff would be entitled to recover exemplary damages; provided the jury find that the plaintiff was treated with indignity, insult, or contempt; and in adding thereto the words: 'I do say that, if the conduct of the conductor amounted to insult or contempt, it would be a basis for exemplary or punitive damages.' Whereas it is submitted that there was no evidence on the part of the plaintiff showing indignity, insult, or contempt, or from which the jury were authorized to infer such indignity, insult, or contempt, or for which they would be authorized to give exemplary or punitive damages. (2) In charging the jury that: 'If the plaintiff was entitled by her ticket to be taken from Allendale to Orangeburg, and if

Myers v. Southern Ry

she was ejected, or threatened to be put off, and if, under the influence of such a threat of being put off, she did pay the fare to prevent being put off, then it will be left for you to say whether that would amount to a technical ejection or not; and if the conduct of the conductor, in so threatening, was, in the language of the complaint, willful or wanton, then it would be a ground of punitive damages in whatever amount you might think justifiable, not more than the amount claimed or more than in your opinion ought to be granted.' Whereas it is submitted that there is no evidence on the part of the plaintiff from which wanton or willful conduct could reasonably be inferred by the jury, no evidence that plaintiff was ejected, or any other evidence 'warranting the jury in finding punitive damages. (3) In refusing to charge the first request submitted by defendant, in the following words: 'That the damages which plaintiff could possibly recover in the present suit for any delay in making connection is limited to the expense incurred by her by reason of such delay,' without adding any other words thereto; and in further adding thereto the words: 'That does not, of course, prevent the jury from considering the question of punitive damages.' Whereas it is submitted that there is no evidence on the part of the plaintiff from which the jury were authorized to find punitive damages for the delay alleged in the complaint and referred to in the evidence. (4) In refusing to charge the second request submitted by defendant: 'That, even if the jury find that the plaintiff was wrongfully compelled to pay her fare from Blackville to Orangeburg, the only damages they could find for the plaintiff is the amount paid by her for her ticket from Blackville to Orangeburg, admitted by defendant to be \$2.00, inasmuch as no physical injury was inflicted upon plaintiff nor any insult nor indignity;' and further, in adding to the said request the following words: 'I cannot so charge you. The last part would ask me to say what is or is not in evidence. If there was no evidence whatsoever on the question of willful conduct on the part of the conductor, I might charge you that; but, as I have said to counsel before, where there is any evidence, no matter how slight, tending to show willful or wanton or malicious conduct on the part of a conductor of the railway company, the court is not allowed to say to the jury that it was not sufficient, and I cannot say here that there is none. Therefore the request is refused.' Whereas, it is submitted that there was no evidence whatsoever from which the jury were authorized to infer willful, wanton, or malicious conduct on the part of the conductor. (5) In charging the jury as follows: 'I have to say to you that you must look into the testimony, and see whether she [the plaintiff] has made a good claim for vindictive or punitive damages. Was the conduct of the railway conductor, if he, as alleged, threatened to put her off unless she paid,—was that a willful act on his part, or a wanton or malicious act? Was it such

Myers v. Southern Ry

an act as subjected her to indignity,—such as would humiliate her in the presence of others? If so, then you would have to say whether, on that account, she should have vindictive damages. There is no doubt that railway companies are liable in damages when their servants, through whom they act, subject passengers, who are in their cars, to indignity or oppression, or conduct themselves towards them in a way that shows utter disregard of their feelings or their rights, and humiliate them in the presence of others.' Whereas, it is submitted that there was no evidence on the part of the plaintiff from which the jury were authorized to infer indignity, or oppression, or disregard of the feelings of the plaintiff, or tending to humiliate her in the presence of others, or showing that the conduct of the conductor was willful, wanton, or malicious.'

It will be observed that these exceptions all make the point that there was no evidence to go to the jury on the question of exemplary damages. The testimony was to the effect stated above, and, in our opinion, was such as to warrant submitting the issue to the jury. The defendant conductor was informed by plaintiff of the circumstances under which she claimed the right to use said ticket as passenger. The defendant makes no exception to the charge of the court to the effect that, as matter of law, plaintiff, in the circumstances stated, if true, had the right to use said ticket for passage on said train; and, indeed, on the trial defendant admitted liability for actual damages. It was fairly left to the jury in other portions of the charge to determine whether defendant's agent was merely negligent in his conduct or whether he was acting willfully or wantonly. If defendant's agent, conscious of plaintiff's right as passenger, nevertheless invaded that right by exacting and coercing an unlawful payment of money under threat of expulsion from the train, his conduct was willful or wanton, such as would subject defendant to exemplary damages.

In addition to the matter just considered, the second exception involves another point. It is complained that the court left it to the jury to say whether the conduct of the defendant's agent amounted to a "technical ejection." Respondent argues that there was a technical ejection, and cites as authority *Railroad Co. v. Eskew*, 86 Ga. 641, 12 S. E. 1061, 22 Am. St. Rep. 492. The case does not sustain respondent's view. The language of the court is: "Although the conductor neither used physical force to expel the plaintiff from the train nor was immediately present when the plaintiff left the train at Conyers, yet it was in fact an expulsion if the plaintiff alighted against his own will, and as an act of obedience to the conductor's previous command." This has no applicability to a case where the passenger does not leave or is not put off the train. In the case before us the passenger never left the train under threat or command or otherwise,

Louisville & N. R. Co. v. Landers

and we are at a loss to conceive how the matter of ejection from the train could, in any view, be submitted to the jury. Plaintiff's case was not based upon any unlawful ejection from the train, but was based upon an unlawful and wanton coercion of the payment of money under threat of expulsion from the train. Such an issue was not only foreign to the case as alleged and proven, but it was harmful to submit it to the jury, because under such instruction the jury may have supposed that they were at liberty to treat the case as one in which there had been, in effect, an unlawful ejection from the train. It is true, the verdict of the jury was not very large, but we are unable to ascertain the extent the jury were influenced by the erroneous charge by any consideration of the amount of the verdict.

The judgment of the circuit court is reversed, and the case remanded for a new trial. _____

LOUISVILLE & N. R. CO. v. LANDERS.

(*Supreme Court of Alabama, Jan. 20, 1903.*)

[33 So. Rep. 482.]

Carriers—Injuries to Property—Assignability of Claim—Constitutionality of Statute.

Const. 1875, art. 14, § 12, declares that a corporation shall have the right to sue and be subject to be sued like natural persons. Code, § 877, authorizes the assignment in writing of claims against railroad companies for injuries to property, and suits thereon in the name of the assignee: *held*, that Code, § 877, was not violative of the constitution; the chose in action assignable being a claim for damages growing out of alleged breach of contract, and being assignable irrespective of the statute.

Same—Limiting Liability.

A provision in a bill of lading limiting the carrier's liability to damages resulting only from negligence of itself or its agents is reasonable and binding.

Same—Same—Variance.

Where, in an action against a railroad company on a bill of lading, the declaration is in the form prescribed by the Code, that the bill introduced in evidence contains special limitations on the common-law liability of the carrier constitutes no variance.

Expert Testimony—Value of Cattle.

In an action against a carrier for damages for injury to cattle in shipment, a witness who testified that he had been a dealer in cattle all his life, and had shipped cattle several times over defendant's road, and between the stations between which the cattle in question were shipped, was qualified to testify as an expert as to the value of the cattle, and as to whether they could be shipped safely without partitions.

Res Gestæ *

In an action against a carrier for injury to cattle in shipment, it was proper to admit in evidence conversations between the plaintiff and defendant's agents relative to the transportation of the cattle, in the course of such transportation, as a part of the *res gestæ*.

Testimony—Cause of Injury to Cattle.

In an action against a carrier for injury to cattle in shipment, a

*See notes at end of case.

Louisville & N. R. Co. v. Landers

witness was asked what he would say caused the injury, if cattle that had been shipped as those in question reached their destination in the condition in which he saw the cattle in question on their arrival: *held* error not to exclude the answer, as the question called for a conclusion of the witnesses as to a fact in issue which it was the province of the jury to determine.

Injury to Live Stock in Transit—Notice of Claim.

Where a bill of lading for a shipment of cattle provides that the shipper, as a prerequisite to any right to recover from injury to the cattle, shall, before removal of the cattle from the place of delivery, and before their mingling with other cattle, give written notice of any damages, the requirement is complied with where the shipper does not discover injuries, and could not have done so, before removal, but he gives notice thereof within a reasonably short time after discovery of the injury.

Same—Same.

That an owner to whom a bill of lading has been issued gives written notice of injury to certain cattle before their removal does not preclude him from the right of giving additional notice of other injuries within a reasonable time after their discovery.

Same—Same.

Where, under a bill of lading requiring written notice of injury before removal, the only notice given the carrier as to the death of cattle was for certain cattle that had died before removal, the shipper could not recover for cattle that died after the removal.

Tyson, J., dissenting.

Appeal from circuit court, Calhoun county; D. C. Blackwell, Special Judge.

Action by J. C. Landers against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

The complaint contained six counts, each of the counts being in the statutory form for suit against a common carrier on a bill of lading. The defendant pleaded the general issue, and by special pleas set up the violation of special stipulations, which were agreed to by the shipper, in the bill of lading issued by the defendant. The plaintiff introduced evidence tending to show that a number of cattle which had been shipped over the defendant's railroad were injured during transportation, and that said injuries were caused by negligence on the part of the defendant or its employees. The defendant introduced evidence tending to show that the injuries caused to the cattle, for which the suit was brought, were occasioned by reason of the cattle being crowded in cars without reference to their size or weight, and, further, because there were no partitions made by the plaintiff in the cars, as he agreed to do. The facts of the case relating to the rulings of the trial court reviewed on the present appeal are sufficiently stated in the opinion. The court, at the request of the plaintiff, gave to the jury the following written charges: "(1) The court charges the jury that, in order to entitle the plaintiff to recover, he need only show delivery to the railroad in good condition, unreasonable delay in transportation, and delivery in bad condition; and, if the plaintiff has shown these

Louisville & N. R. Co. v. Landers

facts, the jury will find the issue in favor of the plaintiff, unless the evidence also satisfy the jury that the railroad company was not guilty of negligence. (2) If the jury believed that the defendant negligently delayed to ship the cattle from Montgomery, or negligently permitted them to stand upon the track for several hours at Calera, and that the cattle were injured thereby, then the jury will find the issue in favor of the plaintiff. (3) If the cattle were in good condition when delivered to the defendant railroad company at Montgomery, and there was an unreasonable delay in transportation, and the cattle after such delay were delivered in bad condition, the presumption is that the injury resulted from the negligence of defendant. (4) If the defendant failed to deliver the cattle in a safe condition within a reasonable time, the presumption of negligence on the part of the defendant arises, and the burden of proof is shifted to the defendant to excuse itself from negligence; and, if this burden has not been discharged, the jury must find the issue in favor of the plaintiff." The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of the following charges requested by it: "(1) I charge you, gentlemen of the jury, that you cannot find for the plaintiff for any damage occasioned by the death of any of these stock after the same had left Attalla, Alabama, if you believe from the evidence that no notice was given the defendant or its agent at Attalla, or elsewhere, except the notice testified by J. C. Landers and Judge Pelham. (2) I charge you, gentlemen of the jury, that the undisputed evidence in this case shows that the plaintiff only gave notice to the defendant of the loss and damage of fourteen head of cattle, and you cannot find for the plaintiff for any damage on account of the loss or death of any other cattle after the same left Attalla, Alabama. (3) I charge you, gentlemen of the jury, that unless the evidence shows that the plaintiff gave notice of the damage to the cattle to the defendant or its agent before the cattle were taken from the cars at Attalla, and before leaving the yard of the company, then you cannot find for the plaintiff." The other charges requested by the defendant, to the refusal to give each of which it separately excepted, were the general affirmative charge upon the whole of the complaint, and the general affirmative charge in favor of the defendant upon each count of the complaint separately.

Thos. G. & Chas. P. Jones, for appellant.

W. P. Acker, for appellee.

DOWELL, J. The complaint in this case is in the prescribed form of the Code, No. 15, p. 946, for suit against a common carrier on a bill of lading. There are six counts, and in the four last the plaintiff claims as assignee. A demurrer was interposed to the complaint, which was overruled, but the assignment relating to this ruling is expressly waived by the appellant.

Louisville & N. R. Co. v. Landers

The first contention of counsel in argument for appellant is that the subject-matter of the suit is a chose in action, of which there can be no valid assignment; the insistence being that, section 877 of the Code, authorizing the assignment in writing of claims against railroad companies for injuries to property, and suits thereon in the name of the assignee, is an unjust discrimination against railroad corporations as a class, and violative of section 12, art. 14, of the constitution of 1875. There is no merit in this contention, since the chose in action here assigned is a claim for damages growing out of the alleged breach of a contract, and the action is in form *ex contractu*. There can, we think, be no doubt of the assignability of such a claim, apart from the statute. The right of the plaintiff to sue in his own name on the claims assigned is not raised in the pleadings, and, on the case as presented to the jury, was not involved in any of the rulings on the charges.

The property transported in the present case consisted of live stock,—three car loads of cattle,—and the bill of lading contained a special contract between the shipper and the carrier limiting the latter's liability to damages resulting only from negligence of itself or its agents. Special contracts of this character have been upheld by this court as reasonable and binding between the shipper and carrier. *Railway Co. v. Harwell*, 97 Ala. 341, 11 South. 781; *Id.*, 91 Ala. 340, 8 South. 649. In *Railway Co. v. Parker*, 123 Ala. 683, 27 South. 323, it was held that, where the action on a bill of lading was in the form prescribed in the Code, it was a suit upon the common-law liability of the carrier, and that a bill of lading containing special stipulations limiting such common-law liability, when introduced in evidence, constituted a fatal variance between the complaint and the proof. We feel constrained now to depart from this holding. The fact that a bill of lading contains special stipulations exempting the common carrier from a part of its common-law liability makes it none the less a bill of lading. The prescribed form in the Code is, in general terms, for suits "on a bill of lading of a common carrier," and we think it is sufficiently broad to cover bills of lading containing special stipulations.

There are a number of assignments of error based on the rulings of the court in the admission of evidence. We will notice only those insisted on in argument:

The witness Clarkson, sworn and examined on behalf of the plaintiff, was permitted, against the defendant's objection, to testify as to the value of the cattle, and whether they could be loaded and transported with safety without partitions in the cars in which they were placed, and also as to what would be a reasonable time for transporting them from Montgomery to Attalla, Ala.; those being the places of receiving and delivery. This witness testified that he had been a dealer in cattle all of his life,—buying, selling, and shipping them on railroads; that he had bought cattle several times, within the year of the

Louisville & N. R. Co. *v.* Landers

shipment of the cattle in question, in and around Montgomery; that he knew the market value at Montgomery at the time of the shipment of plaintiff's cattle; that he had shipped cattle several times over defendant's road from Montgomery to Gadsden, a point within five miles of Attalla, and was familiar with loading and transporting cattle on railroads. This testimony of the witness, we think, very clearly qualified him to testify as an expert witness; and as the evidence objected to came within the rule of expert evidence, and other conditions as a predicate having been shown for the admission of expert testimony, the rulings of the trial court were free from error.

Exceptions were taken and reserved to the admission in evidence of conversations between the plaintiff and defendant's agents relative to the transportation of the cattle, and in the course of the transportation of the same. These conversations were admissible as a part of the *res gestæ*, and the rulings of the court were free from error in this respect.

The plaintiff was permitted, over the objection of the defendant, to ask the witness Clarkson the following question: "If these cattle had been loaded at Montgomery at three or four o'clock p. m., switched in the yard for two or three hours, unloaded, reloaded about nine or ten o'clock next morning, carried to Calera about twelve o'clock, side-tracked there until ten or twelve o'clock at night, and then reached Attalla at three or four p. m. next day, in the condition that you saw them, with a number dead, what, in your judgment, caused the injury?" To which the witness answered: "It was caused by the delay in shipment." Motion was made to exclude the answer, which was overruled by the court, and to which action of the court in allowing the question and overruling the motion to exclude, the defendant duly excepted. The court erred in its ruling. The question called for evidence without the limit of expert testimony. It called for a conclusion of the witness as to a fact in issue, and which it was the province of the jury alone to determine, and the answer of the witness was a clear invasion of this province of the jury.

There was a provision in the special contract of affreightment of the cattle which required the plaintiff, at the point of destination, and before the removal of the cattle from the place of delivery, and before their mingling with other cattle, to give written notice to the defendant of any claim of damages, as a prerequisite to any right of recovery. While this provision of the contract has been held to be a reasonable one, especially where the owner or his agent accompanies the stock, or agrees to do so, it is also said that such stipulation is not to be strictly construed. "The object is to prevent fraud on the carrier. When the shipper does not discover, and by ordinary diligence could not have discovered, the injury, and its extent, before the animals are removed, notice

Notes

thereof within such reasonably short time after their removal as effectually secures the carrier from fraud is a substantial and sufficient compliance with the condition." *Railway Co. v. Harwell*, supra, and authorities there cited. The fact of having given written notice before removal of the animals from the place of delivery would not preclude the plaintiff from the right of giving additional notice of claim for other injuries which had not been discovered, and which could not have been discovered at the time of removal by ordinary diligence. But notice of such other injuries would be required within a reasonable time after discovery, to entitle plaintiff to recover damages for the same. To hold otherwise would be to impair, if not to destroy, the effect of the stipulation in the contract as to such notice.

There was evidence tending to show that some of the cattle died after they had been removed from Attalla, the point of delivery. The notice, and only notice, given to the defendant or its agent pursuant to the stipulations contained in the bill of lading, was for cattle which had died before such removal. On this phase of the evidence, the court erred in refusing written charges requested by the defendant to the effect that the plaintiff could not recover for cattle that died after their removal from Attalla.

We discover no error in the rulings of the court on other charges refused to the defendant, nor in the rulings on those given for the plaintiff.

For the errors pointed out, the judgment will be reversed, and the cause remanded.

TYSON, J., dissenting.

NOTES.

RES GESTÆ—DECLARATIONS OF RAILROAD EMPLOYEES.

Scope of Note.

It has not been considered useful or necessary to discuss the general rules and principles in this note. They are too elementary and well settled. The difficulty lies in their application.

The illustrations are so numerous, and so little susceptible of logical arrangement that, perhaps, their arrangement by states will be found to be the most convenient.

UNITED STATES.—*Held Inadmissible.*

From Several Hours to Five Months Prior—Defective Condition of Engine.

In *Louisville & N. R. Co. v. Stewart*, 56 Fed. 808, it was held that where an accident is charged as having been produced by a defective locomotive, declarations by engineers as to its defective condition, made at various times ranging from a few hours back to five months before the accident, are not part of the *res gestæ*, and not admissible against the company.

Two and a Half Days after.

Declarations of the captain of a steamer as to the cause of an accident, made two and a half days after the accident, but on the same voyage, were excluded, in *Packet Co. v. Clough*, 20 Wall. 528.

Notes

*Held Admissible.***Just Prior to Killing of Passenger by Lunatic—Conversation with Conductor.**

In *St. Louis, I. M. & S. R. Co. v. Greenthal* (C. C. A.), 6 Am. & Eng. R. Cas., N. S., 261, it was held that a conversation relative to the sanity of the person who killed the passenger, had by the conductor of the train while at his post, just prior to the killing, with a passenger in his charge who had become alarmed for her personal safety, was a part of the *res gestæ*, such conversation being in the line of the conductor's duty.

Almost Simultaneous with Injury—Declarations of Coemployees.

In *Peirce v. Van Dusen* (C. C. A.), 7 Am. & Eng. R. Cas., N. S., 1, it was held that it was not error to admit the declarations of the conductor, who was engaged with the plaintiff in performing the work in which such plaintiff was injured, made while the work was yet unfinished, on the spot where the injury occurred, and almost simultaneous with the injury, and describing how it was caused.

After Injured Person's Return Up Stairs.

Where the thing to be established was that a death was caused by accident, it being shown that the person arose and went down stairs in the night, his statement on his return that he had fallen down stairs and hurt himself badly was held a part of the *res gestæ*. *Ins. Co. v. Mosley*, 8 Wall. 397.

DISTRICT OF COLUMBIA.—Held Inadmissible.**From Two to Five Minutes—Negligence of Conductor—Statement of Employee Not Directly Connected with Occurrence.**

In *Metropolitan R. Co. v. Collins*, 1 App. Cas. (D. C.) 383, it was held that where a street railway company is sued for an injury to a passenger resulting from the negligence of a conductor, the declarations of the company's transfer agent, who is not directly connected with the occurrence, made from two to five minutes thereafter, to the effect that the conductor "would get into trouble," that "he started the car without my authority," are not admissible as part of the *res gestæ*.

ALABAMA.—Held Inadmissible.**A Moment before Accident—Conductor's Statements as to Bad Condition of Road.**

Declarations made by the conductor of a train to a passenger, a moment before the accident, of the bad condition of the road, and his train having run off the track five consecutive times next preceding the present trip, were held not to be admissible in proof of negligence, either as *res gestæ* or as admissions of an agent binding on the principal. *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 15.

Destruction of Goods by Fire—Statement of Depot Agent to Owner.

In *Louisville & N. R. Co. v. Carl*, 91 Ala. 271, 9 So. Rep. 334, it was held that the declaration of a depot agent, made in response to plaintiff's inquiry for his goods, that they were burned up in a car a few nights previously, was not admissible as evidence against his principal, the railroad company, when sued for the loss of the goods.

Immediately after Killing Trespasser—Remark of Trainman.

Plaintiff's intestate having been run over and killed by a train belonging to defendant, the declaration of one of the trainmen on the stoppage of the train immediately after the accident, "We have run over a man and killed him as dead as hell," was held not admissible for the plaintiff as part of the *res gestæ*. *Memphis & C. R. Co. v. Womack*, 37 Am. & Eng. R. Cas. 308, 84 Ala. 149, 4 So. 618.

A Few Minutes after—Question as to Failure of Engineer to Respond to Bell-Call.

In an action for personal injuries sustained by a passenger, it was held that a witness for the plaintiff could not be allowed to tes-

Notes

tify that the conductor, "a few minutes after the plaintiff had been hurt, asked the engineer why he did not respond to the bell-call; and that the engineer answered, he did respond to all the bell-calls he heard," because such declarations were not part of the *res gestæ*. *Alabama G. S. R. Co. v. Hawk*, 18 Am. & Eng. R. Cas. 194, 72 Ala. 112, 47 Am. Rep. 403.

Declarations of Trainmen While Returning to Town with Dead Body.

In *Tanner v. Louisville & N. R. Co.*, 60 Ala. 621, the declarations of the servants of the railroad company, while returning to town on the train with the dead body of the deceased, were held to be not admissible against the company as a part of the *res gestæ* connected with the killing.

Held Admissible.

Assault on Passenger by Brakeman—Prior Altercation.

The material issue being whether the assault on plaintiff was justified or even palliated by his own conduct, everything that was said and done by and between the parties, just before and up to the time when he was ejected, or forced to leave the car, it was held was admissible evidence as part of the *res gestæ*. *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45, 9 So. Rep. 303.

Book Entries Made When Goods Received.

It was held in *Louisville & N. R. Co. v. McGuire*, 79 Ala. 395, that entries on the books of the carrier, made by his authorized agent in the regular course of business, and at the time the goods are received, are admissible evidence against the carrier, as forming a part of the *res gestæ* of the fact of delivery.

ARKANSAS.—Held Inadmissible.

Subsequent Declarations.

In *St. Louis, I. M. & S. R. Co. v. Sweet*, 57 Ark. 287, 21 S. W. 587, it was held that declarations of employees of a company relating to the cause of an accident upon the road, made after the accident occurred, and not as part of the *res gestæ*, are hearsay and not admissible.

CALIFORNIA.—Held Inadmissible.

Five Minutes after—Declarations of Negligent Engineer.

In *Durkee v. Central Pac. R. Co.*, 69 Cal. 533, 58 Am. Rep. 562, 11 Pac. 130, it was held that where it was claimed that plaintiff was injured through the negligence of defendant's engineer, the declarations of the engineer in explanation of the accident, made about five minutes after the occurrence, are not admissible as part of the *res gestæ*.

Declarations of Injured Engineer after Removal from Wreck—Action by Another Injured Employee.

It was held in *Williams v. Southern Pac. Co. (Cal.)*, 22 Am. & Eng. R. Cas., N. S., 442, that a conversation between an engineer injured in a collision, after he has been removed from the engine, and the division superintendent, as to the accident, is inadmissible as *res gestæ* in action by another employee to recover for injuries sustained in the collision.

Held Admissible.

Immediately after—Exclamation of Road Master Who Had Stationed Employee at Post of Danger.

In *Elledge v. National City & O. R. Co.*, 100 Cal. 282, 34 Pac. 720, it was held that where an employee was injured while in a place of unknown danger to him, an exclamation on the part of the road master who represents the company, and who placed the servant in the position of danger, immediately after the happening of the accident, to the effect that he expected it, was admissible as part of the *res gestæ*.

CONNECTICUT.—Held Inadmissible.

Next Morning—Watch Taken as Security for Fare.

A railroad conductor took a watch from a passenger one evening

Notes

as security for his fare, and put it into his ticket-box, in the conductor's room, the next morning. It was held that statements as to the circumstances of his receiving the watch, made while he was putting it into the box, were inadmissible in evidence. *State v. Coffee*, 56 Conn. 399, 16 Atl. 151.

GEORGIA.—*Held Inadmissible.***While Investigating Cause of Derailment—Declarations of Employee.**

It was held in *Electric Ry. Co. v. Carson*, 98 Ga. 652, 27 S. E. 156, that declarations made by an employee of a railroad company while investigating the cause of the derailment of a car, being inadmissible as a part of the *res gestæ*, were properly rejected as hearsay.

While Carrying Off Slave—Admissions of Conductor.

In an action for carrying off plaintiff's slave, the admissions of the conductor, made at a subsequent time, that he knew the negro was plaintiff's slave, were held not admissible as a part of the *res gestæ*. *Griffin v. Montgomery & W. P. R. Co.*, 26 Ga. 111.

Some Time after Frightening Horse—Declarations of Engineer Showing Hatred.

In a suit against a railroad company for damages resulting from a fall from a buggy, caused by the frightening of the plaintiff's horse by the blowing of defendant's whistle, what defendant's engineer said some time after the injury and at a different place, indicating the state of his feelings toward the person injured, was held to be not admissible against defendant. *Newson v. The Georgia Railroad*, 66 Ga. 57.

At Next Station, after Accident to Brakeman—Remarks of Conductor.

The sayings of the conductor to the fireman at the next station were held to be inadmissible, in action for injury sustained while coupling cars particularly when offered as evidence for the company. *Central R. & B. Co. v. Kelly*, 58 Ga. 107; *Sims v. Macon & W. R. Co.*, 28 Ga. 93.

After Injury to Employee—Obligations to Support—Declarations of Assistant Supervisor.

On the trial of a suit against a railroad company for damages to the plaintiff (who was an employee of the company) caused by the negligence of his coemployees, it was held to be error in the court to permit the plaintiff to testify before the jury, that an assistant supervisor had told him, after the injury was done, that the company felt itself under obligations to support him and his family during his life. *East Tennessee, V. & G. R. Co. v. Duggan*, 51 Ga. 212, 6 Am. Ry. Rep. 195.

Several Days after Accident—Reports Made under Rules or Orders.

Reports to the general manager of the company touching the facts, circumstances, and results of a railway accident, and who was to blame therefor, made several days after the event, by the superintendent and the conductor, supported by the affidavit of the latter and of several other employees, were held not to be admissible in evidence to affect the company, whether such reports were exacted and made under standing rules requiring the same, or under special orders for the particular occasion; no question of notice to the company being involved in the controversy. *Carroll v. East Tenn., V. & G. R. Co.*, 41 Am. & Eng. R. Cas. 307, 82 Ga. 452, 10 S. E. 163.

*Held Admissible.***Representations of Carrier's Agent to Owner Receiving Injured Live Stock.**

It was held in *Columbus & W. R. Co. v. Kennedy*, 31 Am. & Eng. R. Cas. 92, 78 Ga. 646, 3 S. E. 267, that where the owner of live stock sues a carrier for injuries thereto while being carried, it is proper for him to testify that he at first refused to accept them, and told the agent so, and that the latter told him to take them and do

Notes

the best he could with them; that the company would make it all right, such statements being admissible as part of the *res gestæ*.

Declarations of Agent Procuring Deed for Company.

The sayings of the person who procured a deed in behalf of the company, made at the time the deed was executed, to the effect that he was acting as agent for the company, were held to be admissible in *Chattanooga, R. & C. R. Co. v. Davis*, 89 Ga. 708, 15 S. E. 626.

While Investigating Cause of Accident—Statements of General Manager.

Statements made by the general manager of a railroad, whose duty it was to investigate the cause of the disaster, tending to show what caused the disaster, and made while he is actually engaged in his inquiries were held to be admissible in *Krogg v. Atlanta & W. P. R. Co.*, 77 Ga. 202, 4 Am. St. Rep. 79.

After Accident—Statements of Superior Employee.

Statements made after the injury occurred, by a servant of the company superior to plaintiff, that it was plaintiff's duty to examine the cars in the manner in which he did were held to be admissible in *Howard v. Savannah, F. & W. R. Co.*, 84 Ga. 711, 11 S. E. 452.

ILLINOIS.—Held Inadmissible.**After Injury to Employee—Admissions of Negligence by Fellow Servant.**

Where an employee sued for an injury alleged to have been caused by the negligence of his superior servant, an admission made after the injury, by a fellow servant, tending to show that he was responsible for the injury, was held to be not admissible as part of the *res gestæ*. *Hellmuth v. Katschke*, 35 Ill. App. 21, following *Chicago, W. D. R. Co. v. Becker*, 128 Ill. 545, 21 N. E. 524.

After Injury to Prospective Passenger Falling through Uncovered Bridge—Declarations of Conductor.

In an action to recover for injuries occasioned by falling through an uncovered bridge in attempting to get on defendant's train, the bridge being under the control of defendants, declarations of the conductor of the train, made after the accident had happened, tending to show that the company had been guilty of negligence, were held to be inadmissible. *Chicago & N. W. R. Co. v. Fillmore*, 57 Ill. 265.

Several Days after Explosion of Boiler—Declarations of Master Mechanic.

Where a company was sued for the death of an employee killed through alleged defects of a boiler, declarations made several days after the accident by the company's master mechanic, and by the general superintendent of the company's machinery, tracks and buildings, tending to show the condition of the boiler, were held not to be admissible as part of the *res gestæ*. *Chicago & St. L. R. Co. v. Ashling*, 34 Ill. App. 99.

Long after Injury to Passenger—Admissions of Employees.

Where a passenger sues to recover for injuries received, admissions of certain employees of the company, made long after the accident, touching defects in the track tending to produce the injury, and as to the liability of the company, were held not to be admissible as part of *res gestæ*. *Mobile & O. R. Co. v. Klein*, 43 Ill. App. 63.

Held Admissible.**Just Prior to Collision—Declarations of Conductor.**

In an action for injuries caused by the collision of one of defendant's railroad trains with the train which plaintiff was upon, declarations of the conductor of defendant's train, made just before the collision, showing the situation of the train, and that plaintiff's train had not been flagged, were held admissible as part of the *res gestæ*. *Chicago & E. I. R. Co. v. Holland*, 122 Ill. 461, 13 N. E. 146.

While Engaged in Burning Off Right of Way—Declarations of Employees.

Where a company directed its servants to set fire to the dry grass, weeds, and other combustible material on the right of way, and the

Notes

fire spread to the premises of an adjacent owner and destroyed his property, in a suit to recover, statements made by the company's servants while engaged in the act, concerning the same, were held admissible against the company as a part of the *res gestæ*. *Ohio & M. R. Co. v. Porter*, 92 Ill. 437.

While Signing Contract—Declarations of Station Agent

On the question whether a shipper's contract was fairly and understandingly executed by the shipper, or whether he was induced to sign the same without examination, under the false assurance of a station agent that it was only a pass, the agent, on his examination in chief, stated certain of his declarations to the shipper, made at the time and relating to the signing of the alleged contract. On cross-examination an objection was sustained to this question: "Did you tell Black (the shipper) what it was when you had him sign it?" It was held that the court erred in its ruling, and that everything that was said or done at the time by either of the parties relating to the signing was a part of the *res gestæ*, and was proper to be elicited on cross-examination. *Black v. Wabash, St. L. & P. R. Co.*, 25 Am. & Eng. R. Cas. 388, 111 Ill. 351.

While Plaintiff Was under Car—Statement by Driver.

In an action against a street railroad company for injuries caused by a car running over plaintiff, statements made by the driver just after the car had stopped, and while plaintiff was still under it, were held to be admissible as part of the *res gestæ*. *Quincy Horse Ry. & C. Co. v. Gnuse*, 137 Ill. 264, 27 N. E. 190.

*INDIANA.—Held Admissible.***At Time of Accident—Statements of Plaintiff's Driver.**

In *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185, it was held that where the suit is for damages caused by running a train over plaintiff's wagon and horses while being driven by his servant on a highway, statements made by the servant at the time as to the cause of the accident are a part of the *res gestæ*, and admissible against the plaintiff.

Two Minutes after Collision—Declarations of Engineer Made While Standing near Injured Brakeman.

A brakeman on a flat car received an injury in a collision between such car and a detached portion of his train while making "a running switch." About two minutes after the injury, and while the brakeman was still on the car, the engineer left his engine, and walked about a car length, to where the brakeman was. It was held that declarations by the engineer as to the cause of the accident, where they did not refer to acts done or matters happening prior to the collision, were part of the *res gestæ*. *Ohio & M. Ry. Co. v. Stein*, 133 Ind. 180, 31 N. E. 180.

*IOWA.—Held Inadmissible.***Two Minutes after Injury to Boy Passing through Obstructing Train by Invitation of Brakeman—Statements of Brakeman.**

In such action, it was held that evidence was not admissible to show that within two minutes after the accident such brakeman came to the injured boy, and said, "Kid, you are not to blame for this; you are innocent," as such statement is of a conclusion, and not a fact. *Scott v. St. Louis, K. & N. W. R. Co. (Iowa)*, 19 Am. & Eng. R. Cas., N. S., 63.

After Ejection of Passenger—Declarations of Conductor.

Where a passenger sued for being willfully and maliciously removed from a train by the conductor, evidence of what the conductor said after the passenger was removed was held not admissible as part of the *res gestæ*. *Curl v. Chicago, R. I. & P. R. Co.*, 11 Am. & Eng. R. Cas. 85, 63 Iowa 417, 16 N. W. 69, 19 N. W. 308.

At Another Time—Statements of Section Foreman as to Dangerous Condition of Track Where Engineer Was Injured.

In *Worden v. Humeston & S. R. Co.*, 72 Iowa 201, 33 N. W.

Notes

629, it was held that where a company was sued for the death of an engineer, happening by reason of a defect in the track, evidence of what a section foreman said at a time other than the time of the accident, as to the dangerous condition of the track, was held not admissible as part of the *res gestæ*.

*Held Admissible.***Two Minutes after Accident—Statements of Injured Brakeman.**

In an action for death of plaintiff's decedent, a brakeman, while attempting to uncouple cars in motion, his statement, made two minutes after the accident, as to the cause thereof, was held admissible against the railroad company as *res gestæ*. *Fish v. Illinois Cent. R. Co.*, 96 Iowa 702, 65 N. W. 995.

While Ejecting Trespasser—Remarks of Brakeman.

Where a brakeman was guilty of a tort in removing a trespasser from a train, it was held that it was competent, in an action against the company, to prove what the brakeman said at the time, as part of the *res gestæ*, not to establish his authority, but to show his intention. *Marion v. Chicago, R. I. & P. R. Co.*, 64 Iowa 568, 21 N. W. 86.

Within a Minute after Blowing Off Steam—Declarations of Engineer Wantonly Frightening Child.

A declaration of a railroad engineer, who had blown off steam and frightened a little girl so that she fell and broke her leg, that he only did it in sport, made within a minute after blowing off the steam, and as soon as the engineer could reach the point where the injured child was lying, was held admissible in an action against the company, as part of the *res gestæ*. *Alsever v. Minneapolis & St. L. R. Co.* (Iowa), 1 R. R. R. 587, 24 Am. & Eng. R. Cas., N. S., 587.

*KANSAS.—Held Admissible.***While Running Train Carrying Delayed Cattle—Declarations of Trainmen.**

In *Atchison, T. & S. F. R. Co. v. Consolidated Cattle Co.* (Kan.), 10 Am. & Eng. R. Cas., N. S., 368, an action to recover damages from a railroad company for injuries to cattle caused by delay in the transportation of them, it was held that the declarations of the trainmen as to matters in the line of their respective duties, and relating to the cause of delay, made at the time and while they were charged with the duty of propelling the train, were admissible against the company, but that such statements must relate to their conduct or duty at the time.

While Delivering Delayed Telegram—Statements of Agent.

In an action to recover damages resulting from failure to deliver promptly a telegram addressed to the plaintiff's attorneys, and concerning the bringing of an attachment action, it was held that a statement respecting such failure made by the agent of the telegraph company at the receiving office to the said attorneys when handing them the telegram, three days after its date, was a part of the *res gestæ*, and was properly admitted in evidence. *Western Union Tel. Co. v. Getto-McClung Boot & Shoe Co.*, 9 Kan. App. 863, 61 Pac. 504.

*KENTUCKY.—Held Inadmissible.***After Finding Goods—Admissions of Delivery Clerk as to Failure to Deliver.**

In an action against a carrier for conversion of goods it was held competent for plaintiff to prove a conversation which he had with defendant's delivery clerk after the goods were found, in which the clerk admitted that he failed to deliver the goods when they were demanded, and expressed his belief that he would lose his position as the result of it, that the testimony was competent, not as an admission against defendant, but by way of contradicting the clerk, who had testified that he did, in fact, deliver the goods when demanded. *Louisville & N. R. Co. v. Lawson*, 88 Ky. 496, 11 S. W. 511.

Notes

More Than Ten Minutes after Accident to Passenger—Conductor's Admissions of Negligence.

Where a passenger sued for an injury received in alighting from the train, where it appeared that the train remained at the station ten minutes after the accident, a statement made by the conductor when half way to the next station, admitting that the accident was caused by his negligence, was held not to be admissible as part of the *res gestæ*. *Chesapeake & O. R. Co. v. Reeves*, 11 Ky. L. Rep. 14, 11 S. W. 464.

When Train Had Passed a Mile and a Half beyond Bridge Causing Injury—Statements of Another Brakeman.

Testimony for plaintiff to prove that another brakeman had said, after the train was about a mile and a half from the bridge and such brakeman had returned to the bridge, that deceased had been knocked off the train was held not to be admissible, on the ground that such statements were not a part of the *res gestæ*, and not offered to contradict the brakeman. *Hughes v. Louisville & N. R. Co.* (Ky.), 12 Am. & Eng. R. Cas., N. S., 560.

Several Hours after Injury to Brakeman—Declarations of Negligent Engineer.

Declarations of the engineer causing injury to brakeman through negligence in backing train made several hours after the injury was inflicted, were held not admissible against the master, not being a part of the *res gestæ*. *Cincinnati, etc., Ry. Co. v. Cook* (Ky.), 2 R. R. R. 321, 25 Am. & Eng. R. Cas., N. S., 321.

Held Admissible.

A Few Minutes after—Declaration of Motorman as to His Failure to Apply Brakes after Discovering Plaintiff's Peril.

In *Floyd v. Paducah Railway & Light Co.* (Ky.), 23 Am. & Eng. R. Cas., N. S., 167, it was held that the declaration of the motorman at the place of the collision, a few minutes after it occurred, to the effect that he had seen plaintiff for 150 yards, and that he made no effort to apply the brakes until the collision was about to occur, though plaintiff had given no heed to repeated signals of the car's approach, was admissible as a part of the *res gestæ*; the declaration being a verbal fact growing out of the transaction, and a part thereof.

MARYLAND.—*Held Inadmissible.*

Day after Accident.

In *Baltimore & O. R. Co. v. State*, 75 Md. 526, 24 Atl. 14, it was held that a statement of an employee of defendant in an action for an accident, made the day after the accident, was inadmissible as evidence for the plaintiff.

Held Admissible.

Shortly after Accident on Track—Statements of Engineer to Switchman.

In *Baltimore & O. R. Co. v. State*, 19 Am. & Eng. R. Cas. 83, 62 Md. 479, 50 Am. Rep. 233, in an action for running over and killing a person walking upon the track, a switchman was held competent to testify as to statements made to him by the engineer of the train causing the accident, to the effect that a man had been run over and killed, it being part of said engineer's business to inform the switchman of any obstruction on the track, so that he might hold back the following trains until the obstruction was removed. Said switchman was, however, it was held, incompetent to testify as to declarations made to him by the engineer as to the manner of killing and the identity of the person killed, on the ground that such evidence was obnoxious as hearsay evidence.

MASSACHUSETTS.—*Held Inadmissible.*

Immediately after Passenger's Fall—Conductor's Admission.

Where plaintiff was injured by the sudden starting of a horse car from which she was alighting, a remark made to her by the con-

Notes

ductor immediately after she fell, to the effect that he was very sorry, and that it was his fault, was held inadmissible as a part of the *res gestæ*, in *Williamson v. Cambridge R. Co.*, 144 Mass. 148, 10 N. E. 790.

Several Hours after—Admissions of Engineer.

Testimony to show that the engineer, several hours after the accident, made statements tending to show that he was negligent in not avoiding to injure plaintiff after he saw him in a place of danger, was held to be inadmissible, not being a part of the *res gestæ*. *Cole v. New York, etc., R. Co. (Mass.)*, 18 Am. & Eng. R. Cas., N. S., 383.

A Few Days after.

Where a person sues for an injury while on or near the track through the alleged negligence of an engineer, the latter's statements, made a few days after the accident, were held not admissible against the company. *Robinson v. Fitchburg & W. R. Co.*, 7 Gray (Mass.) 92.

Statements of President as to Injured Person's Right to Compensation:

In *Robinson v. Fitchburg & W. R. Co.*, 7 Gray (Mass.) 92, it was held that neither are statements made by the president of the company after the injury sued for, to the effect that he thought the company would give the plaintiff something, or pay him something, admissible against the company.

MICHIGAN.—Held Inadmissible.

Immediately after Accident—Statements of Driver as to Condition of Brake.

It was held in *Wormsdorf v. Detroit City R. Co.*, 75 Mich. 472, 40 Am. & Eng. R. Cas. 271, 42 N. W. 1000, the testimony of a witness that immediately after the accident he heard the driver of the car tell the company superintendent that he reported the car as having a bad brake, had reference to a past transaction and was not admissible as part of the *res gestæ*, nor for the purpose of charging the defendant with notice of the defect.

Short Time after Accident to Passenger—Brakeman's Admissions as to Negligence in Starting Train.

Where the accident happened while a passenger was getting on a car, the declaration of a brakeman made a short time after, that the train should have stopped longer, was held inadmissible, because not a statement explanatory of anything in which he was then engaged, but relating to a past transaction. *M. C. R. Co. v. Coleman*. 28 Mich. 440.

Next Morning—Statement of Another Employee as to Incompetency of Employee Causing Accident.

In *Catlin v. Michigan C. R. Co.*, 66 Mich. 358, 9 West. Rep. 857, 33 N. W. 515, it was held that where an injured employee seeks to make his company liable for an injury received through the alleged incompetency of a fellow servant, what another employee, who was present at the time, said to plaintiff the next morning after the accident, about the incompetency of the servant, is not admissible as an admission binding the company; but where the employee denied making such statement, proof that he did is admissible for the sole purpose of impeaching him.

Held Admissible.

While Engaged in Carrying Out Contract—Statements of Conductor as to Cause of Delay in Transporting Freight.

Where the question, whether the engine employed in drawing a train was of sufficient capacity for the purpose, was material to the issue, the statements made by the conductor, while he was engaged in the defendant's business, in respect to the contract in question, and relating to the delay complained of and in issue in the suit, and while he had control of the train, was held to be competent and proper

Notes

evidence, as a part of the *res gestæ*. *Sisson v. Cleveland & T. R. Co.*, 14 Mich. 489.

Immediately after Train Had Backed and Stopped at Place of Accident—Statements of Engineer.

Statements as to how an accident occurred, made by an engineer of a train that had just thrown plaintiff from the railroad track, and after running a short distance had backed to the scene of the accident, and made immediately after the train stopped at the place of the accident, were held to be a part of the *res gestæ*, and properly admitted to show how the accident occurred. *Keyser v. Chicago & Grand Trunk R. Co. (Mich.)*, 31 Am. & Eng. R. Cas. 400.

After Injured Person Had Been Carried Three Miles to a Station—Engineer's Report.

After an accident to plaintiff he was taken on the train that injured him, and carried three miles to a station. There the engineer made a report of the accident to his superior officer, and stated the circumstances of its occurrence, which report was required by the rules of the defendant company. It was held that the statements then made by the engineer are competent evidence as to the circumstances of the accident. *Keyser v. Chicago & G. T. Ry. Co.*, 66 Mich. 390, 33 N. W. 867.

MISSISSIPPI.—Held Inadmissible.

Prior to Accident—Report of Section Boss as to Condition of Trestle.

The testimony of a son as to declarations of his father, a section boss, that he had before the accident reported the trestle to the company as dangerous, was held to be inadmissible. *Illinois C. R. Co. v. Ruffin (Miss.)*, 3 So. 578.

Seven Minutes after—Admissions of Engineer as to His Intoxication.

It was held error to permit a witness to testify that he heard the engineer, who was in charge of the locomotive when the plaintiff was hurt, say, about seven minutes after the accident, "How in the hell could a drunken man see a drunken man?" Such testimony was inadmissible, either as evidence of a declaration or admission of an employee of the company, or to impeach the engineer as a witness by contradicting him on such immaterial matter. *Vicksburg & M. R. Co. v. McGowan*, 62 Miss. 682.

Day after Passenger Was Required to Pay Extra Fare—Admissions of Ticket Agent.

In the trial of an action for damages for requiring a passenger having no ticket to pay more than the ticket rate, evidence of the declaration of the ticket agent at the station where the passenger had tried to buy a ticket, that he was asleep before and on the arrival of the train on which plaintiff took passage, such declaration having been made on the day following, is incompetent. So held in *Forsee v. Alabama G. S. R. Co.*, 63 Miss. 66.

Days after Passenger's Fall from Train—Admissions of Conductor.

Admissions of a conductor, made days after a passenger falls from his train, that he kicked him off, were held not to be a part of the *res gestæ*, and do not bind the railroad company. So held in *Moore v. Chicago, St. L. & N. O. R. Co.*, 9 Am. & Eng. R. Cas. 401, 59 Miss. 243.

Held Admissible.

Morning after Loss of Baggage by Fire—Conversation with Baggage Agent.

Where the suit was to recover for baggage lost by fire, evidence that the owner went to the station the next morning after the fire, and had a conversation with the baggage agent, who related to him the circumstances of the burning, was held to be competent as part of the *res gestæ*. *Illinois C. R. Co. v. Troustine*, 64 Miss. 834, 2 So. 255.

Notes

MISSOURI.—*Held Inadmissible.***After Train Had Stopped and Trainmen Were near Deceased—Admissions by Engineer.**

In an action brought by a widow against a railroad company for killing her husband, a witness was allowed to testify that after deceased was struck, and after the train was stopped, two of the trainmen, whom he took to be the fireman and the engineer, came up, and one of them said to the other: "If you had stopped the train when I told you, you would not have killed him," and the other replied. "It cannot be helped now; it is too late." It was held error to admit this as evidence. *Adams v. Hannibal & St. Joseph R. R. Co.*, 74 Mo. 553, 7 Am. & Eng. R. Cas. 414.

Eight Minutes after Ejection of Passenger—Remark by Conductor.

In *Barker v. St. Louis, I. M. & S. Ry. Co.*, 126 Mo. 143, 28 S. W. 866, it was held that the declaration of a conductor, made eight or ten minutes after the ejection of a passenger, that the person ejected ought to have broken his neck, was inadmissible as part of the *res gestæ*.

After Motorman Had Alighted to Help Extricate Deceased's Body.

In *Ruschenberg v. Southern Electric R. Co. (Mo.)*, 61 S. W. 626, it was held that a statement made by the motorman of the car by which plaintiff's intestate was killed, after the accident had happened, the car stopped, and the motorman alighted in the street to help extricate deceased's body from the wheels, was not a part of the *res gestæ*, and hence incompetent.

Not Coincident with Killing of Stock—Declarations of Section Foreman.

In an action for double damages for killing stock, it was held that declarations made by the section foreman which are not part of the *res gestæ*, and not coincident with the event in which the suit originated, but a mere narration of a past occurrence, were not admissible in evidence. *Smith v. St. Louis, I. M. & S. R. Co.*, 91 Mo. 58, 3 S. W. 836.

After Freight Has Been Delayed—Statements of Agent.

In *Tuggle v. St. Louis, K. C. & N. R. Co.*, 62 Mo. 425, it was held that a statement by an agent that it was reported that there had been a delay in a freight train, and that, if the facts were as represented, the company ought to and would pay the damages, and requesting the party in interest to investigate the facts, is incompetent and irrelevant in a suit against the road for damages from such delay.

Few Days after—Statement of Conductor.

In action for damages for personal injuries occasioned by the negligence of a railroad company, it was held error to permit a witness to testify that a few days after the injury the conductor who had charge of the train at the time of the injury, said that the bell was not rung, and that the train was running at an excessive rate of speed. *Wengler v. Missouri Pac. R. Co.*, 16 Mo. App. 493.

Several Days after—Statements of Fellow Servant as to Knowledge of Servant's Incompetency.

In *McDermott v. Hannibal & St. J. R. Co.*, 2 Am. & Eng. R. Cas. 85, 73 Mo. 516, 39 Am. Rep. 526, it was held that where an injured employee seeks to hold his company liable for a personal injury received at the hands of another employee, on the ground that he was incompetent, of which fact the company had knowledge, evidence of statements made by the company's roadmaster several days after the accident was not admissible to show that the company had knowledge of the servant's incompetency.

*Held Admissible.***While Assisting Passenger to Alight—Remarks of Brakeman.**

In *Waller v. Hannibal & St. J. R. Co.*, 83 Mo. 608, it was held that where a company is sued for the death of a passenger when getting off a train, evidence of remarks by a brakeman while assisting her to alight, urging her to "hurry up," are admissible as

Notes

part of the *res gestæ*, and as tending to rebut a charge of contributory negligence.

NEW HAMPSHIRE.—*Held Inadmissible.*

Just Prior to Collision—Telegraphic Correspondence between Engineer and Train Dispatcher.

When an irregularity existed in the running of trains, and a collision occurred, and the negligence of the engineer and train dispatcher was alleged as causing it, it was held that the telegraphic correspondence between the two upon the subject, just prior to the collision, was competent as a part of the *res gestæ*, and if not in writing could be proved by a listener. *Deverson v. Eastern R. Co.*, 58 N. H. 129.

NEW JERSEY.—*Held Inadmissible.*

Immediately after Accident—Written Statement by Conductor.

In *North Hudson County R. Co. v. May*, 27 Am. & Eng. R. Cas. 151, 48 N. J. L. 401, 5 Atl. 276, it was held that a written statement made by the conductor of a car, in the line of his duty, giving details of an accident immediately after it happened, was not admissible in evidence, but the facts had to be proved by the conductor or others who witnessed the occurrence; but if the conductor be sworn, he may use the written statement to refresh his memory.

NEW YORK.—*Held Inadmissible.*

Immediately after Passenger's Fall—Remark of Guard.

The remark of a guard on an elevated railway train to a female passenger that "you must be injured," made immediately after her fall, and while he was assisting her to arise, was held to be a mere expression of opinion, not part of the *res gestæ* and not admissible in evidence. *De Soucey v. Manhattan R. Co.*, 39 N. Y. S. R. 79, 15 N. Y. Supp. 108.

Subsequent Trip—Declarations of Arrested Car Driver to Officer.

In *Seipp v. Dry-Dock, E. B. & B. R. Co.*, 61 N. Y. Supp. 409, it was held that the declaration of the driver of a street car to the officer arresting him, on a trip subsequent to that on which it was claimed he ran into plaintiff's wagon, that he was the man he was looking for, from which it could be inferred that he deemed himself at fault, and was seeking to make a voluntary surrender, is inadmissible.

After Car Stopped and Driver Arrested—Statements of Driver to Policeman.

In *Luby v. H. R. R. Co.*, 17 N. Y. 131, the plaintiff had been run against and injured by a car drawn by horses. The car was stopped, and the driver arrested by a policeman. In the trial the policeman was allowed to testify that, upon arresting the driver as he was getting off the car and out of the crowd surrounding it, he asked him why he did not stop the car, to which the driver replied the brake was out of order. This was held error.

Considerable Time after Collision with Wagon—Conversation between Street Car Drivers.

Where a street car company is sued for an injury to plaintiff's wagon, alleged to have been caused by the negligence of the driver, evidence of a conversation between plaintiff and another driver, a considerable time after the accident, was held not to be not admissible as part of the *res gestæ*. *McCabe v. Dry Dock, E. B. & B. R. Co.*, 15 Daly 504, 8 N. Y. Supp. 336, 28 N. Y. S. R. 879.

After Leaving Service—Admissions of Engineer.

An admission of an engineer concerning an act while he was in the company's service, made after the transaction, and after he has left the service, was held not admissible to bind the company. *Card v. New York H. R. Co.*, 50 Barb. (N. Y.) 639.

Held Admissible.

Just before, at Time of, and Subsequent—Statement of Workman Causing Injury to Property by Removing Cap from Water Pipe.

A sewer pipe, which passed under the floor of a basement, became

Notes

obstructed, and defendant's employees, while taking it up, noticed that water was leaking from a pipe extending from the roof to the floor. Defendant's attention was directed to the leak by one of his men, and he told them to pay no attention to it. The pipe had no connection with the one defendant had been employed to attend to. When defendant went away, one of the men took the cap off the elbow, and water standing in the pipe rushed out, and injured plaintiff's goods. It was held statements of the servants just before, at the time of, and subsequent to, the removal of the cap, tending to show their purpose, were admissible as *res gestæ*. *P. Cox Shoe Mfg. Co. v. Gorsline*, 71 N. Y. Supp. 619.

While Constructing Defective Embankment—Declarations of Engineer.

Where a company was sued for damages resulting from an embankment washing away, the declarations made by the company's engineer while actually engaged upon the work, tending to show that it was not properly constructed, were held to be admissible as part of the *res gestæ*. *Brehm v. Great Western R. Co.*, 34 Barb. (N. Y.) 256.

At Moment of Accident—Brutal Remark of Brakeman.

In an action by a husband to recover for loss of services of his wife, who was injured while boarding one of defendant's trains, she was allowed to state that, at the moment of the accident and her exclamation of pain, the brakeman said that she could go to hell. Defendant's counsel objected to the question as incompetent, improper, hearsay, and immaterial, and excepted when overruled. It was held that the evidence was material and competent as a part of the *res gestæ*. *Butler v. Manhattan R. Co.*, 4 Misc. (N. Y.) 401, affirming 3 Misc. 453, 52 N. Y. S. R. 498; distinguishing *Sherman v. Delaware, L. & W. R. Co.*, 106 N. Y. 542; quoting *Tilson v. Terwilliger*, 56 N. Y. 273.

At Time of Accident—Declarations of Negligent Guard Causing Injury to Elevated Railway Passenger.

Where a female passenger sues an elevated road for personal injuries, alleged to have been caused by the rude and negligent act of a guard, declarations of the guard at the time of the accident that he was "sorry he had done it," are competent for plaintiff as tending to explain the nature of the act complained of. So held in *Keotter v. Manhattan R. Co.*, 36 N. Y. S. R. 611, 59 Hun 623, 13 N. Y. Supp. 458.

Delay—Declarations of Agent to Shipper.

In *McCotter v. Hooker*, 8 N. Y. 497, it was held that declarations of the agent of a carrier at the shipping point as to the reason for delay in transporting property are admissible as part of the *res gestæ*.

Freight Agent's Answers to Inquiries about Lost Baggage.

In *Curtis v. Avon, G. & M. M. R. Co.*, 49 Barb. (N. Y.) 148, it was held that a local freight agent is the proper person to enquire of as to baggage sent to his station, and his answers to such inquiries as to a loss is admissible as part of the *res gestæ*.

NORTH CAROLINA.—Held Inadmissible.**Length of Time Uncertain—Description of Plaintiff's Injuries Made to Conductor.**

In an action against a railroad company for personal injuries sustained by plaintiff in being thrown from her seat in a caboose by the sudden backing of the engine against the train, testimony of the conductor of the train whether any one told him when he went into the car how plaintiff was hurt was held not to be admissible as part of the *res gestæ*, where he was not present at the time of the injury, and did not know how long it was afterwards before he went into the caboose, and did not know whether plaintiff heard the statement then made. *Butler v. South Carolina, etc., R. Co.*, 130 N. Car. 15, 40 S. E. 770, 2 R. R. R. 114, 25 Am. & Eng. R. Cas., N. S., 114.

Notes

SOUTH CAROLINA.—*Held Inadmissible.***Day after Burning of Cotton at Depot—Declaration of Agent as to Liability of Company.**

At the trial of an action to recover for the loss of cotton alleged to have been delivered at a depot of defendants, and burned the same day, a declaration of the agent made the next day, that "the railroad company was responsible for the cotton," was received as evidence against defendant. It was held error, but no ground for a new trial, the declaration being a mere expression of opinion and irrelevant to the issues. *Patterson v. South Carolina R. Co.*, 4 S. Car. 135.

*Held Admissible.***During the Loading of Cattle—Declarations of Engineer Showing Malice.**

In *Crawford v. Southern Ry. Co.* (S. Car.), 19 Am. & Eng. R. Cas., N. S., 17, it was held in an action against a railroad company founded upon the loss of and injury to cattle while being carried over defendant's railroad, that evidence was admissible to show that while the cattle were being loaded on the train the engineer of the train said "he would kill those damn cattle before he got to Charlotte," as the declarations of an agent, within the scope of his agency, are the declarations of his principal, and a principal is liable for the wilful or malicious conduct of the agent within the scope of the agency.

TENNESSEE.—*Held Inadmissible.***Half Hour after—Report of Engineer.**

A report made by an engineer to his chief a half hour after an accident, detailing the manner and cause of it, is not admissible in favor of the company as part of the *res gestæ*. *Nashville & C. R. Co. v. Messino*, 1 Sneed (Tenn.) 220.

*Held Admissible.***While Running Train—Admissions of Engineer.**

Where a company was sued for a personal injury, alleged to have been caused by the reckless running of a train, evidence that the engineer in charge was heard to say, either before or after the accident, that he would make his engine make her time or blow her to hell, was held admissible against the company, for the purpose of showing rashness or unfitness of the engineer, and as tending to show the cause of the disaster. *Nashville & C. R. Co. v. Messino*, 1 Sneed (Tenn.) 220.

TEXAS.—*Held Inadmissible.***A Few Minutes after Explosion of Boiler—Defects—Statements of Engineer.**

In action for damages caused by the explosion of a boiler, the statements made by the engineer a few minutes after the explosion, tending to show that the boiler was defective, were held not admissible as part of the *res gestæ*. *Houston & T. C. R. Co. v. Hicks*, 2 Tex. Unrep. Cas. 437.

Soon after Wreck—Statements of Conductor as to Cause.

In *San Antonio & A. P. R. Co. v. Robinson*, 73 Tex. 277, 11 S. W. 327, it was held that a statement by a railway conductor, made after a wreck of the train under his control, with regard to the cause of the wreck, is not competent; it is not *res gestæ*.

Fifteen Minutes after Horse Stepped into Hole in Bridge—Declarations of Trainmen.

In an action for personal injuries by a traveler, due to his horse stepping into a hole in a bridge over a culvert at a railway crossing, it was held that evidence of the declarations of the trainmen on a train passing about fifteen minutes after the accident, that some one had put timber on the track, was not a part of the *res gestæ*, but mere hearsay. *Denison & P. S. Ry. Co. v. Foster* (Tex. Civ. App.), 3 R. R. R. 577, 26 Am. & Eng. R. Cas., N. S., 577.

Notes

Some Days after Sale of Tickets—Declarations of Ticket Agent.

In *St. Louis, A. & T. R. Co. v. Mackie*, 37 Am. & Eng. R. Cas. 94, 71 Tex. 491, 1 L. R. A. 667, 9 S. W. 451, it was held that the declarations of a ticket agent made some days after the sale of the tickets out of which the plaintiff's right of action arose, are not admissible as part of the *res gestæ*.

Held Admissible.

Immediately after Blowing Whistle—Engineer's Statement That He Had Not Seen Horse.

Declaration of engineer, where his attention was called to a runaway horse, after blowing signal for crossing, that he had not seen the horse before he blew the whistle, was held to be admissible as part of the *res gestæ*. *Gulf, C. & S. F. Ry. Co. v. Milner* (Tex. Civ. App.), 1 R. R. R. 607, 24 Am. & Eng. R. Cas., N. S., 607.

UTAH.—*Held Admissible.*

Immediately after Collision with Wagon—Statement of Switchman to Plaintiff.

In jumping from a wagon struck by a train of cars, plaintiff was injured, and immediately after, the train having moved along, plaintiff walked across the track, and said to the switchman, "Who is to blame for this?" who answered, "It was the engineer. I told him to stop, and you to cross." It was held that this conversation was admissible as part of the *res gestæ* but not as an admission of the company. *Wilson v. Southern Pac. Co. (Utah)*, 4 Am. & Eng. R. Cas., N. S., 40.

VIRGINIA.—*Held Inadmissible.*

Some Time Prior and Some Time After—Statements of Company's Agents as to Cause of Derailment.

In *Virginia & T. R. Co. v. Sayers*, 26 Gratt. (Va.) 328, it was held that the statements of agents of a company, as to the condition of the brakes on the cars, or as to the condition of the road at the place where the accident occurred, made some time before and some time after the accident, and at some miles from the place, are not a part of the *res gestæ* and are not competent evidence for a plaintiff in a suit against the company, to prove negligence in the company.

WEST VIRGINIA.—*Held Inadmissible.*

Hour after Killing of Cattle—Statements of Engineer.

The statement of the engineer in charge of the engine which killed the cattle, made an hour after the accident and several hundred yards from where it occurred, though made while he was on the engine, which was off the track, having been thrown from the track as one of the results of the accident, were held not competent evidence for the plaintiff in a suit against the company to prove negligence in the company, as they are no part of the *res gestæ*. *Hawker v. B. & O. R. R. Co.*, 15 W. Va. 628.

Held Admissible.

While Car Was Still on Body of Child—Declarations of Motorman.

A declaration by the motorman running an electric car, made while the car was still on the body of one it had run down, that "I saw the child, but thought I could pass it;" or, "This is a terrible thing, I saw the child, but thought I could run past it," was held to be admissible in evidence as a part of the *res gestæ* in an action for the injury. *Sample v. Consolidated Light & Ry. Co.*, 50 W. Va. 472, 40 S. E. 597, 1 R. R. R. 380, 24 Am. & Eng. R. Cas., N. S., 380.

WISCONSIN.—*Held Inadmissible.*

After Sale of Ticket—Declarations of Ticket Agent.

Where a passenger sued for being ejected from a train, the conductor claiming that his ticket did not entitle him to ride to the place where he desired to go, evidence of the declarations of the ticket agent, made after the ticket was sold, was held not admissible against the company, not being a part of the *res gestæ*. *Milwaukee & M. R. Co. v. Finney*, 10 Wis. 388.

*Moody v. Springfield St. Ry. Co**Held Admissible.***Immediately after Ejection of Passenger—Conversation between Plaintiff and Brakeman.**

Where a passenger sued for being unlawfully ejected from a train by the conductor and brakeman, a conversation between the plaintiff and the brakeman immediately after he is removed from the car, and yet while on the car platform, tending to illustrate why he was removed, was held to be admissible as part of the *res gestæ*. *Bass v. Chicago & N. W. R. Co.*, 42 Wis. 654.

Immediately upon Stopping Train—Statements of Engineer Tending to Show Lack of Care for Safety of Persons Seen on Track.

In *Hooker v. Chicago, M. & St. P. R. Co.*, 41 Am. & Eng. R. Cas. 498, 76 Wis. 542, 44 N. W. 1085, it was held that the statement of the engineer, made immediately upon stopping his train after running over certain persons, and while going to the place of the accident, that "they had whistled enough for them" was admissible as part of the *res gestæ*.

Few Minutes after—Statements of Engineer as to Cause of Crossing Accident.

In *Hermes v. Chicago & N. W. R. Co.*, 80 Wis. 590, 50 N. W. 584, that an action for the killing of a child by a train at a highway crossing, it was held that what the engineer said about the accident a few minutes after it happened was admissible in evidence as part of the *res gestæ*; and that it was error to exclude a question as to whether a witness heard the engineer say anything at that time as to how it came to run over the child, although it was not stated for what purpose the question was asked, and it did not appear how material the answer would have been.

*ENGLAND.—Held Inadmissible.***Statements of Night Inspector as to Cause of Delay in Carriage of Live Stock.**

In *Great Western R. Co. v. Willis* (Eng.), 18 C. B. N. S. 748, 34 L. J. C. P. 195, 12 L. T. 349, it was held that the admissions of a night inspector having charge of a train at an intermediate station as to the cause of delay in the carriage of cattle are not admissible against the company in an action against it for failure to deliver such cattle within a reasonable time. Such an employee has no authority to bind the company by such admissions.

A. R. Y.

MOODY v. SPRINGFIELD ST. RY. CO.

(*Supreme Judicial Court of Massachusetts, Hampden, Oct. 30, 1902.*)

[65 N. E. Rep. 29.]

Passengers—Riding on Running Board.

While there were vacant seats in a street car at the place where plaintiff boarded it, he passed along the outside running board on the side next to another track, while the car was in motion, and was struck by a passing car: *held*, that plaintiff had assumed the risk.

Same—Same—Evidence.

A passenger on a street car, while passing along the outside running board, was injured by being struck by a passing car. In an action for the injury, he offered to show that on previous occasions he had been on the running board next to passing cars, and not been injured: *held* proper to exclude such evidence, inasmuch as it had no tendency to show that plaintiff did not assume the risk.

Same—Same—Same.

A passenger on a street car, while passing along the outside running board, was injured by being struck by a passing car. In an action for the injury, he offered to show that the car which struck him was one of several new ones, which were of greater width than

Moody v. Springfield St. Ry. Co

the other cars: *held*, that the evidence was properly excluded, because it had no tendency to show that plaintiff did not assume the risk.

Same—Same—Same.

It was proper to exclude evidence that a rail was used on the inside of new cars purchased by defendant; the fact that it was on the new cars, and not on the old ones, being no proof of negligence.

Exceptions from superior court, Hampden county; Elisha B. Maynard, Judge.

Action by Walter S. Moody against the Springfield Street Railway Company. From a judgment for defendant, plaintiff brings exceptions. Affirmed.

J. D. Carroll and W. H. McClintock, for plaintiff.

Brooks & Hamilton and Jonathan Barnes, for defendant.

MORTON, J. This is an action of tort for personal injuries sustained by the plaintiff while a passenger upon one of the defendant's cars. At the conclusion of the plaintiff's evidence the court directed a verdict for the defendant, and the case is here upon exceptions by the plaintiff to this ruling and direction, and to the exclusion of certain evidence.

The plaintiff started with some friends from his home in Springfield for the Union Station. They stopped one of the defendant's cars going in that direction, and the plaintiff's friends got on board. The plaintiff walked towards the rear end of the car, and, getting onto the running board, paid to the conductor the fares for his friends and himself. The conductor started the car at or about the time that the fares were paid, and the plaintiff, desiring to take a seat with his friends, moved along the running board, with the aid of the grab handles, towards them. While in this position he was struck by an approaching car on the other track, and received the injuries complained of. The plaintiff testified that no warning of the approaching car was given by a gong or signal of any kind, and that the first he knew of the approach of the car was that he was struck by it. He also testified that the conductor said nothing to him as he started forward along the running board, or at any time before the accident. The accident occurred June 2, 1901, about half past 5 in the afternoon; and for some distance from the place of the accident the tracks were straight in the direction of the approaching car, though just how far was not clear. The plaintiff offered to show that prior to June 2d he had been on the running boards of cars in Springfield of the defendant company on the same side on which other cars passed, and that the cars had passed each other without accident to any one. The court excluded the testimony, and the plaintiff excepted. There was testimony tending to show that the defendant company bought some new cars in the spring of 1901, and that the car which struck the plaintiff was one of these new cars. The plaintiff offered to show that a rail was used upon the inside of these cars, and that down to the time when these cars had

Moody v. Springfield St. Ry. Co

been purchased and put in operation, all the cars in Springfield had been of the same width, and that no car had been wider than that on which the plaintiff was when injured. The court excluded this evidence, and the plaintiff excepted.

We think that the rulings were right. Without undertaking to say that in no case would a passenger upon an electric street car, who was injured by being struck by a passing car while attempting to pass along the running board, while the car on which he was was in motion, from one part of the car to another, on the side on which cars were liable to pass, be entitled to recover, we think that in the present case there was nothing to justify the plaintiff, as matter of law, in so doing, and that he must be held to have assumed the risk, if not to have been wanting in due care. Generally speaking, it is the duty of a passenger who boards an electric car to place himself in a position of safety. It is not necessarily negligent for him to stand on the platform, and there may be circumstances—such as the crowded condition of the car—which justify him in standing or being upon the running board. *Cummings v. Railway Co.*, 166 Mass. 220, 44 N. E. 126; *Powers v. City of Boston*, 154 Mass. 60, 27 N. E. 995. But manifestly a position on the running board of a car in motion, on the side on which other cars are liable to pass, is one of danger; and we think that a passenger who boards an electric car in which there are plenty of vacant seats at the place where he boards it, and who chooses, for his own accommodation and pleasure, to pass along the running board, while the car is in motion, to another part of the car, on the side on which other cars are liable to pass, must be held to have assumed the risk of contact with and injury from cars passing on the neighboring track. See *Coleman v. Railroad Co.*, 114 N. Y. 609, 21 N. E. 1064; *Woodroffe v. Railway Co. (Pa.)* 51 Atl. 324; *Sharkey v. Lake Roland Railway Co.*, 84 Md. 163, 35 Atl. 1130. The evidence that was offered that the plaintiff had been on previous occasions on the running board on the side next to passing cars, and had not been injured, was rightly excluded. It had no tendency to show that he did not assume the risk, or that he was in the exercise of due care. Whether he was in the exercise of due care depended not on what he had himself done on previous occasions, but on what persons of ordinary prudence would do under the same circumstances. The exclusion of the testimony that was offered as to the width of the cars did the plaintiff no harm. It would have had no tendency to show that he did not assume the risk, or that he was in the exercise of due care. The testimony in regard to the rail was also rightly excluded. The obvious purpose of it was to prevent passengers from getting onto or off from the car on that side. The fact that it was on the new cars, and not on the old ones, was no proof of negligence on the part of the defendant.

Exceptions overruled.

CITY TRANSFER CO. v. DRAPER.*(Supreme Court of Georgia, July 19, 1902.)*

[42 S. E. Rep. 221.]

Loss of Passenger's Baggage—Issues.

If a transfer company, for a given fare charged and paid, undertakes to transport a passenger and hand baggage, it is, in a contest over the company's liability for the loss of the baggage, immaterial whether or not it was the general custom of the company simply to carry passengers, and not to hold itself out as offering to carry their baggage without extra compensation.

Continuance.

In view of the facts brought to light on the trial of this case, the denial of the defendant's motion to continue affords no cause for ordering a new trial.

Same—Degree of Care—Harmless Error.

There being ample evidence to show that the plaintiff's hand baggage, for the loss of which the action was brought, had been by him intrusted to the exclusive custody and control of the defendant, which was an incorporated city transfer company, engaged in the transportation for hire of passengers and their baggage, and the evidence demanding a finding that he was not guilty of any negligence, and that the defendant company did not exercise ordinary diligence in taking care of his baggage, a charge to the effect that the liability of the defendant was that of an insurer, even if inapplicable (as to which no ruling is now made), was not harmful to the company.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Eve, Judge.

Action by R. D. Draper against the City Transfer Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Boykin Wright and Geo. T. Jackson, for plaintiff in error.
Wm. H. Barrett, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

CRARY v. LEHIGH VAL. R. CO.*(Supreme Court of Pennsylvania, Oct. 13, 1902.)*

[53 Atl. Rep. 363.]

Carriers—Excursion Ticket—Reduced Rate—Waiver of Common-Law Liability.

A passenger bought from a railroad company an excursion ticket at a reduced rate, with indorsement that the person accepting it assumes all risk of accident and damage: *held*, that the acceptance of the ticket was a waiver of the common-law rule making the carrier liable for the passenger's safety; and he must affirmatively prove negligence on the part of the carrier, and cannot avail himself of the presumption of negligence arising in favor of the passenger where an injury occurs.

Appeal from court of common pleas, Luzerne county.

Action by Erasmus D. Crary against the Lehigh Valley

Crary v. Lehigh Val. R. Co

Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

July 4, 1896, plaintiff purchased a reduced rate excursion ticket between Wilkes-Barre and New York, on which was indorsed an assumption of risk by the passenger. While he was seated next to the window in a car, the door of a freight car on a passing train became loose, and, in scraping along the car, came through the window where plaintiff sat, and caused the injury for which suit was brought. Error assigned was in giving binding instructions for defendant.

Argued before McCOLLUM, C. J., and MITCHELL, FELL, BROWN, and MESTREZAT, JJ.

William S. McLean, George R. McLean, and William R. Gibbons, for appellant.

H. W. Palmer and Woodward, Darling & Woodward, for appellee.

BROWN, J. On July 3, 1896, the plaintiff purchased at a reduced rate from the Lehigh Valley Railroad Company a ticket designated an "employee's excursion ticket." It was for a passage from Wilkes-Barre to New York and return. Upon it there was the following, among other conditions: "The person accepting and using this ticket thereby assumes all risk of accident and damage to person or property." There was nothing on the ticket requiring that it be signed by the passenger, to make the conditions upon which it was issued binding upon him, but it was accepted by him with the indorsement plainly stamped on it that all of the conditions imposed by the company were "fully understood and agreed to." The evidence of the assent of the appellant to the conditions is therefore as complete as if he had signed the ticket. *Railroad Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 260; *Wells v. Railroad Co.*, 24 N. Y. 181; *Fonseca v. Steamship Co.*, 153 Mass. 553, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660. By the purchase and acceptance of the ticket at a reduced rate, with the condition indorsed on it that the appellant, in using it, would assume all risks of accident and damage to his person, there was an agreement between him and the railroad company that the common-law rule making the common carrier an insurer of his safety should be set aside, and that he would be bound by the agreement between them as the law defining the duty and liability of the appellee in carrying him to New York and bringing him back. *Farnham v. Railroad Co.*, 55 Pa. 53. That such an agreement may be made has long since been settled. *Atwood v. Transportation Co.*, 9 Watts, 87, 34 Am. Dec. 503; *Laing v. Colder*, 8 Pa. 479, 49 Am. Dec. 533; *Powell v. Railroad Co.*, 32 Pa. 414, 75 Am. Dec. 564; *Express Co. v. Sands*, 55 Pa. 140; *Express Co. v. Sharpless*, 77 Pa. 517; *Railroad Co. v. Miller*, 87 Pa. 395; *Clyde v. Hubbard*, 88 Pa. 358; *Buck v. Railroad Co.*, 150 Pa. 170, 24 Atl. 678, 30 Am. St. Rep. 800. But it is

Crary v. Lehigh Val. R. Co

equally well settled that by such an agreement the common carrier cannot relieve itself from liability for its negligence. "The reason for this qualification of the power to limit liability rests on public policy. At common law, if property was lost or injured while in the hands of the carrier, the burden of proof was on the carrier to show the existence of such circumstances as were sufficient to excuse him from liability. Such is still the general rule, but, when a special contract is entered into between the shipper and the carrier, the contract takes the place of the common-law rule, and fixes the liability of the carrier." *Railroad Co. v. Raiordon*, 119 Pa. 577, 13 Atl. 324, 4 Am. St. Rep. 670. The liability of the common carrier being by such an agreement confined to its negligence, there is no reason why the ordinary rule, that negligence is not to be presumed, but must be proved, should not apply. The agreement of the parties is that there shall be no liability at all by the common carrier for injury to the passenger, but, on grounds of public policy, the law says to the passenger that he cannot contract to relieve the carrier from negligence, and the carrier cannot, for any consideration, be absolved from its duty to exercise proper care in carrying its passengers. If, however, injury results from the negligence of the common carrier to one with whom such an agreement is made, the injured party, having taken himself out of the protection of the common law, which makes the railroad company that carries him an insurer of his safety, and which, in case of accident resulting in injury, is presumed to have been negligent, must show affirmatively, as in all other cases of negligence, the specific negligence complained of. The law, in the face of his agreement to the contrary gives him the protection against negligence; but when so given to him against his will, and he afterwards calls for it, he ought in good conscience, to be compelled to show that negligence existed, and this is the law's requirement, established by authority. "A contract limiting their liability as carriers does not relieve them from ordinary care in the performance of their duty, and the most that it can do is to relieve them from those conclusive presumptions of negligence which arise when the accident is not inevitable, even by the highest care, and to require that negligence be actually proved against them." *Goldey v. Railroad Co.*, 30 Pa. 242, 72 Am. Dec. 703. "The respondents having succeeded in restricting their liability as carriers by the special agreement, the burden of proving that the loss was occasioned by the want of due care or by gross negligence lies on the libelants, which would be otherwise in the absence of any such restriction." *New Jersey Steam Nav. Co. v. Merchants' Bank of Boston*, 6 How. 344, 12 L. Ed. 465. The same principle is laid down in *Marsh v. Horne*, 5 Barn. & C. 322; *Farnham v. Railroad Co.*, *supra*; and *Patterson v. Clyde*, 67 Pa. 500.

We are not to be understood as holding that there may not

Morgan's La. & T. R. & S. S. Co. v. R. Com. of Louisiana

be cases in which the proof of the accident carries with it the presumption of the common carrier's negligence. Such, by way of illustration, was the case of *Railroad Co. v. Bausch* (Pa.) 7 Atl. 731, where the plaintiff was seriously injured, while riding on a train of the defendant company, in consequence of a collision between that train and another moving in the opposite direction upon the same track. Another illustration can be found in *Railroad Co. v. O'Hara*, 3 Penny. 190, where the train on which the passenger was riding was run into by a special train, the engine of which plunged into the rear coach. In these two cases, and others that might be cited, the only inference to be drawn from the accident itself was that the common carrier had been negligent. But the present is not such a case, for the mere proof of the accident does not carry with it the presumption or inference of the appellee's negligence. The falling of the door of the freight car may have been due to the sudden breaking of a lock or hinge, of a defect in which the company may have known nothing; the bricks with which the car was loaded may have been jolted and thrown against the door by some sudden, but unavoidable, violent motion of the train, causing the door to break; or the door may have fallen from other causes which may have existed, but of which the company had neither actual nor constructive notice, nor ought reasonably to have been aware of; and it could not, therefore, as the learned judge below properly held, have been presumed to be guilty of negligence against this specially contracting passenger. The burden was upon him to submit some proof of it, and, in the absence of any, the jury ought not to have been allowed to guess that the appellee had been negligent.

Judgment affirmed.

MORGAN'S LOUISIANA & T. R. & S. S. Co. *et al.* v. RAILROAD COMMISSION OF LOUISIANA.

(*Supreme Court of Louisiana, Dec. 15, 1902.*)

[33 So. Rep. 214.]

Railroad Commission—Duties and Powers.*

The railroad commission is an administrative board created by the state for carrying into effect the will of the state as expressed by its legislation. Its authority and duty are not limited to matters concerning public safety or health, but extend to matters concerning public comfort and convenience. In the consideration of the latter subject, the number of persons who may be concerned or interested at some particular point enters as an important factor.

Same—Erection of Depot.

The position of the railroads that the point selected by the railroad commission for the erection of a depot as being for the best interest of the people along the line of road should also be one at which the

*As to the powers of railroad commissions, see *Minneapolis, etc., R. Co. v. State of Minnesota*, 4 R. R. R. 650, 27 Am. & Eng. R. Cas., N. S., 650.

Morgan's La. & T. R. & S. S. Co. v. R. Com. of Louisiana

business of the road is remunerative is not supported by authority, nor is it sustainable on principle, in view of the theory upon which the state grants franchises and corporate rights. Regard is to be had to the ability of the railroad, in view of its entire business, to establish and maintain the depot, and not by the situation at some special locality.

Same—Jurisdiction of Supreme Court.

In disposing of matters of dispute between the railroads of the state and the railroad commission, the supreme court acts as a judicial tribunal, not as a mere administrative board supervisory of the acts of the railroad commission.

(Syllabus by the Court.)

Appeal from judicial district court, parish of East Baton Rouge; H. F. Brunot, Judge.

Action by Morgan's Louisiana & Texas Railroad & Steamship Company and the Southern Pacific Company against the railroad commission of Louisiana. Judgment for defendant, and the plaintiffs appeal. Affirmed.

Thomas J. Kernan and Denegre, Blair & Denegre, for appellants.

Walter Guion, Atty. Gen. (Lewis Guion, of counsel), for appellee.

Statement of the Case.

NICHOLLS, C. J. The plaintiffs alleged: That the railroad commission is a corporation organized and existing under the constitution and laws of the state of Louisiana, and domiciled in the parish of East Baton Rouge, and the said commission derives any and all authority, power, and character as such commission, in respect to the matters complained of, from and under articles 285 to 289, both inclusive, of the constitution of this state, of the year 1898.

That petition of the Southern Pacific Company is a railroad corporation. That it is, and has been since the year 1884, engaged in operating lines of railway in the state of Louisiana, being:

(1) The line of railway known as Morgan's Louisiana & Texas Railroad & Steamship Company, which begins at the city of New Orleans, and runs through the parishes of Jefferson, St. Charles, Lafourche, Terrebonne, Assumption, St. Mary, Iberia, and St. Martin, to the town of Lafayette, in Lafayette parish; thence through the parishes of St. Landry and Avoyelles to Cheneyville, in the parish of Rapides, together with branch lines from its main line, commonly known as the Houma, Lafourche & Thibodaux, Salt Mine, St. Martinsville & Cypremont Branches, and which said railroad reaches the city of New Orleans on the left bank of the Mississippi river by means of a ferry transfer connecting its terminus on the right bank of said river with its wharves and delivery depots on the left bank of said river, and that the total length of the railways of said Morgan Company, exclusive of side tracks, amounts to 282 miles, or thereabouts, all located

Morgan's La. & T. R. & S. S. Co. v. R. Com. of Louisiana

within the limits of the state of Louisiana, and that said railways belong to petitioner, Morgan's Louisiana & Texas Railroad & Steamship Company.

(2) A line of railroad beginning at Lafayette, in the parish of Lafayette, and running to the border line of the state of Texas, together with the branches running from Midland to Eunice and from Midland to Gueydan,—a corporation organized and existing under the laws of the state of Louisiana.

(3) A line of railroad beginning at Salt Mine Junction, in the parish of Iberia, and running to the town of Abbeville, in Vermilion parish, belonging to the Iberia & Vermilion Railroad Company, a corporation organized and existing under the laws of the state of Louisiana.

That on the line of railroad owned by said Morgan Company, and operated by said Southern Pacific Company, is and has long been situated the town of Morgan City, which is located on the east bank of Berwick Bay, an estuary of the Gulf of Mexico; that said line of railroad passes through Morgan City in a direction approximately at right angles to Berwick Bay, and crossing said bay at a point where it is less than 700 yards wide enters and passes through an unincorporated settlement of about 175 families known as "Berwick," which is in constant communication with Morgan City by means of a ferry across said estuary, and constitutes practically a suburb of Morgan City.

That petitioners have long operated and owned at said Morgan City an important station, situated upon or near the shore of Berwick Bay, fully equipped with waiting rooms, platforms, switches, and switch engines, and all other appliances, and all officials and employees necessary for the carrying on of a large freight and passenger business. Said station and its equipment are and have always been sufficient for the prompt and proper handling of all passengers and freight traveling or consigned to or from Morgan City, or from any of its suburbs or surrounding country, including Berwick City, and no complaint has ever been made thereof to said commission or otherwise. That the inhabitants of Berwick have easy communication with Morgan City by means of a steam ferry running between Morgan City and said suburb, parallel to said railroad, at about 100 yards distant therefrom, and across a distance of less than 700 yards; said ferry being easily reached at both ends from both the stations hereinafter referred to and all other points within Morgan City and its suburbs by the public streets; and the inhabitants of Berwick have thus better facilities for reaching a regular railroad station for freight and passengers, thoroughly equipped and maintained with all necessary employees and appliances, than have or can have the average population along the lines of other roads of petitioners, or of any other railroad similarly situated in the United States, and their facilities are equal to those of any other settlement similarly situated in the United States.

Morgan's La. & T. R. & S. S. Co. v. R. Com. of Louisiana

That nevertheless petitioners have caused to be placed at Berwick, and have for a long time maintained at that point, a suitable passenger station, consisting of white and colored waiting rooms, and have had their passenger trains Nos. 5 and 6 stop there daily for passengers, the amount of travel to and from Berwick not justifying the stopping of other trains at that point; and passengers there boarding said trains are charged only the rates that would be charged if tickets were sold by an agent there. Petitioners have also arranged that freight for Berwick, when so desired, shall be unloaded at Morgan City Station, and there carefully checked, and then placed in a freight car and sent across the bayou to Berwick platform daily by the Morgan City switch engine; the freight in said car being distributed in separate piles for the various consignees, and being thus fully protected from the weather; and this method has long been in operation, with no loss or injury or inconvenience of any kind to the population of Berwick. That said platform at Berwick is situated on heavy grades, and that it would be both expensive and detrimental to the freight-train service for freight trains to stop and load or unload freight at that point, resulting in delays and increased expense and risk both to freight destined to Berwick, and to all other freight handled by petitioners.

That stations with far less facilities and accommodations, known as "flag stations," are and long have been common throughout the United States, and throughout the state of Louisiana, at points where the business is more remunerative and larger than at Berwick, and have been recognized as proper and reasonable by many courts, and especially by the supreme court of Louisiana. That all station facilities, not only at Berwick, but throughout petitioners' lines have been properly fixed and established by petitioners, with due regard to all financial and commercial conditions and laws which enter into, affect, or control the operation and management of railroads, both in the state of Louisiana and elsewhere, and which have been recognized as fair, just, and proper by all persons, commissioners, courts, and bodies expert in or intrusted with such matters; and such facilities are properly adjusted with due regard to the earnings and expenses of operation, the revenue from rates, the amount of passenger and freight business, the value of the commodities transported, the volume of traffic, the amount of net earnings of the properties concerned, the original the annual cost of facilities, including the salaries of employees, and operating expenses, taxes, and fixed charges and capitalization of same, and all other circumstances fairly and justly affecting the question.

That said railroad commission did on August 2, 1900, issue an order decreeing that the Southern Pacific Company should erect within 60 days from the date of said order "a suitable station at Berwick, with a floor space of not less than 500

square feet," and that the said company should provide a representative or agent at that point; thus decreeing that said company shall provide a second station and agent less than 700 yards from a larger station, properly provided with all necessary equipment and employees.

Now petitioners show that said order of said commission is unfair, unjust, unreasonable, and in conflict with the rules hereinbefore stated, as observed with regard to the furnishing of railroad facilities, in the following particulars:

(1) That said facilities thus sought to be enforced are much greater than customary facilities afforded under similar conditions by other railroads, either in Louisiana or in other states of the Union.

(2) That the facilities thus sought to be enforced are not justified or demanded by the necessities and conditions of the traffic affected thereby. That the existing facilities are fair and reasonable in themselves.

(3) That the order of said commission is further unjust and unreasonable for this: that, without any justifying necessity, it imposes upon petitioners a certain large annual loss of revenue; and the necessity of making said expenditures not only for the construction and maintenance of said station house, but the salary of said agent, will involve to petitioners a large annual loss.

(4) That the said order of said commission is further unreasonable in this: that it discriminates in favor of said Berwick over all other settlements similarly situated in Louisiana, by prescribing facilities greater than can possibly be, or by order of said commission are to be, or are, customarily furnished to other communities similarly situated.

(5) That the said order is also unreasonable because the facilities required to be furnished are such that the rates upon freight and passengers to and from Berwick, either as fixed by order of this commission, or such as might be charged consistently with the movement of such business, would not be compensatory, and petitioners would not receive from said business sufficient to pay the cost of movement, and the share which such business would bear of the fixed charges and of the expenses occasioned by such order, and of the unreasonable return upon the capital invested in the railroads transporting the same. That the carrying out of said order will be, in effect, the taking of property of petitioners to an extent greatly in excess of \$2,000, without due process of law, and without adequate compensation being previously made, contrary to and in violation of section 1 of article 14 of the amendment to the constitution of the United States, and of articles 2 and 167 of the constitution of the state of Louisiana for the year 1898. That said increased facilities cannot and will not cause any such compensatory increase in the business of petitioners as will in any degree make up for the loss of revenue caused thereby; and said articles and provisions

Morgan's La. & T. R. & S. S. Co. v. R. Com. of Louisiana

of the said constitutions are expressly pleaded as causes of nullity and invalidity of the order of said commission.

Further, that their right of resort to the courts for relief hereinafter prayed for is reserved to them not only under the general provisions of the constitution and laws of the state of Louisiana, but expressly in and by the articles of said constitution establishing said railroad commission.

Plaintiffs prayed that the order of the railroad commission which they complained of should be decreed to be unjust, unreasonable, null, and void, and of no effect, and further prayed for all further and equitable orders in the premises and for general relief.

The defendant first pleaded a general denial. It then admitted that on the 2d of August, 1900, after a full hearing of the whole subject-matter, an order was granted by the railroad commission of Louisiana, defendant herein, directing that plaintiffs erect within 60 days from that date a suitable freight depot at Berwick, with a floor space of not less than 500 square feet, and that in addition a representative or agent of said company be placed at that point in charge of said freight depot station.

That in thus acting, defendant was performing a duty required by the article of the constitution under which it was created, and after full opportunity had been given to all parties in interest to appear before said commission either in support of or against the granting of such order, and that the same was reasonable, just, and equitable, in the interest of shippers, and not in violation of any of the rights of plaintiffs.

They aver that the demand of plaintiffs is neither just nor well founded, and pray that the same be dismissed and rejected, with costs, and for all and general relief.

The district court rendered judgment in favor of the defendant, denying, disallowing, and rejecting plaintiffs' demand and dismissing the suit, and they appealed.

Article 283 of the constitution of 1898 created a railroad commission. Its powers and authority are set forth in the next article (article 284). It therein granted power and authority, among other matters, to govern and regulate railroad freight and passenger tariffs and service, and to require all railroads to build and maintain suitable depots, switches, and appurtenances wherever the same are reasonably necessary at stations.

By article 285 it was provided that, if any railroad be dissatisfied with the decision or fixing of any rate, classification, rules, change, order, act, or regulation, it might file a petition setting forth the cause of objection to the same in a court of competent jurisdiction against the commission as defendant, and either party to said action might appeal to the supreme court of the state, without regard to the amount involved.

The order complained of by the plaintiffs was granted after

Morgan's La. & T. R. & S. S. Co. v. R. Com. of Louisiana

hearing evidence upon the petition to it of 25 persons, describing themselves as receivers and shippers of freight at Berwick. The demand was based upon the following averments:

"In the first place, we have no freight depot or the necessary protection for the safekeeping of our freight here, especially against weather, as all freight destined for this station is prepaid, and when delivered it is done so by switching crew. It is then either placed on the platform of the Berwick Lumber Company, Limited, or car is placed on switch at the mercy of thieves or any one.

"All freight destined for this station is claimed at risk of consignees, as several of us have lost freight and have had no reclamation against said company, as in all cases they claim delivery here. We further state that our demand is just, on the face of the receipts of the station for freight and passenger business done by said company, justifies the granting of our demands in full.

"We have no means of ascertaining how the passenger trains are,—whether on time or late. Our only means are the bridge tender, and he always says he can't find out.

"If your honorable commission will investigate the books of the company, you will perceive that the receipts of this station are far in excess of stations who have the facilities we demand of said company."

The claims of the parties are set out in the syllabi of their briefs:

On Behalf of the Plaintiffs—First. As to the Unreasonableness of the Order.

(1) A railroad cannot be compelled to locate stations at points where the cost of maintaining them will exceed the profits resulting "therefrom to the company." *Mobile & O. R. Co. v. People* (Ill.) 24 N. E. 646, 22 Am. St. Rep. 556. See, also, *Darlaston Local Board v. London & N. W. Ry. Co.* [1894] 2 Q. B. 703. In the present case the expenses of the required station agency are more than double or triple the net revenues of the business to be served thereby.

The existence of such a state of facts establishes, to say the least, the strongest *prima facie* case against the reasonableness of the order complained of, which can be met, if at all, only by proof of extraordinary and exceptional conditions in justification of the action of the commission.

The evidence, so far from establishing the existence of extraordinary and exceptional conditions at Berwick, imperatively requiring freight accommodations, tends, on the whole, to strengthen the *prima facie* case made out, from the revenue point of view. Extensive depots and terminal facilities exist within 700 yards of the proposed location of the new depot. Arrangements are in force for bringing their freight daily to consignees at Berwick, so that even the 700 yards need not be traversed. All reasonable complaint as to the character of this particular service has been removed since the

Morgan's La. & T. R. & S. S. Co. v. R. Com. of Louisiana

original complaint to the commission. This method of serving the people at Berwick has worked so well in practice that the community has for years enjoyed remarkable immunity from lost or damaged freight. Berwick is so small a place that there is practically no freight shipped therefrom. In addition to all this, the evidence establishes that the physical conditions are such that obedience to the order would necessitate a very expensive and inconvenient handling of trains at Berwick.

As to the Unconstitutionality of the Order of the
Commission.

(2) An order of a railroad commission which requires a railroad company to conduct its business, or the part of it affected by the order, at a loss, or without any profit, is in violation of the constitution of the United States. *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 702, 33 L. Ed. 970; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

Plaintiffs cite *Metropolitan Trust Co. v. Houston & T. C. R. Co. of Texas* (C. C.) 90 Fed. 683; *Southern Pac. Co. v. Board of Railroad Com'rs* (C. C.) 78 Fed. 236; *Reagan v. Trust Co.*, 154 U. S. 362-407, 14 Sup. Ct. 1047, 38 L. Ed. 1014, 58 Am. & Eng. R. Cas. 699; *Munn v. Illinois* (Granger Cases) 94 U. S. 113, 24 L. Ed. 77; *Railroad Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. Ed. 417; *Stone v. Trust Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *Road Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560; *Railroad Co. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. Ed. 417; *Railroad Co. v. Keyes* (C. C.) 91 Fed. 47; *Mobile & O. R. Co. v. People* (Ill.) 24 N. E. 643-646, 22 Am. St. Rep. 556.

On Behalf of the Defendant.

(1) The evidence shows that the want of facilities for the handling of freight at Berwick, the annoyance and expense to which shippers at that place are subjected in getting their freight, the importance of Berwick as a lumber shipping point, and its size, all unite in sustaining the action of the railroad commission in requiring that a freight depot be built, and that an agent be provided by the railroad company, aside from any question of the reasonableness of the order from a revenue-producing standpoint.

(2) The evidence also shows that Morgan's Louisiana & Texas Railroad & Steamship Company earned during the years 1898, 1899, and 1900, ending June 30, 1900, a large surplus, amounting to \$732,004.48 for the year 1900 as dividends to stockholders; showing that its business in the state of Louisiana during those years was more than compensatory.

(3) The evidence also shows that the order of the railroad commission will not cause a loss to the railroad company, as

Morgan's La. & T. R. & S. S. Co. v. R. Com. of Louisiana

the business done by it to and from Berwick, as shown by the statements of the auditor of the railroad company for the year ending July 31, 1900, amounted to \$4,652.60, or not less than \$4,080.51; that the cost of putting up a depot building would not exceed \$500, and the expense attending the maintaining of such depot, in wages of an agent and porter, would not exceed \$1,200 a year.

(4) The railroad commission of Louisiana had the express authority, under article 284 of the constitution of 1898, to require the building of a depot at Berwick, if reasonably necessary, aside from its common-law right to grant such an order. *People v. Chicago & A. R. Co.*, 130 Ill. 175, 22 N. E. 857; *Northern Pac. R. Co. v. Territory*, 3 Wash. T. 303, 13 Pac. 604; *State v. Republican Val. R. Co.*, 17 Neb. 647, 24 N. W. 329, 52 Am. Rep. 424, 22 Am. & Eng. R. Cas. 500; *Railroad Com'rs v. Portland & O. C. R. Co.*, 63 Me. 269, 18 Am. Rep. 208; *McDonald v. Railroad Co.*, 26 Iowa, 124, 95 Am. Dec. 114; 6 *Thomp. Corp.* 7828; *Com. v. Eastern R. Co.*, 103 Mass. 254, 4 Am. Rep. 555; *Railway Co. v. Scott*, 23 C. C. A. 424, 77 Fed. 726, 37 L. R. A. 94; *Marsh v. Railway Co.*, 64 Ill. 414, 16 Am. Rep. 564; *Bestor v. Wathen*, 60 Ill. 138; *Railroad Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369; 2 *Elliott, R. R.* § 720 (also page 1003); 23 *Am. & Eng. Enc. Law*, p. 115, verbo "Stations"; *Burney's Heirs v. Ludeling*, 47 La. Ann. 96, 16 South. 507.

(5) The question in this case is not whether the railroad commission had the authority to order a railroad company to establish a station, but to erect a depot building at a station already established. *State v. Chicago, St. P., M. & O. Ry. Co.* (S. D.) 81 N. W. 503, 47 L. R. A. 569.

(6) Having the right to order the building of a depot at Berwick, the railroad commission had also the right to prescribe the size of the building, since article 284 of the constitution gave it the right to require "suitable" depots to be built and maintained. 2 *Elliott, R. R.* § 685; *Mayor, etc., of Worcester v. Board of Railroad Com'rs*, 113 Mass. 161; *Crowell v. Londonderry*, 63 N. H. 48.

(7) The right to require the building of a depot for freight of passengers is one which the railroad commission has authority to exercise in certain cases, independent and irrespective of any question of whether the railroad company will thereby incur a loss, if such depot is reasonably necessary in order to afford proper facilities to the public. It is not true that in every instance an order of a commission is unreasonable, where the railroad company will, as a result of the enforcement of such order, incur a loss in its business, or be deprived of a revenue therefrom. *Railroad Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567; *Reagan v. Trust Co.*, 154 U. S. 413, 14 Sup. Ct. 1047, 38 L. Ed. 1014; 2 *Elliott, R. R.* p. 1000, 58 Am. & Eng. R. Cas. 699.

(8) Orders of a railroad commission in such cases may be

Morgan's La. & T. R. & S. S. Co. v. R. Com. of Louisiana

likened to orders requiring railroad companies to submit to an examination of their engineers for color blindness, requiring them to pay the expenses of maintaining a railroad commission, requiring them to announce the approach of trains by the ringing of bells and other signals, and the like, all of which are within the exercise of the police power of the state. *Cleveland, C., C. & St. L. Ry. Co. v. Illinois*, 177 U. S. 516, 20 Sup. Ct. 722, 44 L. Ed. 868, 17 Am. & Eng. R. Cas., N. S., 227; *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352; *Railroad Co. v. Gibbs*, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. Ed. 1051.

(9) It is not necessary that the business done by a railroad company over every portion of its road should be remunerative. If its railroad, as an entirety, does a business which is compensatory, it has no legal right to complain that an order of a railroad commission may deprive it of revenue over a portion of its line. *People v. St. Louis, A. & T. H. R. Co.*, 176 Ill. 530, 52 N. E. 292, 12 Am. & Eng. R. Cas., N. S., 227; *State v. Wabash, St. L. & P. Ry. Co.*, 83 Mo. 395; *St. John v. Railway Co.*, 22 Wall. 149, 22 L. Ed. 743; *Railroad Co. v. Dey (C. C.)* 35 Fed. 866, 1 L. R. A. 753; *Pensacola & A. R. Co. v. State (Fla.)* 5 South. 833, 3 L. R. A. 661.

(10) The presumption of law is always in favor of the maintenance of the order of a railroad commission, which will not be set aside unless flagrantly in violation of the rights of the railroad company. *Railway Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567; *Pensacola & A. R. Co. v. State (Fla.)* 5 South. 833, 3 L. R. A. 661-671, 37 Am. & Eng. R. Cas. 579; *Storrs v. Railroad Co.*, 29 Fla. 617, 11 South. 226; *People v. Board of Railroad Com'rs*, 53 App. Div. 61, 65 N. Y. Supp. 597, 15 Am. & Eng. R. Cas., N. S., 441; *In re Auburn & W. R. Co.*, 37 App. Div. 162, 55 N. Y. Supp. 895; *San Diego Water Co. v. City of San Diego (Cal.)* 50 Pac. 633, 38 L. R. A. 462, 467, 62 Am. St. Rep. 261; *Spring Valley Waterworks v. City of San Francisco (Cal.)* 22 Pac. 910, 1046, 6 L. R. A. 760, 16 Am. St. Rep. 116; *Pensacola & A. R. Co. v. State (Fla.)* 5 South. 833, 3 L. R. A. 671; 37 Am. & Eng. R. Cas. 579; *Dow v. Beidelman*, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. Ed. 841; *Reagan v. Trust Co.*, 154 U. S. 395, 14 Sup. Ct. 1047, 38 L. Ed. 1014, 58 Am. & Eng. R. Cas. 699; *Railroad Co. v. Tompkins*, 176 U. S. 172, 20 Sup. Ct. 336, 44 L. Ed. 417; *Jacobson v. Railroad Co. (Minn.)* 74 N. W. 893, 40 L. R. A. 389, 70 Am. St. Rep. 358; 2 Elliott, R. R. p. 996, 13 Am. & Eng. R. Cas., N. S., 228; *Steenerson v. Railway Co.*, 69 Minn. 353, 72 N. W. 713; *Brannon on the Fourteenth Amendment*, p. 197; *People v. Budd*, 117 N. Y. 25, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460; *People v. Warder of City Prison*, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. Ed. 1145; *Railroad Co. v. Dey (C. C.)* 38 Fed. 656-664.

Opinion.

The plaintiffs urge that "an order of a railroad commission which requires a railroad company to render services to a certain locality or class of its patrons without adequate compensation amounts to a deprivation, pro tanto, of property without due process of law, and is unconstitutional, null, and void. An order of a commission may be unreasonable without being unconstitutional, but it cannot be unconstitutional without being unreasonable." They maintain that "its defenses are independent, in that any one of them is sufficient alone to support a judgment for plaintiff. They are at the same time cumulative, and strengthen each other. The term 'unreasonable,' in a case of this kind, has a very broad meaning. It covers not only a charge that an order, rule, regulation, or tariff of the commission is in violation of the state or federal constitution, because requiring the carrier to conduct its business, or some part of it, at a loss or without any profit, but also any objection or ground of complaint which shows that the action of the commission, while not violative of any organic law, is unnecessarily burdensome in its operation, uncalled for, and not justifiable under the particular facts and circumstances of the case, or for any other reason evidences a mistake of judgment on the part of the commission.

"The jurisdiction of the commission under the law creating it is limited to the enactment of 'reasonable' regulations, orders, etc.; and the jurisdiction of the courts to inquire into the reasonableness of any order or regulation of the commission, and to set it aside if shown to be unreasonable, is perfectly clear.

"It is now well settled that even in the absence of any provision in the railroad commission law of a state for review of the action of the commission by the courts, and in the face of a positive prohibition against such review, the courts are always open to afford relief from any unconstitutional order or regulation of the commission. And the violation of constitutional rights which the courts have most frequently restrained is that involved in an order or regulation which in effect requires a railroad to conduct its business without any profit or return upon the capital invested.

"It is now a maxim of constitutional law that the power to regulate the business of a railroad company does not include the power to make it perform services and furnish facilities to the public without adequate compensation therefor; that by 'adequate compensation' is meant not only receiving sufficient remuneration to prevent the company from conducting its business, or the part affected by the regulation, at a loss, but sufficient to yield a fair return on the capital invested, whether that capital be represented by stocks or bonds or both; and finally that what is adequate compensation, and whether or not the right to receive it has been denied by a commission's order, is a judicial question, to be settled by the courts.

Morgan's La. & T. R. & S. S. Co. v. R. Com. of Louisiana

"But the railroad commission law of this state (article 283 et seq., Const. 1898) has conferred upon the courts more extended jurisdiction than simply to afford protection against noncompensatory or confiscatory regulations or orders of the commission. They do have power to grant relief from orders of the commission which, by requiring a railroad to conduct some part of its business at a loss or without any profit, violates the prohibitions of both the state and federal constitutions against depriving a person of his property without due process of law, and to pass upon any other objection to the fairness or reasonableness of any order, rule, rate, or act of the commission. Our lawmakers have seen fit to provide that every act of the commission may be the subject of judicial inquiry, in order that every mistake or injustice may be corrected. In other words, the reviewing power of the court is practically coextensive with the original powers of the commission.

"It must be borne in mind, however, that the courts have no power to fix rates or make rules or regulations or orders. They can only pronounce unreasonable or unenforceable any particular rule, order, or regulation which may be the subject of valid objection. It is then left to the commission to take such action as it may see fit as to the adoption of new rules."

It appears from the pleadings and this argument that the complaint of the plaintiffs is not directed against any law of the state, but upon the exercise by the railroad commission of the power and authority conferred upon it in respect to the special matter herein complained of.

We recognize the legal right of the plaintiffs, if they be dissatisfied with this order, to have recourse to the courts to have the same set aside, and also the duty of the courts to consider the complaint which they have made from a judicial standpoint.

Article 448 of our Civil Code declares the use of corporations to be to contribute, by the union and assistance of several persons, to the promotion of some object of general utility, although they be at same time established for the advantage of those who are members of such corporations.

It will be seen from this that the object and motive of the state in granting corporate rights is to promote the public welfare. The acceptance of those rights by the incorporators is in aid of that object, though their primary motive and purpose is to derive gain and profit to themselves. What is here said of "corporate rights" applies equally to the grant of public franchises and privileges, and their acceptance. It is a matter not debatable that the state, subject to certain limitations, has, in furtherance of its object of advancing the public good, a power of regulation and control over the action and conduct of those to whom she has granted these rights and franchises. From the very nature of things, there must arise from time to time differences between the corporation,

Morgan's La. & T. R. & S. S. Co. v. R. Com. of Louisiana

seeking to derive from its corporate rights the utmost personal advantage it can, and the state, seeking to obtain through its conduct and action the greatest good possible for the public. These differences may arise at any time between them upon matters of detail or administration more or less important. As it would be manifestly impossible to anticipate what these causes would be, or when they would arise, different states have found it necessary to constitute a body charged, as their representative, with the duty of guarding the public interests upon this particular subject, to which they have expressly given very broad authority and powers. That body in Louisiana is the defendant in this case, the railroad commission.

It is an administrative board created by the state for carrying into effect the will of the state as expressed by its legislation. See *Railroad Commission Cases*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; *Reagan v. Trust Co.*, 154 U. S. 394, 14 Sup. Ct. 1047, 38 L. Ed. 1014, 58 Am. & Eng. R. Cas. 699. The conflicting interests between the corporations and the state are safeguarded by the officers of the former, on the one hand, and by the railroad commission, on the other. The power, authority, and duty of the latter are not limited merely to matters affecting the public safety or the public health. They extend also to matters concerning public comfort and public convenience, and in the consideration of matters of comfort and convenience the number of persons who may be concerned or interested in some particular matter at some particular point enter as important factors in determining what is proper to be done. The commission cannot ignore the comfort and convenience of numbers of citizens on a line of travel or conveyance to base their action exclusively upon a consideration of the amount of dollars and cents which may be involved. As a matter of course, the commission could not, even under expressly delegated powers, act arbitrarily, in manner such as to trench upon the rights of corporations secured to them by law; but, within certain limits, though their action and orders are all subject to review, they are not all subject to reversal. In the present instance it cannot be claimed that the Southern Pacific Road, either in the operation of its line as a whole, or that part of it which falls within the limits of Louisiana, has not been and is not remunerative; nor can it be said that the Morgan Railroad Company is not a paying corporation. It is not claimed that the order complained of in this case, carried into execution, would have the effect of changing the situation in this respect. The utmost claimed is that a small sum, not exceeding five or six hundred dollars in amount, which the commissioner's order would cause to be expended at Berwick City, and the small amount which will be required to keep an agent at that place, will reduce their profits for a trifling amount. The objection seems to be aimed rather at the place where

this money is ordered to be expended, and the inconveniences to which they will be subjected, than to any effect, or any general effect, which the expenditure will have upon the profits of the roads. It is not claimed, nor is there any evidence in the record which would tend to show, that the commission has, by its orders or rulings as to other places along the roads, in respect either to depots or other matters, brought itself within the limitation placed upon it of not trenching upon the plaintiff's legal rights. So far as we know, the order complained of may be the only one as to betterments which the commission has given. We do not think the point is made that, after the business of a railroad corporation has made it fairly remunerative, the commission is without general authority to direct that a portion of the "surplus" profits (if that expression can be used, should be applied to the promotion of the comfort and convenience of the people along the line of road. When such a point in the business of the road is reached, the rights of the "general public" come clearly into view, and it is not for the railroad, but for the commission, to determine how, in what way, and in what place this money is to be expended so as best to subserve their interest. That is a matter submitted to the judgment of the commission, not that of the railroad or of this court, unless the selection trenches upon the legal rights of the railroad corporation. The mere reference of disputed issues between the parties to this court for adjudication was not intended to constitute it an "administrative" board, revisory in character over the orders and conclusions of the commission. Our action is judicial, not administrative. It was not intended that we should substitute our judgment for that of the commission every time there is a dispute touching the particular place on the line of railroad where it would be best for the public interest that a station or a depot should be placed. To come successfully before this court, the appellant must be able to point out some legal right of its own which has been infringed upon.

The position taken by the plaintiffs that the point selected by the commission for the erection of a depot as being for the best interests of the people along the line of road should also be one at which the business of the road was remunerative is not sustained by authority, nor is it sustainable on principle, in view of the theory which the state gives corporate rights and franchises. In *Railroad Co. v. Gill*, the supreme court of the United States used this language: "It therefore appears that the allegations made and the evidence offered did not cover the company's railroad as an entirety, even in the state of Arkansas, but were made in reference to that portion of the road originally belonging to the St. Louis, Arkansas & Texas Railway, and extending from the northern boundary of Arkansas to Fayetteville, in said state. In this state of facts, we agree with the views of the supreme court of Arkan-

sas, as disclosed in the opinion contained in the record, and which were to the effect that the correct test was as to the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of the consolidating roads; that the company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative; that it would be practically impossible to ascertain in what respect the several parts would share with others in the expenses and receipts in which they participated; and finally that, to the extent that the question of injustice is to be determined by the effects upon the earnings of the company, the earnings of the entire line must be estimated as against all legitimate expenses under the operation of the act within the state of Arkansas."

In the Matter of Auburn & W. R. Co., 37 App. Div. 162, 55 N. Y. Supp. 895, it was said: "It thus seems to be settled by authority that where a state, either by statute or through the order of railroad commissioners, requires a railroad to establish a station at a particular place on the line of its road, such statute or order is not to be overthrown by the courts as unreasonable merely because the establishment or maintenance of such station would prove unremunerative, and regard is to be had to the financial ability of the railroad, in view of its entire business, to establish and maintain such station; that a statute or order of railroad commissioners establishing a station or fixing rates of transportation is not to be interfered with, except upon clear and satisfactory evidence, showing that it is unjust and unreasonable."

The district judge has in this case written an exceptionally able opinion, in which he has set out at length his conclusions, both of fact and of law, and has supported the latter by copious extracts from decisions of the supreme court of the United States and the supreme court of different states. In concluding that opinion, he said: "I am of the opinion that the order of the railroad commission is a reasonable one, in view of the size and importance of Berwick, and the inadequate freight facilities which are now afforded at that place. I do not think the Southern Pacific Company has introduced evidence which will justify me in substituting my opinion for the opinion of the railroad commission as to the reasonableness of the order, even if I disagreed with the commissioners, which I do not."

We have examined the record very carefully, and we find no error in his conclusions or his judgment. It may be well for us to say that the order of the commission complained of does not fix the precise spot at which the depot which it has ordered to be built should be placed, and that we are satisfied that such a depot can be easily built.

It is ordered, adjudged, and decreed that the judgment of the district court be, and the same is hereby, affirmed.

SOUTH CHICAGO CITY RY. CO. *v.* DUFRESNE.*(Supreme Court of Illinois, Dec. 16, 1902.)*

[65 N. E. Rep. 1075.]

Injury to Passenger—Proximate Cause—Pleading.

A count for personal injuries, alleging that defendant did not stop the car after plaintiff had given notice of his intention to take passage, in consequence of which, while he was attempting to take passage, he was thrown to the ground, did not state a cause of action, as the refusal to stop and accept plaintiff as a passenger was not the proximate cause of the injury alleged.

Same—Boarding Street Car—Sufficiency of Evidence.

In an action for injuries received by being thrown from a street car, evidence examined, and *held* sufficient to warrant the submission of the question of defendant's negligence to the jury.

Same—Permitting Person to Board Moving Street Car—Evidence—Harmless Error.

On an issue of the negligence of a street railway in allowing plaintiff to board a car while slowly passing over the tracks of a steam railroad, the admission of evidence that it was customary for people to get on the cars at the crossing while in motion, though error, was not prejudicial to defendant; such evidence merely showing that people got in the cars while in motion, where there was no stopping place and no reasonable man would expect them to stop, and such fact not having been made the basis of any instruction as to the law.

Contributory Negligence—Boarding Moving Street Car.*

It is not negligence, as a matter of law, for a passenger to get on a street car when it is in motion; but the question is one of fact, depending on the rate of speed of the car and all the circumstances.

Instruction.

In an action for injuries received by being thrown from a street car, which plaintiff had boarded while it was in motion, an instruction that if plaintiff did not signal to stop, and the motorman did not slacken the speed or stop, to invite plaintiff to get on, the jury must find for defendant, was properly refused, where the evidence showed that a large number of people approached the cars and got on with the knowledge of the conductor and motorman, as, plaintiff being the last one to get on, they had notice of his intention.

Same—Harmless Error.

An improper instruction as to the effect of intoxication as bearing on the question of contributory negligence was harmless, where the evidence would not justify a finding that plaintiff was intoxicated at the time of the accident.

Appeal from appellate court, First district.

Action by Antoine Dufresne against the South Chicago City Railway Company. From a judgment of the appellate court (102 Ill. App. 493) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Charles C. Gilbert, for appellant.

Charles M. Hardy, William H. Richardson, and Pliny B. Smith, for appellee.

CARTWRIGHT, J. Appellant operates a double-track

*See foot-note appended to *Birmingham Ry. & Electric Co. v. Brannon* (Ala.), 2 R. R. R. 154, 25 Am. & Eng. R. Cas., N. S., 154.

South Chicago City Ry. Co. v. Dufresne

street railway on Ewing avenue, in South Chicago. Ewing avenue runs north and south, and at its intersection with 100th street the railroad tracks of the Pittsburgh, Ft. Wayne & Chicago, Lake Shore & Michigan Southern, and Baltimore & Ohio Railroad Companies cross the avenue, running from northwest to southeast. The Pittsburgh, Ft. Wayne & Chicago Railway tracks are the most southern of the three sets of tracks. There is a hotel, called the "Ewing House," on the southwest corner of Ewing avenue and 100th street, and the usual stopping place for cars going south is opposite this house, just south of the railway tracks. On Sunday, October 27, 1897, an electric motor car of appellant, with a trailer car attached, approached from the north, and stopped north of the Baltimore & Ohio tracks. The conductor of the motor car walked forward to the tracks to see if the way was clear, and, upon signals from him and the trailer conductor, the cars passed slowly over the tracks. The cars again stopped, and after the same observation by the conductor, and signals, they crossed the tracks of the Lake Shore & Michigan Southern. They again came to a stop, and after the same signals passed over the Ft. Wayne tracks. Twenty or 30 people had collected at the corner of Ewing avenue and 100th street, in the vicinity of the Ewing House. They were going to a ball game at Hammond, Ind., and as the cars passed over the Ft. Wayne tracks they hurried to the cars for the purpose of taking passage, and climbed on before they came to a stop. The appellee was in the crowd, but was the last, or about the last, of those who attempted to get on. When he reached the cars they were over the railway tracks, or nearly so, and were either running slowly or standing still. In attempting to get on, he fell, and his hand was run over, resulting in its amputation. He brought this suit in the circuit court of Cook county against appellant for damages, and recovered judgment, which has been affirmed by the appellate court for the First district.

At the close of the evidence the defendant moved the court to instruct the jury to return a verdict of not guilty, and this the court refused to do. This refusal is the first alleged error argued by counsel, and it is insisted that the evidence did not tend to prove a cause of action. There were three counts in the declaration. The supposed negligence alleged in the first count was that the defendant did not stop the car after the plaintiff had given notice of his intention to take passage, in consequence of which, while he was attempting to take passage, he was thrown to the ground. The second count alleged that defendant brought the car to a partial stop to allow plaintiff to take passage, and, while he was attempting to secure a seat on the car, increased the speed of the car with a sudden start or jerk, throwing him off. The third count alleged that the defendant stopped the car, and, while plaintiff was attempting to secure a seat, started it in a violent and sudden

South Chicago City Ry. Co. v. Dufresne

manner, by which he was thrown down. The first count did not state a cause of action for plaintiff's injury. If a refusal to stop cars on notice would give rise to a cause of action, it would necessarily be for damages resulting from the refusal to stop, which might consist of delay or loss of time, but the refusal to stop and accept him as a passenger would not be the proximate cause of the injury alleged. As to the actionable negligence charged in the declaration, the evidence was in direct conflict. A considerable number of witnesses who were passengers on the car testified on each side, and directly contradicted each other as to material facts. The plaintiff testified that he jumped on the motor car before it stopped, and the other witnesses called by him either testified that it was moving slowly or that it had stopped. The testimony introduced by plaintiff tended to show that he got safely on the running board toward the front end of the motor car, and worked his way backward to about the center of the car to find a seat, taking hold of the upright supports with his hands, and moving along in that way; that when he reached the middle of the car a passenger got up to let him pass through, and as he had one foot on the running board, and the other raised to step in the car, there was a sudden and violent start or jerk of the car, which threw him off. This evidence tended to prove the cause of action, and the court was right in refusing to instruct the jury, as a matter of law, to return a verdict for defendant.

It is next insisted that the court erred in admitting incompetent and immaterial evidence. On the cross-examination of the motorman and conductor, the court allowed plaintiff's counsel to ask them whether it was not customary for people to get upon cars at the crossing of the railway tracks when they were in motion. The street cars were compelled to stop, and the conductor to go forward and see if the way was clear, in the case of each set of railway tracks, and upon signals the cars would pass over such tracks. In this process they ran so slowly that persons could get on them if they saw fit, so far as the speed of the cars was concerned. It was not the business of the motorman to keep them off, nor the duty of the conductor. To hold that defendant must prevent people from committing acts of negligence by getting on cars in motion at other than the stopping places would be to make it a guardian and protector of the public, and responsible for a failure to prevent acts of negligence. The mere fact that the negligent, heedless, or reckless should choose to get on the cars without due regard for their own safety would not change the responsibility of the defendant. It could only be held responsible for its own act of negligence, and to hold that it must prevent negligent acts in others, or assume the same responsibility as it would at a regular stopping place, would be equivalent to abolish contributory negligence altogether. In the case of *Railroad Co. v. Kaspers*, 186 Ill.

South Chicago City Ry. Co. v. Dufresne

246, 75 N. E. 849, the evidence was that passengers frequently got on the train at a certain place when it was moving slowly, and that the conductors encouraged the practice, telling them to come on, and aiding them to get on. In that case the railroad company induced the practice, and the continuance of it, by the action of its conductors, and it was held that it became its duty to run the trains in reference to the practice which it recognized and aided. To bring the case within the rule stated, there must be some concurrence by the railroad company in the practice, and not a mere failure to prevent acts of negligence, or to compel the public to use prudence and caution for their own safety. The evidence in this case did not embrace all of the facts necessary to bring it within the rule in the Kaspers Case, and the situation was entirely different. The defendant being compelled to pass over these several systems of tracks in the manner it did, there could be no inference that the speed was reduced to enable passengers to get on, and the evidence wholly failed to show any concurrence in the custom. If getting on the cars while crossing the tracks of the steam railroads was negligence, it would, of course, make no difference how many persons were guilty of such acts of negligence, and when it appeared that the defendant was not in any manner responsible for such acts the evidence might have been stricken out. We are of the opinion, however, that the evidence elicited was not prejudicial to the defendant, since it showed no more than that people got on the cars while in motion and jolting over the tracks of the steam railways, where there was no stopping place, and no reasonable man would expect the cars to stop, and the fact was not made the basis of any instruction as to the law.

The court refused to give to the jury instructions numbered 19, 26, 27, and 28, all of which were designed to inform the jury that if the plaintiff attempted to board the motor car while it was in motion, and in doing so missed his footing and fell, they should find for the defendant. It is not negligence, as a matter of law, for a passenger to get on a street car when it is in motion; but the question is one of fact, depending upon the rate of speed of the car and all the circumstances. *Railroad Co. v. Wiswell*, 168 Ill. 613, 48 N. E. 407. Therefore the mere fact that the plaintiff attempted to board the motor car while it was in motion would not justify the court in giving such an instruction. If the attempt of the plaintiff was the sole cause of the accident, it would not have been produced by any act of negligence of the defendant, and the defendant could not be held liable, if it had done nothing to cause the accident; but the evidence for the plaintiff tended to show that he lost his footing and fell on account of the act of negligence of the defendant in suddenly and violently starting the car. These instructions entirely ignored that question, and directed the jury to find for the defendant if he (plaintiff) missed his footing, from any cause, while attempt-

South Chicago City Ry. Co. v. Dufresne

ing to board the car in motion, which would include the negligence of the defendant alleged in the declaration, and which there was evidence tending to prove. It was not error to refuse them.

The court also refused to give instruction numbered 20, requested by the defendant, to the effect that if the plaintiff did not signal the motorman or conductor, and the motorman did not slacken the speed of the cars or bring them to a stop for the purpose of inviting plaintiff to get on, their verdict must be for defendant. The evidence that a large number of people approached the cars and got on, with the knowledge of the motorman and conductor, was uncontradicted. Plaintiff was the last one to get on, and the motorman and conductor had notice of his intention to board the car. Under these circumstances, it was not necessary for him to signal the motorman or conductor to manifest his desire. It was not error to refuse that instruction.

It is urged that instruction No. 12 given at the request of the plaintiff was erroneous, in assuming that the plaintiff was a passenger while attempting to board the car. The instruction required proof that defendant was guilty of the negligence charged in the declaration, and in the manner therein alleged, and that plaintiff was exercising ordinary care and caution for his own safety; and, if that was so, the verdict would necessarily be for the plaintiff, regardless of an abstract statement which was contained in the instruction as to the duties of carriers and passengers. We do not think it can be said the instruction assumed that the plaintiff was a passenger.

The court wrote and gave to the jury, of its own motion, the following instruction: "If it be the case that the plaintiff at the time he was injured was under the influence of liquor or intoxicated, nevertheless it does not follow that he cannot recover in this action. Whether he was under the influence of liquor or intoxicated is material only as bearing on the question of whether, in attempting to get on said car, he was, under the circumstances, exercising ordinary care; that is, such care as prudent persons ordinarily exercise under like circumstances." This instruction was objectionable for different reasons. In the first place, it was argumentative in form. Instructions should merely state the law for the guidance of the jury, and not employ the language of counsel in argument. It is not a proper form of instruction to tell a jury that, although some material fact may exist, nevertheless it does not follow that the plaintiff has not got a good case, and thereby attempt to minimize or destroy the effect of legitimate evidence. Besides, the conclusion of contributory negligence, which would defeat the action, might or might not follow from the mere fact of intoxication, depending upon the degree of such intoxication. The evidence of intoxication was admissible as a fact tending to prove negligence on the part of the

South Chicago City Ry. Co. v. Dufresne

plaintiff. While voluntary intoxication does not constitute negligence in law, proof of the fact is competent to be considered in determining whether the person was taking that care for his safety which a reasonably prudent man who was sober would take under the same circumstances. As was said in *Railroad Co. v. Cragin*, 71 Ill. 177: "Observation teaches that a person under the influence of intoxicating drinks is less capable of seeing and avoiding danger, and is more reckless of his conduct and less regardful of his safety." Intoxication in any degree would affect the faculties to some extent, and it may be of such a character that the intoxicated person has practically lost control of his faculties, and become unable to exercise the care that would reasonably be expected of a sober person under the same circumstances. If the intoxication was of such a degree, the jury might properly conclude that it was the sole cause of an accident. Again, the instruction was objectionable as being open to the construction that plaintiff might recover, though intoxicated, if he was using such care as a prudent person ordinarily exercises under the same circumstances, including the fact of his intoxicated condition. The hypothesis of fact stated in the instruction was that the plaintiff was under the influence of liquor or intoxicated, and, under the instruction, that was one of the things attendant upon the event of his losing his footing and falling from the car. The instruction did not require him to use that degree of care which a person of ordinary prudence and caution, in the full possession of his faculties, would exercise, and that was the degree of care demanded by the law. If the plaintiff, by intoxication, exposed himself to danger, and received his injuries for the want of such care as a reasonably prudent person would have exercised if sober, he would be guilty of contributory negligence. Mere intoxication will not relieve a person from the responsibility of avoiding danger in attempting to get on a street car, to the same extent as if he had been sober. The rule is that voluntary intoxication will not excuse a person from such care as may reasonably be expected from one who is sober. *Railway Co. v. Riley*, 47 Ill. 514; *Railroad Co. v. Bell*, 70 Ill. 102; *Railroad Co. v. Cragin*, supra; *Fisher v. Railroad Co.*, 42 W. Va. 183, 24 S. E. 570, 33 L. R. A. 69, 4 Am. & Eng. R. Cas., N. S., 86; 3 *Thomp. Neg.* 2935. It appears to us, however, that the evidence would not justify the jury in finding that the plaintiff was intoxicated. It was proved that he drank two glasses of beer, and that his breath smelled of it; but there were quite a number of witnesses who were with him, waiting for the car, and who had opportunities to know his condition, who testified that he was not intoxicated or under the influence of liquor at all. In view of all the evidence, we do not think the instruction was harmful to the defendant.

No prejudicial error being made manifest, the judgment of the appellate court is affirmed. Judgment affirmed.

GILMORE v. SEATTLE & R. RY. CO.*(Supreme Court of Washington, July 17, 1902.)*

[69 Pac. Rep. 743.]

Care in Setting Down Passengers—Instruction—Applicability to Pleadings.*

Where the injury complained of was alleged to have been caused by the premature starting of a street car while plaintiff was trying to get off, an instruction defining the duties of railroad companies to passengers leaving trains or cars, and then stating that any breach of these duties would be such negligence as the jury might take cognizance of, was not erroneous, as authorizing a recovery for negligence not charged in the complaint.

Contributory Negligence—Right of Alighting Passenger to Hold to Hand Rail—Instruction.

An instruction seeming to imply that plaintiff had a right to hold on to the hand rail of the car for a reasonable time after getting off, when taken in connection with another instruction to the effect that a passenger was not off of a car so long as he was supporting himself by the hand rail, was not erroneous, as authorizing recovery for negligence not charged in the complaint.

Appeal from superior court, King county; Geo. Meade Emory, Judge.

Action by Sarah S. Gilmore against the Seattle & Renton Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Peters & Powell, for appellant.

Brady & Gay, for respondent.

FULLERTON, J. This is an appeal from a judgment for personal injuries recovered by the respondent against the appellant. The appellant operates an electric street car line in the city of Seattle, and the injury complained of was received by the respondent, as she alleges, because of the negligent act of the appellant's employees in starting a car from which she was alighting. It is conceded that there was sufficient evidence to justify the court in submitting the questions of fact to the jury, but it is contended that the court did not do so fairly in its instructions, committing error therein prejudicial to the appellant's case.

The instruction first complained of is as follows: "You, gentlemen of the jury, are the sole judges of the facts and of the credibility of the witnesses, and of the weight to be given to their respective testimony. You will take into consideration, in passing upon the weight of the testimony, not so much the number of witnesses that testified to any one given fact, but the quality of the testimony. And in weighing the quality of the testimony you will take into consideration the interest of the witnesses, their appearance on the witness stand, the

*As to the care required in setting down passengers, see foot-note appended to *Walters v. Chicago & N. W. Ry. Co.* (Wis.), 2 R. R. R. 237, 25 Am. & Eng. R. Cas., N. S., 237.

Gilmore v. Seattle & R. Ry. Co

interest or lack of interest that they, or any of them, may have in the subject-matter of this action and in your verdict; and you may take into consideration all circumstances which appeal to you, as men knowing human nature, which would affect the credibility of the testimony of those witnesses. You are also entitled to take into consideration the age of any witness, if, in your opinion, that age bears upon the reliability of that witness' testimony." Doubtless the trial court may properly instruct the jury that, in determining the preponderance of the evidence upon any issue of fact made by the pleadings, they need not be controlled by the mere circumstance that a greater number of witnesses have testified upon one side than upon the other, but that they should take into consideration, along with that circumstance, all of the facts and circumstances of the case shown by the evidence, and make up their verdict from the whole thereof as the truth shall appear to them, whether that be with the greater or the less number of the witnesses testifying. But it seems to us that the instruction before us does something more than this. It tells the jury that they will not regard the number of witnesses testifying to any given fact, so much as the quality of the testimony. If by the use of the term "quality" the court meant the better evidence, then the court has invaded the province of the jury, for it is for the jury to say whether they will regard the testimony of the greater number of witnesses testifying as more or less controlling than the better testimony of the fewer number. The court cannot, without invading the province of the jury, instruct them which class of evidence is entitled to the greater weight, or instruct them in any manner which will not leave them free to make up their verdict from their own views of the weight of the evidence. Nor is such an instruction rendered harmless by an instruction to the effect that the jury are the sole judges of the credibility of the witnesses and of the weight of the evidence, as it gives them a wrong rule of law for determining that weight and credibility. The instruction is also objectionable for another reason. It is the right of parties to have the jury instructed on the law applicable to the case, clearly and pointedly, so as to leave no reasonable ground for misapprehension or mistake as to the meaning of the language used. The word "quality" is here used in an unusual sense, and the instruction is for that reason liable to confuse and mislead the jury. In *Morton v. O'Connor*, 85 Ill. App. 273, it was held error to instruct the jury that, in judging the preponderance of the evidence, they should be governed by the quality of the evidence, and not simply by the quantity. Speaking on the question, the court said: "The first proposition announced by the instruction is that the jury should be governed by the quality of evidence, and not simply by the quantity. We do not know what is meant by 'quality,' in the connection here employed, and it is not likely that the jury did. At the best, the instruction was

Gilmore v. Seattle & R. Ry. Co

in such respect confusing and misleading, and that, too, in a case where clearness and accuracy were demanded. If it meant that the jury should be controlled by the testimony of the most intelligent, best informed, most credible, and least interested witnesses, it was error for the court to invade the province of the jury in thus pointing out to them a class of witnesses whose testimony should be given the greater weight. *Railway Co. v. Keenan*, 85 Ill. App. 367. We need not speculate as to what other meaning 'quality' has, as used; for, whatever it may mean, the instruction was, in effect, to single out by the court a class of witnesses whose testimony the jury should attach a controlling weight to. The jury alone shall determine where the weight of evidence is to be found." See, also, the instructive case of *Pennsylvania Co. v. Hunsley* (Ind. App.) 54 N. E. 1071.

The allegation of negligence in the complaint was as follows: "That while plaintiff was such passenger on Washington street, near the intersection of Fourth avenue, in the city of Seattle, when in the act of getting out of and off from the said car, and being still thereon, the said car was, through the negligence of the servants of the said defendant, suddenly started and put in motion, without allowing said plaintiff sufficient time to safely get off." This states substantially the way the injury occurred, as testified by the respondent. On this point the court gave to the jury, among others on the same subject, the following instructions:

"I instruct you in this case, gentlemen, that the plaintiff, if she recovers, must recover upon proof of negligence under the rules I have laid down, which would be included in the allegations of negligence described in the complaint. Any act which you should find to be negligence, even though it were included in the allegations of the complaint, and did not fully cover all the allegations of the complaint, would be sufficient to find as negligence in this case, provided that those acts conformed in other respects to all my instructions."

"I instruct you also, gentlemen, that it is the duty of a railway company such as this to use the degree of care which I have defined as being the duty of railway companies; to see to it that passengers intending to alight have a reasonable time in which to alight and detach themselves in safety from the car in which they are traveling."

"And that it is also the duty of such railroad companies, in the event that a passenger is alighting, or is in the act of alighting, to use that same high degree of care that I have defined, to prevent injury to that passenger, in not starting the car while that passenger is in a position of danger, and when the employees of the company either know, or ought to know by the exercise of that same degree of care that the law imposes upon them, that the passenger is in that condition of danger or apparent danger. Any breach of the performance

Southern Ry. Co. v. Lasseter

of this duty which I have thus more specifically defined would be such negligence, under the issues in this case, that the jury could take cognizance of."

"If you believe from the fair preponderance of all the evidence that the plaintiff had a reasonable time, as I will define that to you, in which to alight from the car, and that she did, as a matter of fact, alight from the car, but that she retained her hold upon the guard rail or stanchion of the car for a time longer than would be reasonably sufficient for a person of ordinary prudence and activity, considering all her conditions and surroundings, and if you find that by reason of her so retaining hold of that guard rail she was injured, it will then be your duty, gentlemen, to find your verdict in favor of the defendant in this case."

It is objected to these that the court did not confine the jury to the allegation of negligence set out in the complaint, but permitted them to find for respondent even though they might believe that she was injured in a manner entirely different from that alleged in her complaint, and claimed by her in her own testimony. If any of these several paragraphs are susceptible to the objection made, it is the last paragraph quoted. But we do not think there was error here. The instruction, standing alone, would seem to imply that the appellant was permitted to hold on to the stanchion or hand rail of the car for a reasonable time after alighting; but the court makes his meaning clear by a further instruction to the effect that a passenger could not be said to be off the car so long as he was supporting himself thereby, and being still in the act of alighting.

For the error committed in the first instruction mentioned, the judgment is reversed, and the cause remanded for a new trial.

REAVIS, C. J., and HADLEY, WHITE, ANDERS, and MOUNT, JJ., concur.

SOUTHERN RY. CO. v. LASSETER.

(Supreme Court of Georgia, June 9, 1902.)

[42 S. E. Rep. 41.]

Railroads—Injury to Baggage—Appeal—Damages.

As the verdict in the magistrate's court was limited in amount to the proved value of the plaintiff's trunk which was destroyed, and the evidence was amply sufficient to establish the liability of the defendant, its petition for certiorari, alleging to the contrary, was wholly without merit. The judgment of the superior court was, therefore, so palpably correct, it must be held that the bill of exceptions was sued out for delay only, and accordingly the judgment is affirmed, with damages.

(Syllabus by the Court.)

Error from superior court, Butts county; E. J. Reagan, Judge.

Southern Ry. Co. v. De Saussure

Action by R. L. Lasseter against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Dessan, Harris & Harris, for plaintiff in error.
O. M. Duke, for defendant in error.

PER CURIAM. Judgment affirmed, with damages.

LEWIS, J., absent on account of sickness.

SOUTHERN RY. CO. v. DE SAUSSURE.

(Supreme Court of Georgia, July 24, 1902.)

[42 S. E. Rep. 479.]

Sale of Commutation Ticket—Loss of Ticket—Right of Purchaser.

When one has purchased from a railway company a commutation ticket at a price below the regular fare charged, by which the purchaser is entitled to a given number of trips between places named in such ticket, on conditions that no rebate on account of the nonuse of the ticket from any cause will be allowed, and that the ticket shall be presented to the conductor on each trip, the presentation of the ticket is a condition precedent to the right of the purchaser to be transported on it; and in case of its loss, so that it cannot be presented, there is no obligation on the part of the company to transport the purchaser except upon the payment of the regular fare; and such purchaser is not entitled, because of the terms of the contract, either to have refunded to him the amount so paid for transportation, or to recover damages against the company for a failure to transport him without paying fare, during the time limit of the lost ticket, the number of trips called for thereby, or for a refusal to issue him a duplicate ticket.

Remanding Case.

The trial judge erred in remanding the case to the justice's court, and in not rendering a final judgment therein in favor of the plaintiff in certiorari.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Action by John B. De Saussure against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Jos. B. & Bryan Cumming and G. M. Beasley, for plaintiff in error.

F. W. Capers, for defendant in error.

LITTLE, J. John B. De Saussure purchased from the Southern Railway Company a commutation ticket in the following form: "Southern Railway Company. Fifty four trips commutation ticket. When properly stamped, this ticket will entitle J. B. De Saussure to fifty four continuous trips in either direction between Augusta and Aiken, if presented on or before 14th July 1901, inclusive, 30 days limit.

Southern Ry. Co. *v.* De Saussure

[Signed] W. A. Smith, Gen. Passenger Agent,"—subject to conditions printed on back of ticket, which must be signed by purchaser before using. This ticket was properly stamped, and on the back thereof was printed what was termed a "contract," which read as follows: "In consideration of the reduced rate at which this ticket is sold, I agree that its use shall be subject to the following conditions." Among those enumerated only the seventh and eighth are important in this connection, which are as follows: "(7) That I have no claim for rebate on account of the nonuse of this ticket from any cause. (8) It is to be presented to the conductor each trip, [who] will cancel one of the marginal numbers, and is to be surrendered on the last trip taken, during the period for which it is issued." De Saussure lost this ticket, and was unable to find it. He communicated these facts to the railroad company, and requested its agent to issue him a duplicate, or in some way to give him a right of passage between Augusta and Aiken in accordance with the terms of its contract with him. The company refused to do so, and also refused to allow him to deposit with it the value of the ticket as an indemnity and pass him over the road the number of consecutive trips represented by the ticket at the time of its loss, unless he would produce the ticket. He then instituted an action in a justice's court, alleging that the railway company had caused a breach of the contract which they had entered into; and sought a recovery of damages, in consequence of such breach, in the sum of \$6.50. He also averred that the company had caused him unnecessary trouble in compelling him to institute the suit to recover what he should have had without suit, and unnecessary expense in being compelled to employ counsel to bring the action, and claimed that the damages in this regard was \$25. Defendant denied liability, and the case was tried before a jury in the justice's court, which returned a verdict for the plaintiff "for full amount" sued for. The railway company then applied to the judge of the superior court for a writ of certiorari, which was ordered to issue; the petition for which writ recited, as the evidence had on the trial in the justice's court, substantially the following: Plaintiff paid \$7.50 for the ticket, a correct copy of which was attached to the petition. He had ridden several times on it between Augusta and Aiken, and, after having done so, had lost it. There were 11 or 13 "punches" unused at the time of the loss. He had searched for the ticket, and was unable to find it. He then notified the company's agent of the loss, and desired to have a duplicate issued. This was declined. He then applied to the passenger agent of the road for such duplicate, without success. He then asked for some papers which would entitle him to continue his trips, but was refused. He then offered to deposit with the company the amount of the ticket, and, if anybody used it, to forfeit the amount so deposited. This proposition was also

Southern Ry. Co. v. De Saussure

declined. He then employed an attorney, whose fee was \$25, to institute an action against the company to recover his damages. The "punches" unused on the ticket amounted to \$6.50. He did not sign the contract on the ticket, and was not asked to do so. He did not read the conditions on the ticket when he purchased it, and not until he had taken the first ride. He then read them, and continued to ride on it. He subsequently purchased a second ticket, which he did sign. The price which was paid for the ticket was considerably less than the straight fare. The conductor of the defendant testified that, to the best of his knowledge, the ticket in question was signed; that he allowed plaintiff to ride three times after he had lost his ticket; that commutation tickets were sold at largely reduced rates. The lost ticket had never been presented. The company put up a bulletin to look out for the ticket, etc. The answer of the magistrate was, in effect, that the evidence set out in the petition was substantially correct. The errors assigned in the petition for certiorari were that the verdict rendered in the justice's court was contrary to the evidence, and contrary to law. At the hearing, the judge of the superior court passed an order that the case be sent back to the justice's court for a rehearing. To this judgment the railway company excepted, and specifically assigned, as error, that the judgment was erroneous, because, under the undisputed evidence, any finding against the company was erroneous, and because the only question involved was one of law, and therefore the judge should have made a final disposition of the case in favor of the petitioner in certiorari. It may be well to remark, at the outset, that each of the parties is to be governed by the terms of the contract into which they entered, and that it is the duty of the courts to enforce the terms of contracts which parties have made, and neither to enlarge nor restrict such terms beyond or below the intention of the parties as therein expressed. The plaintiff testified that he did not sign the contract. If he did not, then he was not entitled to be transported on the ticket at all; for on the face of his ticket, which was confessedly sold at a greatly reduced rate, is the statement that the transportation of the purchaser is subject to the conditions printed on its back, which must be signed before using the same. However, this is not material in the consideration of the questions involved, for the reason that the conductor of the defendant's train testified that it was signed; and, even if De Saussure had not signed it, he used it after he had knowledge of its conditions, and he was, of course, thereafter bound by such conditions.

1. The first question which arises in the consideration of this case is whether the plaintiff in the court below had the legal right, after having lost his ticket, to have the company issue him a duplicate ticket, or in some way give him the right of continuous passage between Augusta and Aiken for the trips remaining unpunched thereon, under the terms of the

Southern Ry. Co. v. De Saussure

contract which the company had made with him at the time he purchased his ticket. If he had this right, it was denied to him by the railway company, and he was entitled to recover the damages which he sustained by reason of that denial. If he had no such right, then he was entitled to no damages. This question is to be determined by the contract between the parties. By reference thereto, it will be seen that it was stipulated that the plaintiff should have no claim for rebate on account of the nonuse of the ticket from any cause. The legal effect of this condition in a commutation ticket was passed on by the Interstate Commerce Commission in the case of *Sidman v. Railroad Co.*, 3 Interst. Com. R. 512, where passage on a commutation ticket was subject to a condition in the exact terms of the one just referred to,—that is, that the purchaser should have no claim for rebate on account of nonuse of the ticket from any cause. It was there ruled by the commission that, under that condition, it was not an unlawful discrimination to refuse to refund to the purchaser, who held such ticket, but had forgotten to take it on a certain trip, the amount which he had paid as his fare. It is, however, claimed by counsel for defendant in error that the performance of an impossible condition is not required; and that inasmuch as the ticket had been permanently lost, and could not be presented, the condition requiring its presentation on each trip was impossible of performance, and therefore he would be entitled to be refunded by the company the value of so much of the ticket as remained unused at the time of its loss. This contention is not a sound one. It has been repeatedly ruled that regulations such as are expressed in these conditions are not unreasonable. In the case of *Railroad Co. v. Fleming*, 14 Lea, 128, it was ruled that a regulation which provided that passengers should, on demand, exhibit their tickets on entering the train, and should afterwards, on like demand, surrender the same, or pay fare, under penalty, in case of refusal, of removal from the cars, was a reasonable one; and that there is no distinction, so far as the relative rights of the parties are concerned, whether the ticket be lost or mislaid before or after going on the train. But whether such stipulation would be reasonable or not as one of the regulations of the company is not the question here, because the contract between the parties expressly provides the stipulation referred to as a part of the contract, and as a part of the contract it was binding on each of the parties. In his *Commentaries on the Law of Negligence* (volume 3, § 2625), Judge Thompson says: "Passengers riding upon commutation tickets are bound strictly by the terms of the contract embodied in such tickets."

We are therefore very clear in our opinion that, under the conditions attached to the issuance of the lost ticket, the plaintiff was not entitled to have refunded to him any sum for the unused parts of the ticket, nor any sum which he may have

Southern Ry. Co. v. De Saussure

paid out for transportation during the time covered by the ticket. The stipulation that the ticket was to be presented to the conductor on each trip was equally binding as a part of the contract; and if the plaintiff was not entitled to be transported until, as a condition precedent, he had exhibited his ticket, then whether such failure was attributable to the fact that the ticket had been lost, or to other cause, is in no sense material; for by his own agreement he was only excused from paying his fare when he exhibited a ticket showing his right to be transported without such payment. In the case of *Ripley v. Transportation Co.*, 31 N. J. Law, 388, it appeared that plaintiff had purchased a commutation ticket from defendant, to be good from January 1, 1865, to January 1, 1866, at a reduced price. In a receipt given for the money, this note appeared: "The commutation ticket is to be shown to the conductors and ferry masters each trip, whenever required. * * * No repayment in consequence of any inability to use the privilege. No duplicate ticket will be issued." This ticket was stolen from the plaintiff, and, because he could not show his ticket, the railroad company refused him the privilege of a free pass; and he thereupon brought his suit for damages. In discussing the question presented, Vredenburg, J., said: "This is not a question of the reasonableness of the rules of the company, or whether plaintiff complied with such rules, * * * but simply whether it was lawful for the parties so to contract, and whether they did so contract. It is argued that, the ticket being lost, the plaintiff should be permitted to prove its contents, as in the case of other lost instruments. But nobody objects to that; that is not the difficulty. The difficulty is that upon proving the contract it appears that, by the terms of the instrument, the plaintiff has lost the privilege of a free pass. The right to a free pass depended, by the terms of his contract, upon his showing the conductors his ticket; and this he could not do, for he had lost it. It has been argued that the plaintiff had paid his fare, and that he ought not to lose his right because he has lost the evidence of the payment. If there had been no special contract, or if the plaintiff had paid all the fare that the law allowed the defendants to charge, that would have been another question. But he paid here a special fare under a special contract. The defendants agreed that the plaintiff might travel for a fare which is not alleged to be the full fare the law allowed, and the defendants had a right to impose such conditions as they saw fit; and they saw fit to prescribe, as a condition, that the plaintiff should show his ticket, and this he agreed to. He thus became his own insurer that he would not lose his ticket. If he did not like that contract, he should not have entered into it. But, having entered into it, he is bound by it as much so as the company are to carry him if he does show his ticket." Not only the ruling, but also the reasoning, in this case seems to be conclusive against the right of the plaintiff to recover damages from the railway company for refusing to

Southern Ry. Co. *v.* De Saussure

issue him another ticket, or in refusing to pass him over its road without the presentation of it. The company never agreed to substitute another ticket if the one he purchased was lost. While the plaintiff in this case did contract and pay for a given number of trips, which was evidenced by his ticket, his right to make those trips was by agreement based on the condition that the ticket which was sold should be presented each trip. It may be, if the plaintiff had contracted for and paid in advance the usual fare for each of the trips, that his right to be transported would have been absolute. But when it appears, as in this case, that he purchased the ticket for a given number of trips for a sum largely below the regular fare, the better doctrine is that he is not entitled to be transported unless the conditions of the contract which form a part of such ticket are fully complied with. In the case of *Bennett v. Railroad Co.*, in the court of common pleas of Philadelphia, 7 Phila. 11, it was ruled that "a railroad company has the right to require commuters to show their tickets, and, in default, to exact the fare without liability to repay it." To the same effect, see the citation from *Thompson on Negligence*, supra. Inasmuch, then, as by the contract of the parties the plaintiff was not entitled to be transported over defendant's railroad without the payment of the regular fare, unless he exhibited his ticket, he would not be entitled to have from the defendant any amount paid for such transportation when he failed, for any cause, to present his ticket. Nor, after its loss, would he be entitled to be transported free without the production of the ticket. Nor could he lawfully demand of the company another ticket, or papers entitling him to any number of trips under the terms of his original contract, because that very contract provided that he was not so entitled unless his ticket was presented. Its loss was his misfortune. His right to transportation depended on the production of his ticket. This right was only a right on conditions. These conditions the company could lawfully impose, because the right was given for a largely reduced compensation. As the company was not bound to issue him a duplicate, and as he was not entitled to be transported free without the presentation of his ticket, although he had lost it, it follows that he was not entitled to recover any damages for the failure of the company in any of the respects as to which he claims to have been damaged. Not being entitled to recover any damages against the company for any default shown in the pleadings, of course plaintiff was not entitled to have a verdict or judgment for the attorney's fees which he claimed. Therefore, the verdict in the justice court was contrary to law, and, as the determination of the case rested solely upon a question of law, the judge of the superior court should have finally disposed of the case, on certiorari, by a judgment in favor of the plaintiff in certiorari.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

CATTANO v. METROPOLITAN ST. RY. CO.*(Court of Appeals of New York, Feb. 24, 1903.)*

[66 N. E. Rep. 563.]

**Passenger Compelled to Ride on Platform of Crowded Street Car*—
Negligence of Driver.†**

Where a street car company fails to provide seats or standing room, so that a passenger must stand on the platform, and the company permits him to ride there, the question of its negligence is for the jury where the platform is so crowded that he is liable to be pushed off by an employee operating the car.

Same—Same—Contributory Negligence.

Plaintiff was a passenger in a street car, the seats of which were occupied, and he rode on the front platform, with seven others. In going fast on a downgrade the driver, in his efforts to apply the brakes, jostled the crowd, and decedent was thrown off, and instantly killed: *held*, that the questions of negligence and contributory negligence were for the jury.

Same—Contributory Negligence.

A passenger on a street car is not chargeable with contributory negligence as a matter of law because he stood on the platform of the car with knowledge of its overcrowded condition, where there was no evidence that he was ever on a street car before, or that he knew of any fact, other than the crowded condition of the platform, which would expose him to danger.

Appeal—Review.

Calling attention to an improper statement of counsel in summing up for the first time after the instructions and the taking exceptions to the language used by counsel present no question that can be reviewed by the court of appeals.

Same—Same.

An exception to the denial of a motion to withdraw a juror because of improper remarks of counsel in summing up presents no question for review, the denial resting in the discretion of the trial court.

Parker, C. J., and Haight, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Frank Cattano, administrator of Paul Cattano, against the Metropolitan Street Railway Company. From a judgment of the Appellate Division (73 N. Y. Supp. 1131) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Charles F. Brown, Addison C. Ormsbee, and Henry A. Robinson, for appellant.

Roger Foster, Thomas Gilleran, and Moses Jaffe, for respondent.

VANN, J. This action was brought by the plaintiff, as the administrator of his deceased son, to recover damages on account of his death, caused, as alleged, by the negligence of

*As to the liability of carriers of passengers for the consequences of overcrowding their conveyances, see note to Chicago, etc., R. Co. v. Morse, 4 R. R. R. 215, 27 Am. & Eng. R. Cas., N. S., 215.

†As to the liability of carriers of passengers for the acts and omissions of servants, see notes to next case post.

Cattano v. Metropolitan St. Ry. Co

the defendant. The answer raised the usual issues in such cases. On July 3, 1899, the decedent, a young man about 20 years of age, was a passenger on one of the crosstown horse cars of the defendant running on Thirty-Fourth street, in the city of New York. The car was crowded inside and out. All the seats were occupied. There was no standing room in the aisle, and on the front platform, where the decedent was riding, as many as eight persons were standing. As one witness put it, "The front platform apparently had no room for anybody else." The decedent had been riding on that platform for five or six blocks, and just before the accident he stood next to the step, and near the driver. As the car was going very fast on a downgrade, the driver, in his efforts to apply the brake, "made room for himself" by backing and pushing, and thus jostled the crowd, and shoved the people around, so that the decedent was thrown off and instantly killed. The jury could have found these facts, although they could have found, as certain witnesses for the defendant testified, that the decedent met his death by stepping off backward, and falling under the wheels. The defendant's case might have been stronger if the driver or the conductor had been called to corroborate its theory of the accident, but neither was put upon the stand.

Were these facts—which the jury is presumed to have found—sufficient to warrant the inference of actionable negligence on the part of the defendant, and freedom from contributory negligence on the part of the plaintiff's intestate? Assuming that no unnecessary force was used in operating the brake, the primary question is whether the defendant was negligent in allowing the platform to become so crowded that the driver could not use the brake without pushing away those standing near him, and thus crowding off some one on the outside. It was the duty of the defendant, when it allowed passengers to ride on the platform, to use a high degree of care to protect them from injury. As it did not provide railings to keep them from being crowded off in case of a sudden movement in the crowd, it was bound, as the jury at least might have found, to see that the crowd did not become so dense that the driver could not put on the brake without pushing some passenger off. If there had been vacant seats, or even standing room, inside, the case would be different, for then the passenger voluntarily standing on the platform might be held to run his own risk. When a carrier of passengers fails to provide either seats or standing room inside its cars, so that a passenger must stand on the platform in order to ride at all, and the company permits him to ride there, it cannot allow the platform to become so crowded that he is liable to be pushed off in operating the car, without presenting a question of fact for the jury as to its negligence in the premises.

As was said by Follett, C. J., in *Lehr v. Steinway & Hunters Point R. R. Co.*, 118 N. Y. 556, 561, 23 N. E. 889,

Cattano v. Metropolitan St. Ry. Co

890: "The exposure of a passenger to a danger which the exercise of reasonable foresight would have anticipated, and due care avoided, is negligence on the part of a carrier. It clearly appears that the defendant undertook to carry more passengers than could sit and stand inside the car, and that both platforms and their steps were filled to their utmost capacity. The actions of persons so crowded together, and the great force which they exercise, sometimes almost unconsciously, on each other, is understood by carriers of passengers and their employees, and the court would not have been justified in nonsuiting the plaintiff, and holding, as a matter of law, that the exercise of reasonable foresight would not have led the defendant to anticipate that overcrowding this car and its platforms might render accidents like the one which befell the plaintiff probable. * * * Whether the defendant negligently caused the injury to the plaintiff, and whether he negligently contributed to his own injury, were, under the evidence, questions of fact for the jury." In *Willis v. Long Island R. R. Co.*, 34 N. Y. 670, 683, the court said: "As the defendant in the present case neglected that duty [to furnish seats inside its cars], and the plaintiff rode on the platform because the company did not provide him with suitable and reasonable accommodations within the cars, the circumstances of his being in that position when he was injured does not relieve the defendant from liability." In *Merwin v. Manhattan Ry. Co.*, 48 Hun, 608, 1 N. Y. Supp. 267, 113 N. Y. 659, 21 N. E. 415, both cars and platforms were so crowded that it was almost impossible for the decedent to get on. As the train approached a station where he intended to alight, the passengers began to come out on the platform in order to get off, and, owing to the pressure, he stepped back, fell between the platforms, and was fatally injured. It was held that the defendant ought to have foreseen that such an accident might happen, and that the omission to provide suitable safeguards against its occurrence was actionable negligence. It was further held that, even if it was obvious to the decedent that he would not be able at once to find a seat inside the car, yet the defendant, by taking him upon the train for the purpose of transporting him as a passenger upon the platform, was bound to exercise a high degree of care to make the platform safe and secure for his occupation, and that he was entitled to assume that it would do so. All the cases thus far alluded to were cited with approval in the recent case of *Graham v. Manhattan Ry. Co.*, 149 N. Y. 336, 43 N. E. 917, in which it was held that where a passenger boarded an elevated railroad train, and was compelled to ride upon the platform because the crowded condition of the car prevented him from occupying any other position, and he was injured while trying to save himself from being pushed from the platform by a movement of the crowd, caused by acts of an employee of the company, it was a question of fact for the jury

Cattano v. Metropolitan St. Ry. Co

whether either party was guilty of negligence. Even when there were vacant seats inside, and a passenger was smoking upon the front platform, as permitted by the company, and was injured by the negligence of the defendant, it was held that the question of contributory negligence was one of fact for the jury. *Nolan v. Brooklyn City & N. R. R. Co.*, 87 N. Y. 63, 41 Am. Rep. 345. See, also, *Ginna v. Second Ave. R. R. Co.*, 67 N. Y. 596; *Spooner v. Brooklyn City R. R. Co.*, 54 N. Y. 230, 13 Am. Rep. 570; *Edgerton v. N. Y. & Harlem R. R. Co.*, 39 N. Y. 227; *Clark v. Eighth Ave. R. R. Co.*, 36 N. Y. 135, 93 Am. Dec. 495. We think that these cases, and others which might be added, demonstrate that the trial judge properly submitted to the jury the usual questions relating to the negligence of the defendant and the contributory negligence of the plaintiff's intestate.

The argument is made that, if it was negligent for the company to permit the platform to become overcrowded, it was negligent for the decedent to stand there. This argument implies that the decedent knew as much about the situation and danger as the defendant, whereas it was not shown, and cannot be presumed, that he was ever on a street car before, or that he was acquainted with the grade, the method of operating the brakes, or with any fact, aside from the crowded condition of the platform, which might expose him to danger. The company, of course, is presumed to have known the situation as it actually existed. Moreover, the argument ignores the legal obligation of the defendant, upon which the decedent had the right to rely, to exercise a high degree of care to "make the platform safe and secure for his occupation." Thus it is apparent that the argument, so plausible upon its face, is founded upon a presumption which does not exist, and disregards a legal obligation of the defendant upon which the decedent had a right to rely.

The counsel for the plaintiff, in hastily summing up before the jury, inadvertently went beyond even the wide latitude allowed in such addresses, and charge, in substances, that the defendant maintained a school for perjury to instruct witnesses how to swear falsely in its interest. A verdict should be found only on the law and the evidence. Appeals to prejudice or passion, and the statement of facts neither proved nor presumed, have no place in a trial conducted according to the rules of the common law. The statement in question was calculated to arouse prejudice, and lead the jury away from the evidence. It was not warranted, even if similar remarks had been made by the defendant's counsel, which is suggested, but not shown, by the record. It would have justified the trial court or the Appellate Division, in exercising the great power of dealing with the facts, which is intrusted to them, but not to us, by setting aside the verdict and granting a new trial. The Court of Appeals, however, can reverse only on an exception taken to a ruling of the court, and no

Cattano v. Metropolitan St. Ry. Co

exception relating to the subject raises an error that we can review.

The plaintiff's counsel was permitted to finish his address without any objection. The court was not asked to take any action or make any ruling until after the charge had been delivered. The remedy of the defendant was to move promptly for directions to counsel to desist, and to the jury to disregard. As was said by the Supreme Court of the United States: "It is the duty of the defendant's counsel at once to call the attention of the court to the objectionable remarks, and request its interposition, and, in case of refusal, to note an exception." *Crumpton v. United States*, 138 U. S. 361, 364, 11 Sup. Ct. 355, 356, 34 L. Ed. 958. The defendant's counsel, however, did not ask the court to interpose, or to tell the jury to pay no attention to the mischievous remark, but waited until after the charge, when he called attention to the subject for the first time by excepting to the language used by counsel in summing up. This was not the subject of an exception, for an exception can properly be taken only to a ruling of the court, or to a refusal to rule. The court should first be asked to rule in accordance with the law which the counsel deems adapted to the occasion, and in case of refusal an exception will lie. *Dimon v. N. Y. C. & H. R. R. Co.*, 173 N. Y. 356, 358, 66 N. E. 1. Finally, however, the defendant's counsel moved to withdraw a juror on account of the improper observation, but the motion was denied, and he excepted. This was not the proper remedy, for leave to withdraw a juror is a favor, not a right, and has always been held to rest within the sound discretion of the court. Matters of discretion are reviewable by the Appellate Division, but not by us. As was said by Judge Earl in a late case: "It is now claimed that the trial judge erred in permitting the case to go before the jury which had heard the objectionable remark. The remark was undoubtedly an improper one, but the refusal of the court to grant the defendant's motion [to withdraw a juror] was not a legal error reviewable in this court. The motion was addressed entirely to the discretion of the court, which could grant or refuse it, taking into consideration the circumstances surrounding the case." *Chesebrough v. Conover*, 140 N. Y. 382, 388, 35 N. E. 633, 635.

I find no error in the record that we have the power to correct, and hence the judgment appealed from should be affirmed, with costs.

CULLEN, J. I vote for the affirmance of this judgment. I do not take issue with the Chief Judge of the court in the proposition that a passenger who causes the danger by which he is injured cannot complain of the injury. It is necessary in the management of street cars that the brake from time to time should be operated, and it requires room for the driver or motorman to use it. When a passenger takes his stand on

Cattano v. Metropolitan St. Ry. Co

the platform of a car, I think he assumes, not the exceptional, but the natural and usual, risks of his position, such as the jolts and jars from which a car propelled, even over the best of tracks, is not entirely free. So, also, he should see that he keeps out of the way of the brake when it is necessary to apply it. If a passenger will insist in getting on the crowded platform of a car, so far as the position is dangerous from the presence of the crowd and the natural incidents of the operation of a car to which I have alluded, he takes the risk of those dangers, though not exceptional ones. So, in this case, if the deceased had got on the front platform when it was so crowded that in the application of the brake in the ordinary manner it was likely to strike him, I should think he could not recover. But the evidence tends to show that when he was received as a passenger there was plenty of room on the platform, and that he could have remained there safe from the injury which caused his death. If so, then the negligence of the defendant was in suffering the platform to subsequently become too crowded for safety.

PARKER, C. J. (dissenting). The defendant's evidence that plaintiff's intestate, Cattano, fell while attempting to step off the car, was contradicted by one of plaintiff's witnesses on cross-examination, who said that the brakeman "forced his way to put on the brake, and almost pushed me, as well as pushing the young fellow, off the other end." Considered with the rest of the testimony of this witness and the testimony of plaintiff's other witnesses, the conclusion might well be reached, I think, that the witness did not see Cattano pushed off, but inferred that he must have been from the general situation, and the result of it. The jury, however, had the right to give such value to his evidence as they deemed it worth, and we cannot say but they gave to it entire credit, and therefore must assume that they did. Assuming the jury did give entire credit to this witness' testimony, we find that Cattano was pushed off the platform by the surging of others against him, or by the force of the brakeman's arm as he applied the brake to check the car on a downward grade. There is no evidence that the brakeman did either more or less than his duty, or that what he did was done in an unusual way. This statement is quite sufficiently supported by the comment of the distinguished counsel for the plaintiff in summing up to the jury: "Who says the driver was seriously at fault? We haven't intimated that;" and this he followed with a statement that there was fault in overcrowding the platform. Well, if there were fault in overcrowding, did not Cattano contribute toward it? There were at the most eight men on the platform, and he furnished, therefore, one-eighth of the overcrowding. And he continued to furnish it after he had a chance to go in the car, according to the plaintiff's witness Peck, who stood beside and talked with Cattano on the front platform until the car reached Lexington avenue. He

Cattano v. Metropolitan St. Ry. Co

says: "I went into the car at Lexington avenue. I went into the car when people got off and made room on Lexington avenue. * * * People were going out of the car, and the platform was being relieved. Then I went into the car. * * * I probably went in three or four feet. People crowded in after me. There were people between me and the door of the car at the time." As Cattano stood beside Peck, he could have gone into the car, and been one of those standing behind him; but he elected to stay where he was, swelling by one-eighth or one-sixth the crowd on the platform. And it is now contended that the law permits a jury to say that in doing so he was not guilty of negligence, but at the same time to say that the conductor—who does not appear from the evidence to have been on the platform prior to the accident—was guilty of negligence in permitting the platform to be overcrowded. In other words, one who merely permitted overcrowding is negligent in not apprehending danger therefrom, while one who contributed his person to the overcrowding is free from negligence contributing to his own injury. Such a result is clearly illogical, and ought not to stand, unless commanded by authority covering precisely such a state of facts. In *Lehr v. Steinway & H. P. R. R. Co.*, 118 N. Y. 556, 23 N. E. 889, the plaintiff was forced from a platform and injured, and a recovery was sustained. But the facts were different from this case. The plaintiff entered the car and secured a seat for his wife, who was lame, and then retired to the rear platform, where, owing to the crowd, he was obliged to stand on one of the steps. Seeing that the front platform was less crowded, he asked the conductor to stop the car so he might go to the front platform. Receiving no reply, he stepped from the rear platform at about the same time as the conductor and walked to the front platform, his disclosed purpose and his action not being objected to by either the conductor or driver. The front platform was so crowded that he did not fully accomplish his purpose, as he only succeeded in getting one foot on the platform, the other being on the step. So he clung with his right hand to the rail of the dash and with his left to the handrail at the end of the body of the car. A movement of the passengers broke the hold of his right hand, which he was unable to regain. Before he fell, however, he called upon the driver to stop the car, which was not done until after he had fallen and the car had passed over one of his legs. This court said: "The evidence in respect to the speed of the car, and the circumstances under which the plaintiff attempted to enter on the front platform, would not have justified the court in ruling, as a matter of law, that the plaintiff contributed to his own injury by making the attempt." A very different case from this, where, as we have seen, Cattano rode upon the front platform for a long time with full knowledge of the extent of the crowding, making no attempt to enter the car when the man standing next to

Cattano v. Metropolitan St. Ry. Co

him and others on the front platform did so. In *Willis v. Long Island R. R. Co.*, 34 N. Y. 670, the plaintiff, while riding upon a platform, was injured by a collision, a danger which he had no reason to apprehend, and therefore it could not be said, as a matter of law, that he was careless in not guarding against it. In *Graham v. Manhattan Ry. Co.*, 149 N. Y. 336, 43 N. E. 917, while the plaintiff's injury would not have happened had not the platform been crowded, yet it would not have happened had not the defendant's employee had an altercation with a passenger, and struck him, the effect of which was to cause a movement of the crowd upon the platform, which tended to crowd the plaintiff from the train. In order to save himself, he made a quick, involuntary movement with his left hand to grasp the railing behind him, and his arm was caught between the railing of the car upon which he was riding and those on the car immediately in the rear, as they came together in rounding a curve. And this court properly held the action of the employee in striking the passenger to be an element tending to render the question of contributory negligence one for the jury, inasmuch as he had a right to assume that the company's servants would cause no unusual disturbance of the crowd; and, further, that he had a right to assume that the company's cars were so constructed as not to render his position dangerous from their proximity to each other in passing over any portion of the road. In *Nolan v. Brooklyn City & N. R. R. Co.*, 87 N. Y. 63, 41 Am. Rep. 345, the plaintiff, while standing on the front platform of the street car—no other person being on it except the driver—was thrown off because of the action of the driver in suddenly whipping one of the horses, which plunged under the blows, occasioning a jar, which, coming without warning, threw him from the car. The testimony showed that the defendant was accustomed to allow men smoking to ride on the front platform, and plaintiff went there because he was smoking. The court necessarily held that the plaintiff was not guilty of contributory negligence, as a matter of law, in accepting and acting upon the custom of the defendant. In *Ginna v. Second Ave. R. Co.*, 67 N. Y. 596, the car was so crowded that plaintiff's intestate could not enter it without great discomfort, and so he stood upon the platform, with his back against the body of the car. The platform was not crowded, but, a switch having been left open, the car ran off upon it, producing a violent jolt, which threw the plaintiff's intestate and the other passengers who were standing on the platform off the car. The negligence of the defendant was conceded, and, of course, it was held that the question of contributory negligence was for the jury, who would not have been justified in holding that the plaintiff's intestate could have anticipated an open switch.

It will readily be seen that the authorities above referred to—and they are the leading ones brought to our attention—are

Cattano v. Metropolitan St. Ry. Co

all readily distinguishable from the one under consideration. In this case the platform was crowded with men, who, rather than wait for the next car, were taking their chances on a crowded car, as men do every day; and, if it be negligent for a company to permit men to crowd upon a platform because some one may be hurt if the crowd surge for some cause, it is equally negligent on the part of the man who, in possession of his faculties, insists upon adding his person to an already overcrowded platform. It is impracticable, in our large cities, to furnish seats for all persons in the street cars during what are known as "rush hours," and during those hours men insist upon riding upon platforms in order to gain time, and in so doing they contribute something toward the risk of injury to some one in case of the surging of the crowd from some one of the many causes that arise from time to time; and, if one of the last to crowd himself on, obtaining an insecure and unsafe position, be injured, without any other fault on the part of the company than that it permitted a crowd on the platform—which is this case—then there should not be, it seems to me, a recovery by the man who insisted upon being a part of the crowd.

Whether there be overcrowding on a platform is a question of fact for the jury, but they are not to determine the legal effect of overcrowding. That is a question of law for the courts. It has not been held so far that it is a negligent act on the part of a street railroad to permit passengers to ride on the front platforms of cars, or to allow as many of them to ride there as can get secure positions; and I think it should not be so held, in view of the necessities of the case. But if my view should not obtain, then it follows it should be held, as matter of law, that to permit the platform and steps to be crowded constitutes negligence, leaving the jury, in case of controversy on that point, to determine whether it was crowded. And if the fact of overcrowding be conclusively established—as in this case—it must follow that the persons on the steps or on the outside of the crowd, who are thrown off, contribute, as matter of law, to the result, for they not only helped to create the overcrowded and dangerous condition, but, in addition, placed themselves in the most hazardous of all the positions—on the platform.

The judgment should be reversed.

O'BRIEN and MARTIN, JJ. (and CULLEN, J., in memorandum), concur with VANN, J. HAIGHT, J., concurs with PARKER, C. J. GRAY, J., not sitting.

Judgment affirmed.

LIMA RY. CO. v. LITTLE.*(Supreme Court of Ohio, Nov. 18, 1902.)*

[65 N. E. Rep. 861.]

Injury to Passenger—Master and Servant—Evidence of Relationship.

Where, in an action brought by L. against a street railway company to recover damages for personal injuries sustained by her in consequence of the alleged negligent conduct of a servant of the defendant company, such company by its answer denies that the person whose act caused the injury complained of was at the time of such injury the servant of said company engaged in the prosecution of its business, and there is evidence tending to support such denial, *held* that, whether the person whose immediate negligence or misconduct caused the particular injury complained of was, at the time, the servant of and was then acting for the defendant company sought to be charged, is a question of fact to be submitted to the jury under proper instructions from the court.

Liability of Carrier for Negligence of Servants.*

The test of a master's liability is not whether a given act was done during the existence of the servant's employment, but whether such act was done by the servant while engaged in the service of and while acting for the master in the prosecution of the master's business.

Same.

A master is not liable for the negligent act of a servant or employee if, at the time of the doing of such act, the servant or employee is not then engaged in the service or duties of his employment, although the act be one which, if done by such servant or employee while on duty and at a time when actually engaged in his master's service, would be clearly within the course and scope of the usual and ordinary duties of such servant or employee.

(Syllabus by the Court.)

Error to circuit court, Allen county.

Action by Margaret Little against the Lima Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

This was an action commenced originally in the court of common pleas of Allen county, Ohio, by Margaret Little against the Lima Railway Company, to recover damages for injuries sustained by her in attempting to board one of the company's street cars at the public square in the city of Lima. Mrs. Little had come to the public square as a passenger on one of the company's cars from the south part of the city of Lima, and had received from the conductor of the car on which she came from the south a transfer ticket which entitled her to passage on an east-bound Market street car. Said east-bound Market street car was standing at the company's transfer station near the center of said public square at the time Mrs. Little reached said station from the south. While she was attempting to get upon said east-bound Market street car, and had placed one foot on the lower step, the bell of said car was rung by one John Cordrey, the car was suddenly started, and she was thrown to the street and injured. The Market

*As to the liability of carriers to passengers for the acts and omissions of servants, see notes at end of case.

Lima Ry. Co. v. Little

street car which Mrs. Little was then attempting to board was car No. 36, and had come to the transfer station only a minute or two before, in charge of said John Cordrey as conductor thereon, and one O'Malley as motorman. The evidence, which is all set out in a bill of exceptions, tends to show that it was the rule and custom of said street railway company, at this time and place, to change conductors and motormen on said car No. 36, and it further tended to show that on the day of this accident, and at the time it occurred, such change of crew had actually taken place, and that Cordrey had then been relieved and gone off duty as conductor, although he had not yet left said car, but he had left his place on the platform (which was taken by McGuff), and he (Cordrey) had gone inside of said car.

Virgil Kline, Richie & Richie, and W. H. Leete, for plaintiff in error.

Ridenour & Halfhill, for defendant in error.

CREW, J. (after stating the facts). By the record in this case, but two questions are presented to this court for determination, and these are: (1) Did the trial court err in refusing to give to the jury the special instruction requested by plaintiff in error? (2) Was the charge as given by the court erroneous?

The only evidence adduced at the trial of this case in the court of common pleas was that offered on behalf of the plaintiff, and the whole of the evidence so offered is set out in a bill of exceptions that is made a part of the record in this case. There was little or no conflict in the testimony of the several witnesses, and the testimony offered tended to prove, if it did not establish the fact, that after the east-bound Market street car had reached the transfer station in the public square, and before Mrs. Little attempted to get aboard of said car, there had been a change of conductors and motormen, and that at the time of the accident—at the time Mrs. Little was injured—John McGuff was then the conductor on, and was in charge of, said east-bound Market street car No. 36, and that Isaac Smalley was then motorman on said car.

John McGuff testified as follows: "Q. Whose duty was it, or who had charge of the car from the time it arrived at the station? A. When it arrived there I was supposed to have charge of it,—to take it there. Q. You? A. Yes, sir. Q. You had taken your place, had you? A. Yes, sir. Q. You were, as you supposed, all ready to move out for the east? A. Yes, sir. Q. Your motorman was in his place? A. Yes, sir. Q. How long had you been in your place, or had the car been standing there, before you took your position? A. About a minute and a half. Q. And you had been in your place for this time? A. Yes, sir. Q. You had taken your place and your motorman had taken his? A. Yes, sir. Q. And that car was in your charge, with Smalley as the motorman of that car? A. Yes, sir."

Lima Ry. Co. v. Little

Isaac Smalley, on his examination-in-chief, testified as follows: "Q. Where do you live? A. 1015 Hughes avenue. Q. What was your business or employment in the month of October, 1899? A. I was a motorman on the Lima street railway. Q. On the evening of October 31st, were you in charge of any car as a motorman? A. Yes, sir. Q. What was the number of that car? A. Car 36. Q. Which way was it headed? A. It was going east on Market street. Q. Where did you take charge of that car? A. At the transfer station. Q. Here in the public square? A. Yes, sir. Q. State, if you know, where is the usual place that passengers transfer from Main street to Market street? A. At the transfer station. Q. Do you know how long that car had stood there, or did stand there, before it moved out? A. Well, not over two minutes, I don't think; of course, I didn't time it; I could not say positively, but I don't think over two minutes. Q. You took charge of it at that place? A. Yes, sir. Q. Who was your conductor that went on duty with you? A. John McGuff." And on his cross-examination as follows: "* * * Q. You had not been on the car coming down Market street? A. No, sir. Q. You changed crews, I believe, at the transfer station? A. Yes, sir. Q. Your crew consisted of yourself and McGuff? A. Yes, sir. Q. What crew had brought the car to the transfer station? A. Why, Motorman O'Malley and Conductor Cordrey. Q. You had relieved O'Malley? A. Yes, sir. Q. And McGuff had relieved Cordrey? A. I supposed he had; of course, I did not know. Q. That is the point that McGuff takes Cordrey's place? A. Yes, sir, and I supposed he relieved him,—he was in charge of the car; of course, he was supposed to relieve him, but I did not know whether he had relieved him or not. Q. Cordrey lives somewhere in the eastern part of the town? A. He gets off at Scott street, there at the hospital. I do not know where he lives, whether he lives on that street or not, but he got off there and went up that street. Q. This was the regular time for the transfer of crews? A. Yes, sir."

At the conclusion of the testimony and after the arguments, the railway company, by its counsel, requested the court to give to the jury the following instruction: "* * * If, at the time plaintiff undertook to get on the car, McGuff, as conductor, and Smalley, as motorman, had absolute charge of the car No. 36, and so continued up and until the accident occurred, the company would not be responsible for the act of Cordrey, former conductor, if his trip and duties had ended upon the stoppage of the car No. 36 at its arrival at the transfer station in the center of the square at a time prior to the injury." This instruction the court refused to give; the defendant, by its counsel, at the time excepted; and such refusal by the court to so charge is one of the matters now assigned here as error. It is clear from the evidence in this case that the instruction so requested by defendant was not a

Lima Ry. Co. v. Little

mere abstraction, but that the same was pertinent and applicable to a condition of facts which the evidence in the case at least tended to prove or establish, and if, in its terms and language, such request embodies and contains a correct statement of the rule of law governing defendant's liability,—if the facts and conditions therein assumed and stated were found by the jury to exist,—then such request should have been given, and the refusal to give it was error. Therefore, in considering the question of whether or not the instruction requested was a proper instruction, and one that should have been given by the court to the jury, it is important, primarily, to determine whether, if the facts and conditions assumed by said request were by the evidence shown to exist, the rule of respondeat superior would then under such circumstances obtain or apply, and the railway company be held liable for the act of Cordrey. In *Railroad Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373, in discussing the doctrine of a master's liability for the wrongful acts of his servant, the court, on page 131, says: "The general rule as to the liability of the master for the wrongful acts of his servant is thus stated by Mr. Smith in his work on Master and Servant: 'A master is ordinarily liable to answer in a civil suit for the tortious or wrongful acts of his servant, if those acts are done in the course of his employment in his master's service. The maxims applicable to such cases being respondeat superior, and that before alluded to, qui facit per alium facit per se. This rule, with some few exceptions, which will hereafter be pointed out, is of universal application; whether the act of the servant be one of omission or commission, whether negligent, fraudulent, or deceitful, or even if it be an act of positive malfeasance or misconduct, if it be done in the course of his employment; his master is responsible for it civiliter to third persons.' Smith, Mast. & S. *151. But, to make the master responsible, the act of the servant must be done in the course of his employment, that is, under the express or implied authority of the master. Beyond the scope of his employment, the servant is as much a stranger to his master as any third person, and the act of the servant not done in the execution of the service for which he was engaged cannot be regarded as the act of the master. Id., s. p. 160; Shearm. & R. Neg. §§ 59, 62; *Limpus v. Omnibus Co.*, 1 Hurl. & C. 541; *Poulton v. Railway Co.*, L. R. 2 Q. B. 535." In the case of *Morier v. Railway Co.*, 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793, Mitchell, Judge, in the course of his opinion, says: "Beyond the scope of his employment, the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment. * * * And, in determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant

Lima Ry. Co. v. Little

was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself and as his own master, *pro tempore*, the master is not liable. If the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all the authorities." This rule or condition of liability, while apparently simple and easy of comprehension, is sometimes found difficult of application, but the difficulty in each particular case arises not from any uncertainty as to the rule itself, but in ascertaining whether the act complained of was one done in the execution of the master's business and within the scope of the servant's employment. This fact once established, the rule which determines the liability or nonliability of the master is easily applied, but the rule itself can in no wise aid in determining the question whether such act was or was not so done.

In determining whether a particular act was done in the course or within the scope of the agent's employment, two things are always to be primarily considered: First. Was the agent engaged at the time in serving his principal? Second. Even though so engaged, was the act complained of within the scope of the agent's employment? The cases dealing with the subject have generally to do with one or the other of these questions, and can generally be classified under these two heads. "If the act is done while the servant is at liberty from service, and pursuing his own ends exclusively, there can be no question of the master's freedom from all responsibility, even though the injury complained of could not have been committed without the facilities afforded to the servant by his relation to the master." 1 Shearm. & R. Neg. § 147. In *Hutchinson v. Railway Co.*, 5 Exch. 343, the court say: "We do not think a master is exempt from responsibility to his servant for an injury occasioned to him by the act of another servant, where the servant injured was not at the time of the injury in the service of his master. In such a case the servant injured is substantially a stranger, and entitled to all the privileges he would have had if he had not been a servant." In the case of *Railroad Co. v. Trainor*, 33 Md. 542, Trainor was employed and paid by the day. At 6 o'clock p. m. his day's work was ended, and on a day that he had been at work, but had finished his day's work and was on his way home, the injury occurred. He had expected to resume his work the next morning. The court held that at the time of the injury he could not be considered in the employment of the company. In commenting on this case, in *State v. Western Maryland R. Co.*, 63 Md. 433, the court say: "The decision in Trainor's Case proceeds upon the assumption that

Lima Ry. Co. v. Little

at the time of the injury he was not acting in the service of the company. His day's labor was over for the day, and, although he expected to resume labor the next day, that when his day's work was over he occupied toward the company the position of a stranger, and was entitled to all the privileges he would have had if he had not been an employee." In the case last cited, Abell, an employee of the railroad company, while off duty for the day, was going to his home on a free pass on a train of his employer, expecting to return to his labor the next morning, and was killed by a collision caused by the negligence of the employees of the company. In an action for damages brought by the wife of the deceased, the court held: "That Abell at the time of the collision was not acting in the service of the company, but was substantially a stranger, and entitled to all the privileges he would have had if he had not been an employee."

In the cases just cited, the principle upon which the master was held to be liable, to wit, that the servant injured was not at the time of the injury in the service of the master, would, when applied to this case, and for like reason, exempt the master from liability, if the facts assumed in the request to charge were, by the evidence, shown to exist. The test of a master's liability is not whether a given act was done during the existence of the servant's employment, but whether such act was done by the servant while engaged in the service of, and while acting for, the master, in the prosecution of the master's business, and such is the rule whether the act complained of be wanton and willful, or whether it be merely negligent on the part of the servant or employee. In whatever else they may differ, the authorities agree upon the principle that an employer is not liable for the acts of an employee unless committed while engaged in the service or duties of his employment. The question presented by the instruction that was asked by plaintiff in error is not whether what was done by Cordrey was such an act as would have been within the course and scope of his employment and duties if he had then been on duty as conductor with the right to control and direct the movements of said car, but is, quoting from the request, "if his trip and duties had ended, and McGuff, as conductor, and Smalley, as motorman, had absolute charge of said car No. 36, and so continued in charge up and until the accident occurred," whether under such circumstances the railway company would be liable for the unauthorized act of Cordrey in causing said car to be started in the manner he did. While the rule is well established that the master will not be exempt from liability merely because the act of a servant was in disregard of a rule laid down by the master, or was in disobedience of his express command, yet, on the other hand it is equally well settled that, to make the master responsible for the act of a servant or employee, such act must be done by such servant or employee while engaged in the service and

Lima Ry. Co. v. Little

duties of his employment, and in the prosecution of his master's business. The fact that Cordrey worked daily for said company, and was, in a popular sense, its employee, could not operate to make the railway company liable at all times and under all circumstances for his negligent conduct. Whether the company is so liable in a given case is made to depend upon actual service within the scope of his employment. A master has the right to select and choose his agents, and to determine himself, and assign to the servants so selected, their respective duties, and no assumption by an employee of duties not assigned to him will bring those duties within the course or scope of his employment as defined by the master, and when an act is not within the scope of a servant's employment it cannot be within either the express or implied authorization of the master.

If, as assumed by the instruction requested by plaintiff in error, at the time the accident complained of occurred, McGuff was then the conductor in absolute charge and control of said car, and Cordrey's trip and duties as conductor thereon had ended, then and in that event Cordrey, having no longer any duty to perform in or about that car, and it being no longer any part of his duty under his employment to be or remain on said car, his act (the ringing of the bell as a signal to start) was an unauthorized assumption of authority, not within the line of his duty or the scope of his employment, and the railway company would not be responsible therefor. The instruction asked by plaintiff in error was, we think, a proper instruction, and should have been given.

On the trial of this cause, in the general charge, the court instructed the jury in part as follows: "And if you find from the evidence that at the time plaintiff undertook to board this car, if you find she did, that the negligent act, if there was one, that caused her injury, if she suffered any, was done by a servant and agent of the defendant then present, and the act that he did was a part of the ordinary duties of his employment, then, and in that case, it would make no difference whether or not the exact time of the performance of his duty, under the rules he was acting under, had expired or not. If the act that he did was a part of his usual duty as an employee of that company, that company is still liable for the negligence in the performance of those acts. So that, 'if you find that the car of the defendant mentioned in the petition and evidence came from the west to the transfer station in the charge of John Cordrey, as conductor, and you further find that he remained aboard of such car, and did any act that he would naturally be called upon to do while discharging his duty as a conductor,—such act would be within the scope and course of his employment; and if such act was negligently performed, thereby causing injury to plaintiff while she was attempting to get aboard said car as a passenger, and she was free from any negligence contributing thereto, then the defendant would be

Lima Ry. Co. v. Little

liable.' " To this instruction the defendant, the railway company, excepted, and the giving of the same is here assigned as error. Much of what we have heretofore said on the question of the refusal of the court to charge as requested by plaintiff in error applies with equal force to this charge as given. This charge, in effect, is an instruction to the jury that although at the time of the act complained of Cordrey may have been off duty, and not then engaged in the actual service or duties of his employment as conductor, and not then clothed with present authority to perform the act in question, yet if what he did was a part of his usual and ordinary duties when actually serving the company, then such act would, if negligent, involve the railway company in its consequences, and would make it liable to Mrs. Little for any injury to her resulting therefrom. From the language employed in this instruction the jury may very well have understood, in the light of the undisputed facts in this case, that, in determining the question of the defendant's liability, they need inquire no further than to ascertain whether the act of Cordrey was such act "as he would naturally be called upon to do while discharging his duty as conductor." If they should find it was, they were by this instruction, in effect, told that such act would bind the company and make it liable, although Cordrey's duties and services for the day were ended, and the relation of master and servant for the time was terminated. Such instruction was, we think, under the facts of this case, misleading and erroneous. As to what was done by Cordrey, there was, in the evidence in this case, no conflict or controversy whatever, but the capacity in which he did what was done, whether acting for himself or as the servant of the company, as well as his authority to so act, were in dispute, and it became and was important to know in this case whether, at the time Cordrey rang the bell which caused the car to be started, he was then acting in the service of the company, within the course and scope of his employment, or was acting outside of it to effect some purpose of his own; and these were not questions of law for the court, but were questions of fact to be submitted to and determined by the jury from a consideration of all the facts and circumstances proven in the case. But the jury were told, in substance, that it was a matter of no consequence whether Cordrey's duties had ended, and his service and employment for the day had terminated; that, "if the act that he did was a part of his usual duty as an employee of that company, that company is still liable for the negligence in the performance of such act," because within the course and scope of his employment. But the act of Cordrey, in legal contemplation, was not within the course of his employment, and the scope of his authority and duties, unless at the time of its commission he was acting in the service of the company and about the company's business; and whether he was so employed and acting, at the time Mrs. Little

Notes

was injured, should have been submitted to the jury, with instruction that, if they should find he was not, then the railway company would not be responsible, and could not be held liable for his unauthorized act. In this case the court said to the jury that whether at the time of the act complained of he was then so employed and acting made no difference, and this we think, was error.

The judgment of the circuit court and of the court of common pleas reversed, and cause remanded to the court of common pleas.

BURKET, C. J., and SPEAR, DAVIS, and SHAUCK, JJ., concur. PRICE, J., not participating.

NOTES.

CARRIERS OF PASSENGERS—LIABILITY FOR ACTS AND OMISSIONS OF SERVANTS.

- I. In General.
- II. Negligence of Servants.
- III. Wilful Acts of Servants.
 - A. In General.
 - B. Assaults upon Passengers.
 - C. Insults to Passengers.
 - D. False Imprisonment and Arrest.
- IV. Scope of Employment.
 - A. In General.
 - B. Inviting or Directing Passenger to Alight at Dangerous Place.
 - C. Assisting Passenger on or off Train or Car.
 - D. Pushing or Pulling Passenger off Train or Car.
 - E. Directing or Permitting Passenger to Alight from Moving Train.
 - F. Giving Information to, or Instructing, Passengers.
 - G. Acts Calculated, or Intended, to Alarm Passengers.
 - H. Unintentional Assaults upon Passengers.
 - I. Falling against, or Jostling, Passengers.
 - J. Directing Passenger to Render Assistance.
 - K. Refusing Passenger Entrance to Car.
 - L. Causing Unnecessary Delay in Transportation.
 - M. Making Overcharge for Ticket.
 - N. Assaults upon Passengers.
 - O. False Imprisonment of Passengers.
- V. Who Are Servants.
 - A. In General.
 - B. Independent Contractors.
 - C. Construction Companies.
 - D. Persons in Charge of Sleeping, or Palace, Cars.
 - E. Servants Invested with Authority of Peace Officers.
 - F. Assistants Engaged by Servants.
 - G. Servants Employed Jointly by Several Masters.
 - H. Servants of Lessors or Lessees.
 - I. Servants of Receivers.
 - J. Pilots.
 - K. Postal Agents.
 - L. Surgeon Employed by Carrier.

I. IN GENERAL.

The old and thoroughly established doctrine that a master is responsible to third persons for damage caused by the wrongful acts or omissions of his servants, in the course of their employment as

Notes

such, is, of course, fully applicable to hold a carrier responsible to his passengers for the wrongful acts and omissions of his servants. Since a carrier owes to his passengers the exercise of a much higher degree of care than a master ordinarily owes to third persons, the considerations of public policy which justify the respondeat superior rule when the master sustains to third persons only the ordinary relations of life, are of especial force when the rule is to be applied to hold a carrier liable to his passengers. In fact, as will appear later, the rule which holds a master, who is a carrier for hire, liable to his passengers is somewhat more rigorous than that which holds him liable to third persons to whom he sustains no special relation.

II. NEGLIGENCE OF SERVANTS.

The cases stating the rule which governs the carrier's liability to passengers for the negligence of his servants, are collected in the note to *Louisville, etc., R. Co. v. Steenberger*, 5 R. R. R. 384, 28 Am. & Eng. R. Cas., N. S., 384.

III. WILFUL ACTS OF SERVANTS.

A. IN GENERAL.

The earlier doctrine of the common law, both in England and the United States, was that the master is not liable for the wilful wrong or trespass of his servant, unless done by his express direction, or with his assent. 1 Am. & Eng. Enc. of L., 2nd ed., p. 1156, note 2; 20 Am. & Eng. Enc. of L., 2nd ed., p. 169, note 1. But, in the modern law of master and servant, the distinction between the master's liability for the negligence and the wilful acts of his servants is generally discarded, and the master is liable not only for the negligence of his servants, but also for their wilful acts, when done within the scope of their employment. 1 Am. & Eng. Enc. of L., 2nd ed., p. 1156, note 3; 20 Am. & Eng. Enc. of L., 2nd ed., p. 1169, note 2. Since then, as is now generally agreed, the wilfulness of a servant's act does not relieve the master from liability even to persons toward whom he sustains only the ordinary relations of life, it is clear that the wilfulness of the wrong cannot relieve him from liability to persons whom he owes some special duty. "The principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or wilful, in the negligence or in the malice of the agent; the contract of the principal is equally broken in the negligent disregard, or in the malicious violation, of the duty by the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third, without responsibility for the malicious conduct of the substitute in performance of the duty. If one owe bread to another and appoint an agent to furnish it, and the agent of malice furnish a stone instead, the principal is responsible for the stone and its consequences. In such case, malice is negligence." Ryan, C. J., in *Croaker v. Chicago, etc., R. Co.*, 36 Wis. 657, 17 Am. Rep. 507. It is, therefore, well settled that a carrier is liable to his passengers for even the wilful and malicious acts of his servants. *Trabing v. California Navigation, etc., Co.*, 121 Cal. 137, 53 Pac. 644, 8 Am. & Eng. Corp. Cas., N. S., 695; *Keene v. Lizardi*, 5 La. 431, 25 Am. Dec. 197; *Weed v. Panama R. Co.*, 17 N. Y. 362, 72 Am. Dec. 474, affirming 12 N. Y. Super. Ct. 133, in which a railroad company was held liable to a passenger for the consequences of an unreasonable delay in the transportation, caused by the wilful act of the conductor in detaining the train, knowing it to be a violation of his duty; *Dwinelle v. New York, etc., R. Co.*, 120 N. Y. 117, 24 N. E. 319, 17 Am. St. Rep. 611, 8 L. R. A. 224, reversing 45 Hun (N. Y.) 139; *Passenger R. Co. v. Young*, 21 Ohio St. 518, 8 Am. Rep. 78; *Lakin v. Oregon, etc., R. Co.*, 15 Ore. 220, 15 Pac. 641, 34 Am. & Eng. R. Cas. 500; *Redding v. South Carolina R. Co.*, 3 S. Car. 1, 16 Am. Rep. 681; *Knoxville Traction Co. v. Lane*,

Notes

103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549; *Croaker v. Chicago, etc., R. Co.*, 36 Wis. 657, 17 Am. Rep. 504; *Gillingham v. Ohio, etc., R. Co.*, 35 W. Va. 588, 14 S. E. 243, 51 Am. & Eng. R. Cas. 222, 29 Am. St. Rep. 827, 14 L. R. A. 798. But see *Jackson v. St. Louis, etc., R. Co.*, 87 Mo. 422, 56 Am. Rep. 460. In at least two states statutes were enacted, at an early date, by which owners of every carriage or vehicle conveying passengers for hire were made liable for injuries done by the driver, whenever the driver was liable therefor, whether caused by negligence or wilful acts. 1 N. Y. Rev. Stat., p. 696, § 6; *Saub. & B. Wis. Ann. Stat.*, § 1595. In view of a section in the New York statute defining the term "carriage" the driver of a street car has been held not to be a driver of a carriage within the meaning of the act. *Isaacs v. Third Avenue R. Co.*, 47 N. Y. 122, 7 Am. Rep. 418. But, while the liability of the carrier to passengers for the wilful acts of his servants is undoubted, there exists much confusion of authority as to whether the servant's act must be within the scope of his employment or the line of his duty in order to charge the carrier with liability. As will appear later, in connection with discussions of the carrier's liability for specific wilful acts of his servants, the state of the authorities upon this question is as follows: The preponderance of authority is to the effect that he is responsible for assaults upon a passenger by a servant if the servant is, at the time, engaged in executing the contract of transportation, although the act may not be strictly within the servant's "scope of employment" or "line of duty" (see the authorities collected in the note referred to in subdivision B of this section); there seems to be no reference to the question in the cases which involve the carrier's liability to passengers for insults by servants (see the authorities collected in the note referred to in subdivision C of this section); and there are a number of dicta and a few decisions to the effect that the carrier is liable for the false arrest and imprisonment of a passenger by a servant only when the servant, in effecting the wrongful arrest, is acting within the scope of his employment. See the authorities collected in the note referred to in subdivision D of this section. Why the carrier's liability to passengers for assaults by servants and his liability for the false imprisonment of passengers should be governed by different rules is certainly not obvious. It is apprehended that the same rule is to be applied to determine the liability of the carrier to passengers for the wilful acts of his servants, whether the particular act be an assault, insult, or false arrest and imprisonment. What that rule should be is sufficiently indicated in the discussion of the carrier's liability for assaults by servants.

B. ASSAULTS UPON PASSENGERS.

It is obvious that there is much greater reason for holding a principal liable for an assault committed by his servant when the person assaulted sustains the relation of a passenger to the principal than when the injury is to a mere stranger. In the much-cited case of *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39, an action of trespass by a passenger for an assault upon him by the defendant's brakeman, it being contended by the defendant that it was not liable because the brakeman's assault upon the plaintiff was wilful and malicious, and was neither directly nor impliedly authorized by the defendant, Walton, J., in delivering the opinion of the court, said: "The fallacy of this argument, when applied to the common carrier of passengers, consists in not discriminating between the obligation which he is under to his passenger, and the duty which he owes a stranger. It may be true that if the carrier's servant wilfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from vio-

Notes

lence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precaution as human judgment and foresight are capable of to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but, a fortiori, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through the negligence or the wilful misconduct of the carrier's servant, the carrier is necessarily responsible." Accordingly, it is uniformly held that, generally speaking, carriers of passengers are liable for wilful and wanton assaults committed upon passengers by their servants. See note to *Birmingham R., etc., Co. v. Baird*, 22 Am. & Eng. R. Cas., N. S., 909.

C. INSULTS TO PASSENGERS.

As to the liability of the carrier for insults to passengers by his servants, see note to *San Antonio Traction Co. v. Crawford*, 5 R. R. R. 517, 28 Am. & Eng. R. Cas., N. S., 517.

D. FALSE IMPRISONMENT AND ARREST.

A carrier of passengers is liable for the false imprisonment and arrest of a passenger which is made, or caused to be made, by a servant when acting within the line of his duties or the scope of his employment. See note to *Brunswick, etc., R. Co. v. Ponder*, ante.

IV. SCOPE OF EMPLOYMENT.

A. IN GENERAL.

Since it is well settled that the carrier is liable for the negligence of his servants only when acting within the line of their duties or the scope of their employment, and since the "line of duty" and "scope of employment" limitation of the carrier's liability to passengers for the wilful wrongs of his servants has not been wholly abandoned, it becomes important to determine what acts are and what are not within the scope of the servants' employment. It may, generally speaking, be said that, from the moment the contract between the carrier and passenger begins until it ends, the official actions of the servants of the carrier touching the payment of fares, or the manner in which passengers shall conduct themselves, or the enforcement of the regulations prescribed for the conduct of the transportation—in short all intercourse between the servants and passengers, naturally and legitimately growing out of the relationship existing between them—may properly be said to come within the scope of their employment. *Sherley v. Billings*, 71 Ky. 147, 8 Am. Rep. 451; *Baltimore, etc., R. Co. v. Barger*, 80 Md. 23, 30 Atl. 560, 45 Am. St. Rep. 319, 26 L. R. A. 220; *Ramsden v. Boston, etc., R. Co.*, 104 Mass. 117, 6 Am. Rep. 200.

B. INVITING OR DIRECTING PASSENGER TO ALIGHT AT DANGEROUS PLACE.

Since the performance of the duty of exercising care to provide passengers with safe alighting places is necessarily reposed in the conductor, a railroad is liable for the act of a conductor in negligently inviting, directing, or otherwise inducing a passenger to get off a train at a dangerous place. *McDonald v. Kansas City, etc., R. Co.*, 127 Mo. 38, 29 S. W. 848; *Adams v. Missouri, etc., R. Co.*, 100 Mo. 555, 12 S. W. 637, 13 S. W. 509, 41 Am. & Eng. R. Cas. 105; *Griffith v. Missouri, etc., R. Co.*, 98 Mo. 160, 11 S. W. 559; *Lewis v. Delaware, etc., R. Co.*, 145 N. Y. 508, 40 N. E. 248, affirming 80 Hun (N. Y.) 192, 30 N. Y. Supp. 28; *International, etc., R. Co. v. Smith* (Tex. 1890), 14 S. W. 642, 44 Am. & Eng. R. Cas. 324.

C. ASSISTING PASSENGER ON OR OFF TRAIN OR CAR.

It is well settled that a railroad or street railway company is liable for the negligence of servants in charge of a train or car while assisting passenger to get on or off. *Pennsylvania R. Co. v. Reed*, 60

Notes

Fed. 694, 9 C. C. A. 219, 58 Am. & Eng. R. Cas. 422; *McCaslin v. Lake Shore, etc., R. Co.*, 93 Mich. 553, 53 N. W. 724, 52 Am. & Eng. R. Cas. 290; *Drew v. Sixth Avenue R. Co.*, 26 N. Y. 49; *Texas, etc., R. Co. v. Humphries*, 20 Tex. Civ. App. 28, 48 S. W. 201; *International, etc., R. Co. v. Mulliken*, 10 Tex. Civ. App. 663, 32 S. W. 152; *Werner v. Chicago, etc., R. Co.*, 105 Wis. 300, 81 N. W. 416. Whenever it is the duty of the carrier to assist passengers to get on or off the vehicle, the carrier is, of course, liable for the negligence of a servant who is charged with the duty of rendering the necessary assistance. *Western, etc., R. Co. v. Voils*, 98 Ga. 446, 26 S. E. 483, 35 L. R. A. 655; *Pittsburgh, etc., R. Co. v. Gray*, 28 Ind. App. 588, 64 N. E. 39, 4 R. R. R. 120, 27 Am. & Eng. R. Cas., N. S., 120; *International, etc., R. Co. v. Gilmer*, 18 Tex. Civ. App. 680, 45 S. W. 1028. And, even though the carrier is under no obligation to afford passengers personal assistance in getting on or off the vehicle, if he does, through his servants, undertake to assist passengers, he is still liable for negligence involved in the character of the personal assistance furnished. *Missouri, etc., R. Co. of Texas v. White* (Tex. Civ. App. 1900), 55 S. W. 593. Thus, whether a railroad company is or is not bound to render assistance in taking passengers aboard its cars, it is liable for the consequences of negligence in giving directions to passengers as to the mode of entering. *Allender v. Chicago, etc., R. Co.*, 43 Iowa 276. A complaint alleging that the conductor of defendant's street car, after assisting plaintiff to alight from the car, stepped back upon the car step and stood on plaintiff's skirt, which had not been removed from the step, while the car was started, throwing plaintiff down, and injuring her, has been held to state a cause of action. *Citizens', etc., R. Co. v. Shepherd* (Ind. App. 1901), 59 N. E. 349. Although a passenger leaves a train at an intermediate station, upon being mistakenly informed by a brakeman, whose duty it is to call the stations and to assist passengers on and off the train, that it is necessary to change cars at that station, the railroad company is responsible for the negligence of the brakeman in assisting the passenger off the train. *International, etc., R. Co. v. Anderson*, 15 Tex. Civ. App. 180, 53 S. W. 606.

D. PUSHING OR PULLING PASSENGER OFF TRAIN OR CAR.

On the ground that the act of a trainman in pushing or pulling a passenger from a train or car is within the scope of his employment, a railroad company is liable to a passenger for injuries sustained in consequence of being negligently or wilfully pulled or pushed from a train by the conductor (*Louisville, etc., R. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; *Texas, etc., R. Co. v. Humphries*, 20 Tex. Civ. App. 28, 48 S. W. 201), by a brakeman (*Owens v. Kansas City, etc., R. Co.*, 95 Mo. 169, 8 S. W. 350, 33 Am. & Eng. R. Cas. 524, 6 Am. St. Rep. 39; *Werner v. Chicago, etc., R. Co.*, 105 Wis. 300, 81 N. W. 416), and even by one of the servants in charge of a sleeping car. *Louisville, etc., R. Co. v. Ray*, 101 Tenn. 1, 46 S. W. 554, 11 Am. & Eng. R. Cas., N. S., 174. If a passenger has boarded a moving train and got safely on the steps of one of the cars, the railroad company is responsible for the act of one of its servants in pushing him off. *Sharer v. Paxon*, 171 Pa. St. 26, 33 Atl. 120, 2 Am. & Eng. R. Cas., N. S., 429.

E. DIRECTING OR PERMITTING PASSENGER TO ALIGHT FROM MOVING TRAIN.

A railroad company is liable to a passenger, who is not chargeable with contributory negligence, for injuries received in consequence of being negligently permitted or directed to alight from a moving train by the conductor (*Evansville, etc., R. Co. v. Athon*, 6 Ind. App. 295, 51 Am. St. Rep. 303, 33 N. E. 469; *Bucher v. New York, etc., R. Co.*, 98 N. Y. 128, 21 Am. & Eng. R. Cas. 361; *Cooper v. Georgia, etc., R. Co.*, 61 S. Car. 345, 39 S. E. 543, 16 Am. & Eng. R. Cas., N. S., 12), or a brakeman. *Eddy v. Wallace*, 49 Fed. 801, 52 Am. & Eng. R. Cas. 265; *Pittsburgh, etc., R. Co. v. Gray*, 28 Ind. App. 588, 64

Notes

N. E. 39, 4 R. R. R. 120, 27 Am. & Eng. R. Cas., N. S., 120; *Filer v. New York, etc., R. Co.*, 49 N. Y. 51, 10 Am. Rep. 327. But, on the other hand, it has been held that the act of a brakeman in telling a passenger, who has been carried by his station while asleep, that the train has just started and that he does not think that there is any danger in getting off, does not charge the carrier with liability for injuries received by the passenger in alighting. "The contract of carriage having terminated, and the person being upon the train through his own fault, the company could become liable only through failure of its servants to exercise ordinary care against inflicting injury upon him. The advice of a porter or brakeman to such person that it would not be dangerous to get off a moving train cannot be considered as the discharge of a delegated duty, for no such obligation rested upon the carrier." *Missouri, etc., R. Co. v. Perry*, 8 Tex. Civ. App. 78, 27 S. W. 496. And it has been held that a declaration which stated in effect that plaintiff was injured while alighting from a moving train in obedience to the negligent order of defendant's flagman, but which did not allege that the flagman had any authority to give the direction, or that the giving of it was within the scope of his duties, or that he gave it by direction of the conductor, failed to state a cause of action. *Savannah, etc., R. Co. v. Wall*, 96 Ga. 328, 23 S. E. 197.

F. GIVING INFORMATION TO, OR INSTRUCTING, PASSENGERS.

A railroad is responsible for the act of its ticket agent in directing a passenger to take the wrong train (*South, etc., R. Co. v. Huffman*, 76 Ala. 492, 52 Am. Rep. 349), and for the act of its conductor in negligently intimating to a passenger, who makes inquiries, that she is on the right train, when, in fact, she is on a train which will not carry her to her destination. *International, etc., R. Co. v. Gilbert*, 64 Tex. 536, 22 Am. & Eng. R. Cas. 405. But, since the control and management of a train is ordinarily vested in the conductor, whose authority is exclusive, the unauthorized acts of a brakeman as to matters connected with the movement of a train is usually not within the scope of his employment. Thus the unauthorized act of a brakeman on a freight train, which was in charge of a conductor, in telling a passenger, who was riding on the train for the purpose of caring for stock, to look after his stock, and that the train, which has stopped at a station, would remain there some time, has been held not to be within the scope of the brakeman's authority. *International, etc., R. Co. v. Armstrong*, 4 Tex. Civ. App. 146, 23 S. W. 236. And since a conductor's duty to, and authority over, passengers is at an end when they have safely alighted from his train, advice, information or instructions which a conductor gives a passenger, who has alighted from the train, usually is not within the scope of the conductor's employment. Thus a direction given by a conductor to a passenger, who had boarded the wrong train and was set down at a distance from the station, as to the course which he should take in returning has been held not to be within the scope of the conductor's authority. *Cincinnati, etc., R. Co. v. Carper*, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352, 31 Am. & Eng. R. Cas. 36. A passenger who, having been carried past his station while asleep, was set down at a distance therefrom, at his own request, has been denied a recovery for injuries sustained in walking back, notwithstanding that he might have been misled by the conductor as to the precise place where the train had stopped; the conductor, it was said, was not serving the company, but the passenger, in what occurred. *Wilson v. New Orleans, etc., R. Co.*, 68 Miss. 9, 8 So. 330.

G. ACTS CALCULATED, OR INTENDED, TO ALARM PASSENGERS.

The act of a brakeman in calling upon passengers to jump from the train, when no real danger was imminent, has been held to be within the scope of his employment, although the expressed duties

Notes

required of him were limited, and, under ordinary circumstances, did not include the duty of directing passengers, or of managing the passenger cars. *Ephland v. Missouri, etc., R. Co.*, 137 Mo. 187, 37 S. W. 820, 7 Am. & Eng. R. Cas., N. S., 579, 59 Am. St. Rep. 498, 35 L. R. A. 107, rehearing denied in 137 Mo. 196, 38 S. W. 926, 59 Am. St. Rep. 502, 35 L. R. A. 109; *McPeak v. Missouri, etc., R. Co.*, 128 Mo. 617, 30 S. W. 170, 2 Am. & Eng. R. Cas., N. S., 226. And a railroad company has been held not to be liable for the act of a baggage master in going into the compartment of the car adjoining his own, at the request of the express messenger, for the purpose of joining the latter in having sport with a boy who, through ignorance or mistake, had entered the express compartment, and so frightening the boy by threatening words and acts as to cause him to jump from the moving train. *Louisville, etc., R. Co. v. Douglass*, 69 Miss. 723, 11 So. 933, 30 Am. St. Rep. 582.

H. UNINTENTIONAL ASSAULTS UPON PASSENGERS.

The act of an engineer in negligently throwing a jet of water from a water tank upon a passenger has been held to charge the carrier with liability. *Terre Haute, etc., R. Co. v. Jackson*, 81 Ind. 19, 6 Am. & Eng. R. Cas. 178. And a street railway company has been held liable to a passenger upon one of its cars for injuries received through the act of the driver in throwing a stick at boys who were hanging on the car. *Allen v. Galveston, etc., R. Co.*, 79 Tex. 631, 15 S. W. 498.

I. FALLING AGAINST, OR JOSTLING, PASSENGERS.

That the negligent or wilful jostling of passengers by employees is within the scope of their employment is illustrated by cases holding a street railway company responsible for the injuries inflicted upon a passenger in consequence of the conductor negligently stumbling against him, while engaged in collecting fares (*Whalen v. Consolidated Traction Co.*, 61 N. J. L. 606, 40 Atl. 645, 11 Am. & Eng. R. Cas., N. S., 207, 68 Am. St. Rep. 723, 41 L. R. A. 836), holding a street railway company responsible for injuries to a passenger, who, while riding on the front platform of one of its street cars, was knocked off by the conductor in attempting to get on (*Gray v. Metropolitan, etc., R. Co.*, 57 N. Y. Supp. 587, 39 N. Y. App. Div. 536), holding a street railway company liable for the negligence of a driver of one of its street cars in knocking a passenger from the platform in leaving the car, after having given the reins to another driver by whom he was relieved (*Commonwealth v. Brockton, etc., R. Co.*, 143 Mass. 501, 10 N. E. 506, 30 Am. & Eng. R. Cas. 632), and holding a railroad company liable for the act of a brakeman in wilfully or carelessly jostling a passenger from the train, as he was passing from one car to another to find a seat. *Louisville, etc., R. Co. v. Kelly*, 92 Ind. 371, 13 Am. & Eng. R. Cas. 1, 47 Am. Rep. 149. A railroad company has been held liable to a passenger who was knocked down and injured, while in the central entrance to defendant's station, in consequence of the violent expulsion of a drunken man by a servant who was employed to care for the men's waiting room. *Gray v. Boston, etc., R. Co.*, 168 Mass. 20, 46 N. E. 397, 8 Am. & Eng. R. Cas., N. S., 481. In a case in which the evidence showed that plaintiff, who was a passenger upon defendant's elevated train, riding on the platform of a car which was so crowded that the gate could not be closed, was injured in consequence of the guard striking at a passenger with whom he had become involved in a quarrel, causing the crowd on the platform to surge against plaintiff, who, in order to save himself from being pushed off through the open gate, made a quick involuntary movement with his left hand to catch the railing behind him, thereby getting his arm caught between the railings of the car on which he was riding and the one immediately following, it was held that plaintiff was improperly nonsuited. *Graham v. Manhattan R. Co.*, 149 N. Y. 336, 43 N. E. 917. But in an action by a passenger who was injured, while on the platform at one

Notes

of defendant's stations, in consequence of the falling against him of one of defendant's servants, who was engaged in a playful scuffle with another employee, it was held that the conduct of the employees was not in the line of, or fairly incidental to, their employment. *Goodloe v. Memphis, etc., R. Co.*, 107 Ala. 233, 18 So. 166, 2 Am. & Eng. R. Cas., N. S., 444, 54 Am. St. Rep. 67, 29 L. R. A. 729.

J. DIRECTING PASSENGER TO RENDER ASSISTANCE.

The act of a brakeman on a freight train, who was invested with no control whatever over any person on the train, in directing a boy, who was riding on the train without the consent of the conductor and without paying fare, to adjust some boards which were falling off the car, has been held not to be within the brakeman's scope of employment. *Sherman v. Hannibal, etc., R. Co.*, 72 Mo. 62, 4 Am. & Eng. R. Cas. 589, 37 Am. Rep. 423.

K. REFUSING PASSENGER ENTRANCE TO CAR.

The act of the porter on a chair car, whose duty it is to direct passengers which car to enter, and who carries the keys to the car, in refusing a passenger entrance to the car, is clearly within the scope of his employment. *Texas, etc., R. Co. v. Kingston* (Tex. Civ. App. 1902), 68 S. W. 518.

L. CAUSING UNNECESSARY DELAY IN TRANSPORTATION.

The act of a conductor in unnecessarily holding his train at an intermediate station, and thereby causing an unreasonable delay in the transportation, is within the scope of his employment, and charges the carrier with liability for the consequent injuries to a passenger. *Weed v. Panama R. Co.*, 17 N. Y. 362, 72 Am. Dec. 474, affirming 12 N. Y. Super. Ct. 133.

M. MAKING OVERCHARGE FOR TICKET.

The act of a ticket agent in making an overcharge for a ticket, being done in the discharge of the duties expressly committed to him by the railroad company employing him, is within the scope of his employment, and the company is liable for the penalty imposed by statute. *St. Louis, etc., R. Co. v. Ryan*, 56 Ark. 245, 19 S. W. 839.

N. ASSAULTS UPON PASSENGERS.

As to when assaults committed by servants upon passengers are and when they are not within the scope of the employment of the servants, see section III, D. of the note appended to *Birmingham R., etc., Co. v. Baird*, 22 Am. & Eng. R. Cas., N. S., 909.

O. FALSE IMPRISONMENT OF PASSENGERS.

In some cases it has been taken for granted that the act of the conductor of a train in causing the arrest of a passenger on a charge of evading payment of fare is within the scope of the conductor's employment (*Palmer v. Maine, etc., R. Co.*, 92 Me. 399, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673; *Krulevitz v. Eastern R. Co.*, 140 Mass. 573, 5 N. E. 500, 26 Am. & Eng. R. Cas. 118, 143 Mass. 228, 9 N. E. 613, 28 Am. & Eng. R. Cas. 138), and that is undoubtedly the law. It has been held that a conductor who causes a passenger on his train, with whom he has had trouble in connection with the collection of fare, to be wrongfully arrested, is acting within the line of his employment. *Atchison, etc., R. Co. v. Henry*, 55 Kan. 715, 41 Pac. 952, 2 Am. & Eng. R. Cas., N. S., 418, 29 L. R. A. 465. A street railway company has been held liable in damages to a passenger who, when he presented a transfer which had, by mistake of the agent of a connecting road, been incorrectly punched, was forcibly ejected by the conductor, and placed under arrest by a policeman at the conductor's instance. *Jacobs v. Third Avenue R. Co.*, 75 N. Y. Supp. 679, reversing 34 Misc. (N. Y.) 512, 69 N. Y. Supp. 981. The conduct of the gate-keeper of an elevated railroad company in refusing to allow a passenger, who had lost his ticket before reaching his destination, to pass from the station platform to the street, detaining him and causing him to be arrested, has been declared to be

Notes

within the gate-keeper's scope of employment, on the ground that all these acts were successive steps taken to enforce the payment of fare by the passenger, or to punish him for refusing to do so. *Lynch v. Metropolitan, etc., R. Co.*, 90 N. Y. 77, 12 Am. & Eng. R. Cas. 119, 43 Am. Rep. 141. And it has been held that a carrier by water is liable for the act of the captain of one of its steamboats, whose duty it is to collect fares from passengers, in handcuffing and chaining a passenger to a post, under the mistaken belief that he has not paid his fare. *Trabing v. California Navigation, etc., Co.*, 121 Cal. 137, 53 Pac. 644, 8 Am. & Eng. Corp. Cas., N. S., 695. But in an action for malicious prosecution it has been held that, when a street railway conductor has been authorized only to put delinquent passengers off his car, the act of the conductor in calling a policeman to take a passenger off the car and to arrest him for violating an ordinance against riding on street cars without the payment of fare, does not render the carrier liable. *Little Rock Traction, etc., Co. v. Walker*, 65 Ark. 144, 45 S. W. 57, 40 L. R. A. 473, *Wood, J., dissenting*. The act of a street railway conductor, who has ejected a passenger from his car, in causing the passenger's arrest, by an officer, immediately after the expulsion, has been declared to be outside the scope of his employment. "It cannot be inferred, in the absence of testimony, that it is in the course of the employment of a conductor of a street cable car to cause the immediate arrest of a former passenger for his conduct in refusing to pay fare or to leave the car, and thus to take the risk of being compelled to leave his car in the street temporarily unprovided with a conductor." *Lezinsky v. Metropolitan, etc., R. Co.*, 88 Fed. 437, 59 U. S. App. 588, 12 Am. & Eng. R. Cas., N. S., 55.

Upon the question as to when the arrest of a passenger by, or at the instance of, a servant of the carrier, on a charge of passing counterfeit money, is to be deemed to be within the scope of the servant's employment, there is much confusion. It has been held that the driver of a street car is not acting within the scope of his employment when he causes a passenger on his car to be arrested on a groundless charge of passing counterfeit money in payment of his fare. *Laffitte v. New Orleans, etc., R. Co.*, 43 La. Ann. 34, 8 So. 701, 47 Am. & Eng. R. Cas. 645, 12 L. R. A. 337. And, again, it has been held that a street railway company is not responsible for the act of its superintendent in causing the arrest of a passenger for depositing a counterfeit coin in the fare box on one of its cars, in the absence of a showing that the superintendent was expressly authorized to procure the arrest, or that the act was ratified or adopted by the corporation. *Central R. Co. v. Brewer*, 78 Md. 394, 28 Atl. 615, 59 Am. & Eng. R. Cas. 639, 27 L. R. A. 63. But where a special agent or detective employed by a railroad company for the purpose of protecting the property of the company, and of ferreting out and prosecuting persons guilty of crimes against the company, had general instructions not to make arrests without first consulting the local attorneys of the road, but was, however, authorized to make arrests when the proof was strong, and there was not time to consult the local counsel, the act of the agent in causing the arrest, without consulting the company's local counsel, of a passenger who has tendered a counterfeit bill at one of the company's ticket offices, was held to be within the line of his employment. *Eichengreen v. Louisville, etc., R. Co.*, 96 Tenn. 229, 34 S. W. 219, 3 Am. & Eng. R. Cas., N. S., 453, 54 Am. St. Rep. 833, 31 L. R. A. 702. The conduct of a ticket agent in declaring that a coin which a passenger had given him was a counterfeit, and demanding another coin in its place, and, on the refusal of the passenger to do so, calling her a counterfeiter, and a common prostitute, and then detaining her at the station while search was made for an officer, releasing her when an officer could not be found, has been held to be within the scope of his employment, so that the carrier was responsible for the slanderous words and false arrest. In delivering the opinion of the court, Gray, J., said: "Here

Notes

the agent was acting for his employers, and with no other conceivable motive; losing his temper and injuring and insulting the plaintiff upon the occasion. He believed that plaintiff had passed a counterfeit piece of money upon him, and thus had obtained a passage ticket and good money in change. What he did was in the endeavor to protect and to recover his employer's property; and if, in his conduct, he committed an error, which was accompanied by insulting language and the detention of the person, the defendant, as his employer, is legally responsible in an action for damages for the injury." *Palmeri v. Manhattan R. Co.*, 133 N. Y. 261, 30 N. E. 1001, 44 N. Y. S. R. 894, 53 Am. & Eng. R. Cas. 56, 28 Am. St. Rep. 632, 16 L. R. A. 136, affirming 60 Hun (N. Y.) 579, 39 N. Y. S. R. 23, 14 N. Y. Supp. 468. But where a ticket agent, who had been notified by the police authorities to watch for men of a certain description, suspected of passing counterfeit bills, accepted from a passenger, who applied for a ticket and whom the agent thought was one of the counterfeiters, a bill which he believed at the time to be a counterfeit, but which was genuine, and then sent for a police officer, to whom he pointed out the passenger, who was then on the station platform, it was held (by a divided court) that the carrier was not responsible for the false imprisonment, because the agent was not, in what he did, acting within the scope and line of his duty. *Mulligan v. New York, etc., R. Co.*, 129 N. Y. 506, 29 N. E. 952, 53 Am. & Eng. R. Cas. 47, 26 Am. St. Rep. 539, 14 L. R. A. 791, reversing 60 Hun (N. Y.) 579, 14 N. Y. Supp. 456. In the prevailing opinion, which was delivered by O'Brien, J., it was said: "It is quite clear from the evidence that the agent was first put upon his guard, and in fact set in motion, not by any direction from the defendant, but by the police. When he took the bill he knew, or at least believed, it to be a counterfeit; but, notwithstanding this, he gave the plaintiff defendant's property for it, whereas it was his duty, considering him merely as the agent of the defendant, to refuse it. He did not take the bill in the course of his business as agent, but for the purpose of entrapping persons that he believed to be engaged in the commission of crimes. This may have been laudable enough on his part as a citizen or as a person aiding the police, but he was not acting in the line of his duty as defendant's agent. If he had been cheated or imposed upon by the plaintiff, or if he honestly believed he had been, and then attempted to recover what he had or supposed he had lost by the arrest of the plaintiff, it might then be said that he was engaged in the protection of the property and interest of the defendant, and therefore acting within the line of his duty. But here a ticket agent of a railroad deliberately takes from a person applying to purchase a ticket what he believes to be a counterfeit five-dollar bill,—not, of course, in good faith, or in the regular and ordinary course of his business, but for the purpose of aiding the police in the detection of criminals,—and then immediately directs the arrest of the person from whom he took the bill. Such an act on his part is not binding on his principal. If he was in fact acting within the scope and in the line of his duty, he would have refused to receive what he believed to be counterfeit money for the property of his principal, and would have refused to part with such property, except upon receipt of what at least he believed to be good money. The defendant, as a citizen, might with perfect propriety render to the police such services as he could in procuring the detection and arrest of persons engaged in passing counterfeit money, but it does not follow that all his acts in that respect are binding on the defendant."

On the ground that the conductor of a train would not be acting within the scope of his employment in going out of the train, and forcing one into a passenger car and carrying him off, if a conductor knowingly and wilfully participates in the act of taking and transporting upon the cars, against his will, one whom he had no right to receive on the cars for transportation, he and not the company, would be liable for his conduct. *Jackson v. St. Louis, etc., R. Co.*, 87 Mo. 422, 25 Am. & Eng. R. Cas. 327, 56 Am. Rep. 460.

Notes

V. WHO ARE SERVANTS.

A. IN GENERAL.

It is sometimes a matter of difficulty to determine who are servants of the carrier within the rule which charges the carrier with liability for the acts or omissions of his servants. In this connection it is to be observed that the carrier is liable not only for the acts and omissions of a servant in the strict sense of those whom he employs to render personal service otherwise than in pursuit of independent callings, and over whom he has the sole power of direction and control, but that he may sometimes be required to respond in damages to passengers who are injured in consequence of the acts and omissions of persons who are not his servants in the strict sense of the term.

B. INDEPENDENT CONTRACTORS AND THEIR SERVANTS.

Since the rule of respondeat superior rests upon the control which the superior has a right, and is bound, to exercise over the acts of his subordinates, it follows, that as to those undertakings which may properly be devolved upon others the employer is not liable to third persons for the acts of an independent contractor, over whom he never has the necessary control, nor is he liable for the acts of the employees and servants of the independent contractor, including his own servants whom he has placed under the contractor's exclusive control. But, since the duties which a carrier owes to his passengers are positive duties imposed by law, so that the carrier cannot relieve himself from liability for a breach thereof, the carrier is liable for the acts and omissions of the servants of an independent contractor, who is employed to discharge any of the duties which the carrier owes to his passengers. *Barrow S. S. Co. v. Kane*, 88 Fed. 197, 59 U. S. App. 574; *Carrico v. West Virginia, etc., R. Co.*, 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50. But see *Wolf v. Third Avenue R. Co.*, 74 N. Y. Supp. 336, 67 N. Y. App. Div. 605. Accordingly a steamship company is liable for an assault upon a passenger by the servants of an independent contractor who is employed to transport the company's passengers from the shore, by tugs or tenders, and place them on shipboard. *Barrow S. S. Co. v. Kane*, 88 Fed. 197, 59 U. S. App. 574. And it is no defense to an action by a passenger for injuries caused by the obstruction of the track by work being done thereon, that the obstruction resulted from the negligence of an independent contractor. *Virginia, etc., R. Co. v. Sanger*, 15 Gratt. (Va.) 230; *Carrico v. West Virginia R. Co.*, 39 W. Va. 86, 19 S. E. 571, 24 L. R. A. 50. When the engine of a railroad company is detached from one of its trains before reaching a passenger station, and an engine of a terminal company is attached for the purpose of completing the transportation, the carrier is liable for the negligence of the terminal company and its servants. *Keep v. Indianapolis, etc., R. Co.*, 10 Fed. 454.

It has been held that the agent of the owner of a street railway, who is employed to run a car over the road and to employ a driver, is not an independent contractor. *Jensen v. Barbour*, 15 Mont. 582, 39 Pac. 906. And it has been held that, although a railroad company placed the repair of a bridge leading to one of its stations in the hands of an independent contractor, the doctrine of independent contractors did not apply where the company undertook to use the bridge before the repairs were completed. *Gilmore v. Philadelphia, etc., R. Co.*, 154 Pa. St. 375, 25 Atl. 774, 56 Am. & Eng. R. Cas. 279.

C. CONSTRUCTION COMPANIES.

While a railroad or street railway company may contract for the construction of its road, it cannot escape liability for injuries to passengers caused by the negligence of another, whom it permits or allows to use the road for the purposes of traffic. In such case, as regards the public, those who operate the road must be regarded as the agents of the corporation. Hence, when a railroad or street railway is operated for the carriage of passengers by a construction com-

Notes

pany for a limited period after the completion of the road, the owner of the road and franchise is responsible to the passengers for the negligence of the construction company. *Chattanooga, etc., R. Co. v. Liddell*, 85 Ga. 482, 11 S. E. 853, 21 Am. St. Rep. 169; *Cogswell v. West Street, etc., R. Co.*, 5 Wash. 46, 31 Pac. 411, 52 Am. & Eng. R. Cas. 500. Even if a construction company engages in the carriage of passengers before the road has been completed and while it is still in full possession of the road, the owner of the franchises, who consents to the carrying on of the passenger traffic, is not relieved of liability to the passengers. *Lakin v. Williamette, etc., R. Co.*, 13 Ore. 436, 11 Pac. 68, 26 Am. & Eng. R. Cas. 611, 57 Am. Rep. 25. And it has been held that if a railroad company furnishes a train to a construction company for the purpose of transporting construction material, and the train is run by persons who are employed and paid by the railroad company, which alone has the power of selection and discharge, the company is responsible to a passenger riding on a pass, given him by the contractors, for injury received through the negligence of those operating the train, even though the contractors have the right to determine when, where and to what extent supplies shall be transported, and to that extent have the control of the company's train and employees. *Burton v. Galveston, etc., R. Co.*, 61 Tex. 526, 21 Am. & Eng. R. Cas. 218. But a railroad company which furnishes a train to an independent contractor for the construction of its road to be used in carrying on the work of construction, is not liable to a passenger, whom the construction company undertakes to carry but with whose transportation the railroad company has nothing to do, for the negligence of an engineer in charge of the train, who is neither employed nor paid by the railroad company. *Scarborough v. Alabama, etc., R. Co.*, 94 Ala. 497, 10 So. 316. And where a passenger is carried on a construction train operated by independent contractors for the building of the road, without the knowledge of the railroad company, and against its express prohibition, the railroad company is not liable to the passenger for injuries sustained through the negligence of the construction company. *Cunningham v. International, etc., R. Co.*, 51 Tex. 503, 32 Am. Rep. 632.

D. PERSONS IN CHARGE OF SLEEPING, OR PALACE, CARS.

Although a sleeping or palace car, which is run in connection with a passenger train, is not owned by the railroad company but by a separate company, which has its own servants in charge thereof, the persons in charge of the car are nevertheless to be regarded and treated, in respect to all matters pertaining to the safety of passengers, as servants of the railroad company; for the law will not permit a railroad company, engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping-car company, whose cars are used by the railroad and constitute a part of the train, to evade the duties imposed upon it by law. Accordingly railroad companies are held responsible for the negligence of persons in charge of a palace or sleeping car (*Airey v. Pullman Palace Car Co.*, 50 La. Ann. 648, 23 So. 512, 11 Am. & Eng. R. Cas., N. S., 836), and for their wilful acts (*Louisville, etc., R. Co. v. Ray*, 101 Tenn. 1, 46 S. W. 554, 11 Am. & Eng. R. Cas., N. S., 174), including assaults upon passengers. *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 417, 4 So. 85, 33 Am. & Eng. R. Cas. 414, 8 Am. St. Rep. 538; *Thorpe v. New York, etc., R. Co.*, 76 N. Y. 402, 32 Am. Rep. 325, affirming 13 Hun (N. Y.) 70; *Dwinelle v. New York, etc., R. Co.*, 120 N. Y. 117, 44 Am. & Eng. R. Cas. 384, 17 Am. St. Rep. 611, 8 L. R. A. 224, reversing 45 Hun (N. Y.) 139.

E. SERVANTS INVESTED WITH AUTHORITY OF PEACE OFFICERS.

The fact that a person who is employed by a carrier has, by statute or special appointment, been invested with the duties and powers of a police officer, does not affect his status as a servant of the carrier, and does not relieve the carrier from liability for his tortious acts done within the scope of his employment. *Brill v. Eddy*, 115 Mo.

Notes

596, 22 S. W. 488. Thus, a railroad company is liable for the false arrest of a passenger by its station agent or conductor, although they are, by statute, made conservators of the peace. *King v. Illinois, etc., R. Co.*, 69 Miss. 245, 10 So. 42; *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 S. E. 243, 51 Am. & Eng. R. Cas. 222, 29 Am. St. Rep. 827, 14 L. R. A. 798. And a railroad company is liable for an assault upon a passenger by an employee in its station, whose duty it is to look after passengers, although he may be clothed with the authority of a police officer. *Texas, etc., R. Co. v. Bowlin* (Tex. Civ. App.), 32 S. W. 918.

F. ASSISTANTS ENGAGED BY SERVANTS.

The carrier may be responsible for the negligence of a person whom a servant of the carrier procures to aid him in his work. A railroad company has been held liable for the negligence of a person who was placed on board an engine by a station agent, having no authority to hire men, for the purpose of learning the road, and who was left in charge of the engine by the regular engineer. *Lakin v. Oregon, etc., R. Co.*, 15 Ore. 220, 15 Pac. 641, 34 Am. & Eng. R. Cas. 500. The proprietors of a stage coach have been held liable for the negligence of a passenger who was permitted, by them or by the regular driver, to drive the coach. *Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695. The owner of a street railway has been held liable for the negligence of a driver of a street car, who had been employed by an agent, whom the owner had engaged, for a stipulated monthly payment, to run the car over the line, and to furnish a driver. *Jensen v. Barbour*, 15 Mont. 582, 39 Pac. 906. A railroad company has been held liable for an assault upon a passenger by a person who was temporarily left in charge of the ticket office by the regular ticket agent. *Fick v. Chicago, etc., R. Co.*, 68 Wis. 469, 60 Am. Rep. 878, 34 Am. & Eng. R. Cas. 378. If, by custom among street railway employees, known and assented to by the company, those who are on duty are in the habit of calling for and receiving assistance from those who are not at the time on duty, and an employee off duty, thus called upon, undertakes to render the assistance asked, he will be regarded as in the employ of the company for such service; and, if he negligently abandons the work before completing it, whereby injuries to a passenger occur, the company will be liable. *Leavenworth, etc., R. Co. v. Cusick*, 60 Kan. 590, 5 Pac. 519, 72 Am. St. Rep. 374. It has been held that where a passenger is carried beyond the point of her destination through the negligence of one of the conductors of defendant railway company, the conductor, in the absence of express authority, cannot constitute the proprietor of a hotel, who is entirely unconnected with the company, its agent for the purpose of providing safe and comfortable lodgings for the passenger until she can return on the company's train to her destination, and, therefore, the company is not liable for injuries sustained by the passenger, while at the hotel, in consequence of the negligence of the proprietor. *Central of Georgia R. Co. v. Price*, 106 Ga. 176, 32 S. E. 77, 12 Am. & Eng. R. Cas., N. S., 283, 43 L. R. A. 402.

G. SERVANTS EMPLOYED JOINTLY BY SEVERAL MASTERS.

Applying the rule that when a servant is employed by two or more masters to do work for all in common, any one of them may be liable for a tort of the servant which is within the scope of his employment, it has been held that when a station is used in common by more than one railroad company, each company is liable, at least to its own passengers, for the tortious acts of the station employees done within the scope of their employment. *Illinois, etc., R. Co. v. King*, 69 Miss. 852, 13 So. 824; *Penfield v. Cleveland, etc., R. Co.*, 26 N. Y. App. Div. 413, 50 N. Y. Supp. 79. And when a bridge company employs a railroad company to take trains over its bridge, so that the two companies act together in the transportation of passengers over the bridge, the railroad company is liable for the tortious acts of a servant of the bridge company whom it permits to control the movements of one of its trains. *Union R. & Transit Co. v. Kallaher*, 114

Notes

Ill. 325, 2 N. E. 77. But where the ticket agent at a union station gives a passenger, who applies for transportation over one road, the ticket of a different road, the company whose ticket is issued is not liable for the agent's mistake, since the breach of duty is that of the company whose ticket is desired. *Scott v. Cleveland, etc., R. Co.*, 144 Ind. 125, 43 N. E. 133, 32 L. R. A. 154.

H. SERVANTS OF LESSORS OR LESSEES.

A railroad company which runs its trains over the road of another company, under a contract or license, is liable to its passengers for the negligence of the servants of the licensing company. *Murray v. Lehigh Valley R. Co.*, 66 Conn. 512, 34 Atl. 506, 32 L. R. A. 539; *Railway Co. v. Peyton*, 106 Ill. 534; *McElroy v. Nashua, etc., R. R. Corp.*, 4 Cush (Mass.) 400, 50 Am. Dec. 794. See *Brady v. Chicago, etc., R. Co.*, 114 Fed. 100. And, on the other hand, a railroad company which allows its track to be used by another company is liable to its passengers for the negligence of the servants of the latter company while running trains over the road. *Central Trust Co. v. Denver, etc., R. Co.*, 97 Fed. 239, 38 C. C. A. 143. See *Chicago, etc., R. Co. v. Martin*, 59 Kan. 437, 53 Pac. 461, 12 Am. & Eng. R. Cas., N. S., 4.

I. SERVANTS OF RECEIVERS.

A railroad company whose business has been in the hands of a receiver, will not, in the absence of a statute imposing liability, be responsible for the tortious acts of the receiver's servants on resuming control of the road. Hence where the ticket agent in the employ of the receiver of a railroad issued the wrong ticket to an intending passenger, who, on attempting to use it after the railroad company had resumed control of the road, was ejected from the train, it was held that the passenger could not recover against the company as for a wrongful expulsion. *Godfrey v. Ohio, etc., R. Co.*, 116 Ind. 30, 18 N. E. 61, 37 Am. & Eng. R. Cas. 8.

J. PILOTS.

A carrier by water is liable for the negligence of his pilot, notwithstanding that the engagement of a pilot is compulsory, and that he must be selected from among those who are licensed by the government; "the doctrine, that the owners are responsible for the acts of their agents and employees, ought not to be discarded because the selection of a pilot by the owner is limited to those who, by the state, have been found by examination to possess the requisite knowledge of the difficulties of local navigation, and the requisite skill to conduct a vessel through them." *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819.

K. POSTAL AGENTS.

Since United States postal agents, who are carried on mail trains, are under the exclusive control of the government, a railroad company is not liable for the consequences of their negligence. It has been so held in actions for injuries to employees and licensees. *Poling v. Ohio River R. Co.*, 38 W. Va. 645, 18 S. E. 782, 24 L. R. A. 215; *Muster v. Chicago, etc., R. Co.*, 61 Wis. 325, 21 N. W. 223, 18 Am. & Eng. R. Cas. 113, 49 Am. Rep. 41. But in actions by passengers to recover for injuries received, while at railway stations, by being struck by mail pouches thrown from moving trains, it has been held that a railroad company is liable for its own negligence in failing to prevent the practice, even if it has to stop its trains at the stations. *Snow v. Fitchburg R. Co.*, 136 Mass. 552, 18 Am. & Eng. R. Cas. 161, 49 Am. Rep. 40; *Carpenter v. Boston, etc., R. Co.*, 97 N. Y. 494, 21 Am. & Eng. R. Cas. 331, 49 Am. Rep. 540. See, also, section II, 4, h, (3), of note appended to *Muhlhouse v. Monongahela St. R. Co.*, 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131.

L. SURGEON EMPLOYED BY CARRIER.

When a carrier by water provides a surgeon to treat passengers who may become sick or meet with accidents, he discharges his duty to his passengers by selecting a reasonably competent man for the

Mobile St. Ry. Co. v. Watters

office, and is liable only for a failure to do so, and not for the negligence of the surgeon employed. This is the rule whether the carrier employs the surgeon voluntarily (*Laubheim v. Netherland S. S. Co.*, 107 N. Y. 228, 13 N. E. 781, 1 Am. St. Rep. 815, affirming 51 N. Y. Super. Ct. 467), or in compliance with an express statutory requirement. *O'Brien v. Cunard S. S. Co.*, 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329; *Allan v. State S. S. Co.*, 132 N. Y. 91, 30 N. E. 482, 28 Am. St. Rep. 556, 15 L. R. A. 166, reversing 55 Hun (N. Y.) 803, 8 N. Y. Supp. 803. Similarly, it has been held that a railroad company, which assumes to furnish a physician to treat a passenger who has been injured in an accident, is bound to exercise care to select a competent man, but, having done so, is not liable for his negligence in treating the passenger. *Secord v. St. Paul, etc., R. Co.*, 18 Fed. 221.

Of course, a steamship company will not be liable as for an assault committed by its servant, on account of the vaccination of a passenger by the ship's surgeon, where the passenger made no resistance but her behavior indicated consent. *O'Brien v. Cunard S. S. Co.*, 154 Mass. 272, 28 N. E. Rep. 266, 13 L. R. A. 329.

THEODOR MEGAARDEN.

MOBILE ST. RY. CO. v. WATTERS.

(*Supreme Court of Alabama, Nov. 27, 1902.*)

[33 So. Rep. 42.]

Ejection of Passenger—Fare—Legal Tender.

A coin issued by authority of law to circulate as money is not deprived of the quality of legality merely by being worn in the process of circulation, so long as it is not appreciably diminished in weight, and retains the appearance of a coin duly issued from the mint.

Same—Same—Same—Issues.

In an action against a street railroad company for ejection of a passenger, defendant's plea alleged that plaintiff tendered to the conductor a coin, as a fare, so worn that the conductor could not tell whether it had originally been a coin of the United States government or not, and that, when the conductor declined to receive the coin, plaintiff declined to pay his fare with any other money, and was ejected: *held* that, irrespective of whether the plea was a good defense, it put in issue the condition of the coin.

Same—Same—Same—Same.

Where, in an action against a street railroad for ejection of a passenger from a street car, the allegations of the plea put in issue whether the conductor, owing to the condition of the coin offered as fare, could determine it legal tender, and the conductor testified that he could not tell the coin from a piece of tin, it was error to instruct that, if the coin tendered were legal tender, plaintiff could recover, as ignoring the plea of defendant.

Same—Same—Same—Evidence.

In an action against a street railroad for ejection of a passenger, the defense was that the coin tendered as fare was so worn that the conductor could not determine it legal tender. The conductor, as a witness, while denying that the dime exhibited in evidence was the same that was offered for plaintiff's fare, testified that the coin so exhibited was a good, visibly lettered dime: *held*, that the court was justified in charging on the assumption that the dime introduced was of legal-tender quality.

Same—Same—Same—Transmission of Coin to Appellate Court.

Supreme court rule 27 authorizes transmission to the supreme court for inspection of original papers used in evidence: *held*, that the rule

Mobile St. Ry. Co. v. Watters

does not authorize the supreme court to inspect a coin in evidence, and transmitted on appeal, to determine its character.

Evidence.

In action against a street railroad for ejection of a passenger on the ground that fare tendered was not legal tender, an objection to a question to plaintiff as to where he got money to pay his fare after he was put off should have been sustained.

Appeal from circuit court, Mobile county; Wm. S. Anderson, Judge.

Action by John L. Watters against the Mobile Street Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

This action was brought by the appellee, John L. Watters, against the appellant, the Mobile Street Railway Company, to recover \$2,000 damages for the alleged wrongful ejection of the plaintiff from one of the street cars owned and operated by defendant in the city of Mobile. It was averred in the complaint that the plaintiff boarded one of the defendant's cars as a passenger, and, when the conductor on said car demanded his fare from the plaintiff, that he tendered him one dime, in United States currency; that said conductor refused to accept said dime, and, on the failure of the plaintiff to pay his fare with any other money, the conductor compelled him to get off of the car, whereby he suffered great inconvenience, delay, humiliation, and anxiety of mind. The defendant pleaded the general issue, and also a special plea, numbered 4, which is sufficiently set forth in the opinion. The facts of the case necessary to an understanding of the decision on the present appeal are sufficiently stated in the opinion. Upon the introduction of all the evidence, the court, of its own motion, gave to the jury, as a part of its general charge, the following instruction: "If the evidence reasonably satisfied your minds that the plaintiff tendered legal coin of the United States in payment of his fare, and the conductor refused to take it, and ejected the plaintiff, the plaintiff would be entitled to recover." The defendant separately excepted to the giving of this charge by the court, and also separately excepted to the court's giving at the request of the plaintiff the following written charges: "(1) If the jury are reasonably satisfied from the evidence that the silver dime in evidence is the same dime offered to the conductor of defendant's car, that the said conductor declined to receive the said dime, and that plaintiff was thereupon compelled to leave the said car, they should find for the plaintiff. (2) If the dime introduced in evidence is the same dime tendered to the conductor of defendant's car, it was the duty of the said conductor to receive the same in payment of plaintiff's fare. (3) The court charges the jury that the dime introduced in evidence is legal-tender coin of the United States for the amount of ten cents." The defendant requested the court to give to the jury the following written charge, and duly ex-

Mobile St. Ry. Co. *v.* Watters

cepted to the court's refusal to give the same as asked: "The court charges the jury that, if they believe all of the evidence, you ought to find a verdict for the defendant." There were verdict and judgment for the plaintiff, assessing his damages at \$120.93. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Gregory L. & H. T. Smith and Phares Coleman, for appellant.

Edward M. Robinson, for appellee.

SHARPE, J. By the fourth plea it is set up as a defense to the action that "the plaintiff got upon the car of defendant, and, when the defendant's conductor demanded his fare, he tendered to the conductor in payment of said fare a coin which was so much worn that the stamping thereon could not be seen with sufficient distinctness to enable the conductor to tell whether it had originally been a coin of the United States government or not; and, when the said conductor declined to receive this fare in compensation for its ride, the plaintiff declined to pay his fare with any other money, wherefore he was ejected." These averments do not put in issue the legality of the coin in question. A coin issued by authority of law, to circulate as money, is not deprived of the quality of legality merely by being worn in the process of circulation; nor does a silver coin by such wear lose its quality as legal tender, "so long as it is not appreciably diminished in weight, and retains the appearance of a coin duly issued from the mint." *Railroad Co. v. Morgan*, 52 N. J. Law, 60, 18 Atl. 904. But the plea does put in issue the coin's condition, together with the ability of the conductor to determine its genuineness. Whether it presents a valid defense is not here in question. By the joinder of issue thereon, its averments were made material; and an issue joined, whether on good pleading or bad, cannot properly be disregarded, but, when submitted to the jury, must be tried, and the verdict should respond thereto. *Steed v. Knowles*, 97 Ala. 573, 12 South. 75; *Allison v. Little*, 93 Ala. 150, 9 South. 388; *Mudge v. Treat*, 57 Ala. 1; *Masterson v. Gibson*, 56 Ala. 56; *Hazard v. Purdom*, 3 Port. 43. Here there was evidence tending to support this plea, in the conductor's statement, in testimony, that the coin produced in evidence, and testified to by plaintiff as being the one which was tendered for his fare, was not in fact the coin which was so tendered, and that, as to the latter, "you could not tell but what it was cut out of a piece of tin"; but the court instructed the jury, "If the evidence reasonably satisfies your minds that the plaintiff tendered legal coin of the United States in payment of his fare, and the conductor refused to take it, and ejected the plaintiff, the plaintiff would be entitled to recover." Without questioning the correctness of this instruction in its bearing on some of

Kansas City, etc., R. Co. v. Dalton

the issues, we are of opinion that it improperly ignored the particular plea above referred to. In effect, it withdrew from the jury the issue submitted concerning the conductor's ability to determine from the appearance of the coin its legal-tender quality, which ability, rather than the real legal-tender quality, had, by the issue joined upon that plea, become a vital question.

On the witness stand, the conductor, while denying that the dime exhibited in evidence was the same that was offered for plaintiff's fare, testified that the coin so exhibited was a good, visibly lettered dime. This evidence, being without contradiction, proved not only that this coin was good, but that the conductor was able to recognize it as being good. The court was therefore justified in charging the jury upon the assumption that the dime introduced in evidence was of legal-tender quality, as was, in effect, asserted in the written charges given at plaintiff's request.

Accompanying the transcript there is a coin which is certified as being the one used in evidence, doubtless for the purpose of having it inspected under rule 27 of supreme court practice. That rule, however, goes no further than to authorize the transmission here, for inspection, of original papers used in evidence in the trial court, and copied into the transcript. Neither that nor any other rule authorizes this court to look to the coin itself to determine its character or for any purpose. The question addressed to plaintiff by his counsel, as to where, after being put off the car, he got money to pay fare homeward, called for immaterial matter, and the objection to it should have been sustained.

For the errors mentioned, the judgment will be reversed, and the cause remanded.

KANSAS CITY, FT. S. & M. R. CO. v. DALTON.

(*Supreme Court of Kansas, Nov. 8, 1902.*)

[70 Pac. Rep. 645.]

Carriers—Negligence—Damages—Mental Suffering.*

In an action for damages sustained by reason of the negligence of a railway company in carrying a passenger beyond her point of destination in the nighttime, thereby causing her expense, annoyance, inconvenience, loss of time, fright, and mental suffering, no recovery can be had for the fright or mental suffering as an independent element of damages, unaccompanied by physical or bodily injury.

(Syllabus by the Court.)

In banc. Error from district court, Miami county; John T. Burris, Judge.

Action by Jennie Dalton against the Kansas City, Ft. Scott

*Physical and mental suffering as elements of damage, see footnote appended to *United Railway & Electric Co. of Baltimore City v. Fletcher* (Md.), 4 R. R. R. 389, 27 Am. & Eng. R. Cas., N. S., 389.

Kansas City, etc., R. Co. v. Dalton

& Memphis Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Pratt, Dana & Black, for plaintiff in error.

Frank M. Sheridan, for defendant in error.

POLLOCK, J. Action brought by Jennie Dalton to recover damages from the railway company for negligence in the discharge of its duty toward plaintiff as a passenger. The facts are: Plaintiff, accompanied by her sister, purchased a ticket and took passage upon one of defendant's trains from Kansas City to Fontana, Kan. The train left Kansas City about 9:45 p. m., and was due to arrive at Fontana about 11:40 p. m. This train was a regular passenger train, not scheduled to stop at Fontana except upon signal. The brothers of plaintiff were at the depot at Fontana with a conveyance to carry the sisters to their home, some 2½ miles in the country. The train was not stopped at Fontana, but plaintiff was carried on to the station of Lacygne, some 10 miles beyond her destination. When the train arrived at Lacygne, plaintiff was required to alight therefrom, and was carried back to Fontana on a freight train, and was compelled to hire a conveyance to carry herself and sister to their destination in the country. It is alleged and shown plaintiff was caused delay, expense, inconvenience, fright, and mental suffering by reason of being carried beyond her destination, in being compelled to ride upon a freight train in the nighttime, and in seeking for a conveyance to carry her and her sister from Fontana into the country, by reason of the negligence of the servants of defendant company in failing to stop the train at Fontana; and it is alleged in the petition that such negligence was willful and wanton. No complaint of physical injury to plaintiff is alleged or shown. Plaintiff had general verdict, and judgment thereon for the sum of \$300. In answer to special questions propounded to the jury, the sum allowed in the general verdict was divided as follows: For expense incurred, \$4.50; inconvenience and trouble, \$45; loss of time, 50 cents; mental suffering, pain, and shock, \$250. In answer to a special question, the jury refused to find any amount as punitive damages. A motion for a new trial having been overruled, defendant brings error.

The court instructed the jury in regard to the measure of damages as follows: "If the plaintiff recover in this action, she should recover in such sum as the jury shall find from the evidence she is entitled to as a full compensation for the additional expense, if any, which she has necessarily incurred for the delay, and consequent loss of time, if any, and for the annoyance, fright, and mental anguish, if any, caused by the negligence of the defendant, its agent or employees." This instruction and the findings made by the jury raise the question whether fright, mental suffering, pain, and shock, caused by the negligence of defendant, independent of and unaccom-

Kansas City, etc., R. Co. v. Dalton

panied by physical injury, can be made the basis of a claim for damages. This question would seem to be well settled by the decisions of this court and in other jurisdictions. In *City of Salina v. Trosper*, 27 Kan. 544, which was an action for damages against the city for negligence in maintaining an open cellarway, it was held: "Damages for mental suffering can be recovered in cases of this kind, where such mental suffering is an element of the physical pain, or is a necessary consequence of the physical pain, or is the natural and proximate result of the physical injury; and can be recovered in cases of this kind, only under such circumstances." In *West v. Telegraph Co.*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530, it is held: "Where an action is brought against a telegraph company to recover damages for a breach of contract in failing to deliver a message announcing a death, held, that damages cannot be recovered by the plaintiff solely for the mental anguish or suffering occasioned by the nondelivery of the message." In *Railroad Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453, in the opinion it is said: "The jury found that the plaintiff below was damaged \$65 by reason of peril and fright. Damages of this kind are too remote. A person who is placed in peril by the negligence of another, but who escapes without injury, may not recover damages simply because he had been placed in a perilous position. Nor is mere fright the subject of damages. Fright must be accompanied by some actual injury caused thereby, and traceable directly thereto, to be the subject of damages. Mere fright, unaccompanied by any injury resulting therefrom, cannot be made the subject of damages. *Commissioners v. Cultas*, 13 App. Cas. 222." In *Shear. & R. Neg.* (5th Ed.) § 761, it is said: "Mental suffering, when connected with any bodily injury, is always to be considered in damages. But damages cannot be recovered for mental suffering alone, in an action on personal injuries, caused by any negligence not gross and reckless. There must be some 'impact' or other direct injury to person or property to allow mental suffering to be included in such cases." A case very similar to the one at bar is the case of *Trigg v. Railway Co.*, 74 Mo. 147, 41 Am. Rep. 305, 6 Am. & Eng. R. Cas. 345. It is there held: "A passenger on a railroad train, who is carried beyond her station by the negligence of the company, but without any circumstances of aggravation, and without receiving any personal injury, may recover compensation for the inconvenience, loss of time, labor and expense of traveling back, but not for anxiety and suspense of mind suffered in consequence of the delay, nor the effects upon her health, nor the danger to which she was exposed in consequence of the train being stopped at her station an insufficient length of time to enable her to get off." It being neither alleged nor shown that plaintiff received any physical or bodily injury as a result of the negligence of defendant, and the jury having found by their special verdict that plaintiff was not entitled to

Simonson v. Minneapolis & St. L. R. Co

recover punitive damages for willful or wanton negligence, the motion for a new trial should have been sustained, as it was error to permit a recovery upon the general verdict for an element of damages, which, upon the pleadings and findings of the jury, was improper in this case.

It follows the judgment must be reversed, and a new trial awarded. All the justices concurring.

SIMONSON v. MINNEAPOLIS & ST. L. R. CO.

(*Supreme Court of Minnesota, Dec. 12, 1902.*)

[92 N. W. Rep. 459.]

Personal Injuries—Remote Damages.

In a personal injury action by a married woman it is *held*, upon a consideration of the evidence, that damages on account of the malpresentation and death of her child at its birth 15 months after the negligent act of the defendant are too remote and conjectural, and no recovery can be had therefor.

(Syllabus by the Court.)

Appeal from district court, Freeborn county; Nathan Kingsley, Judge.

Action by Hannah Simonson against the Minneapolis & St. Louis Railroad Company. Verdict for plaintiff. From an order granting a new trial, she appeals. Affirmed.

H. H. Dunn and Morgan & Meighen, for appellant.

W. S. Hammond, H. C. Carlson, and A. E. Clarke, for respondent.

START, C. J. The plaintiff, a married woman, about 32 years of age, was, on the night of November 30, 1900, a passenger on the defendant's railway train from Albert Lea, this state, to Norman, Iowa, a station one mile south of her home, the village of Emmons, this state. The conductor knew that she was to leave the train at Norman, but ran his train past that station some four miles, when the plaintiff and her traveling companion, Mrs. Guthier, were discharged from the train, and they were compelled to walk back to Norman and to their homes, a distance of some four or five miles, where they arrived about 3 o'clock of the morning of December 1st. The plaintiff, by reason of the fright, exposure, and hardship incident to her walk, was made nervous, and her health was seriously impaired. She brought this action to recover the damages sustained by her by reason of such wrongful act of the defendant. The leading facts of this case, except as hereinafter stated, are substantially the same as those stated in the opinion in the case of Guthier v. Railway Co. (Minn.) 91 N. W. 1096, and need not be here repeated. A trial of the action resulted in a verdict for the plaintiff in the sum of \$1,550. The trial court made its order, on motion of the defendant, granting a new trial, from which the plaintiff appealed.

Simonson v. Minneapolis & St. L. R. Co

In the month of June following the wrongful act of the defendant, the plaintiff discovered that she was pregnant, and 15 months after such act, and on the last day of February, 1902, she was delivered of a dead child. The evidence is practically conclusive that it was not a case of premature birth or miscarriage, and the trial court rightly so instructed the jury. The evidence, however, is undisputed that there was a malpresentation of the child. There were slight indications that the child was alive when the attending physician attempted to relieve the situation, but it was dead when the artificial delivery was completed. The plaintiff had previously given birth to three children without any unusual difficulties. On the trial it was claimed on behalf of the plaintiff that this malpresentation and the resulting consequences to her were due to the injuries she received by reason of her midnight walk, which she was compelled to take by reason of the act of the defendant. The trial court instructed the jury that, if they found that the malpresentation was the result of such walk, they should award her such damages as would fairly compensate her for this particular injury, with such other compensation as they believed from the evidence she was justly entitled to. The motion for a new trial was granted on the sole ground that the court was of the opinion that it was error to submit to the jury the matter of the malpresentation as an element of damage. This presents the only question for our consideration. It would seem to the average man, not deeply read in medical and surgical lore, that it was a far cry from the act of the defendant in discharging the plaintiff from its train to the malpresentation of her child 15 months thereafter. Nevertheless, if such result followed in unbroken sequence from the wrongful act of the defendant, it is liable to the plaintiff for the consequences to her of such malpresentation, although it could not, at the time the act was committed, have been reasonably anticipated that injury would result to her in the form or way in which it did happen. *Christianson v. Railway Co.*, 67 Minn. 94, 69 N. W. 640; *Keegan v. Railroad Co.*, 76 Minn. 90, 78 N. W. 965. If the plaintiff had been pregnant at the time when the defendant's wrongful act was committed, and a miscarriage followed as the direct result thereof, she would have been entitled to recover damages therefor; but not for the loss of the child. Proof of pregnancy and subsequent miscarriage resulting from the wrongful act are allowed in such cases as an element of damages on the same principle that damages are allowed for the aggravation of an existing disease, or other physical condition, by the defendant's negligent act. Pregnancy at the time the party is injured being an existing physical condition, if miscarriage follows as the result of the negligent act, it is a part of the personal injuries sustained by reason of such act. *Wat. Pers. Inj.* §§ 197-199; *Shartle v. City of Minneapolis*, 17 Minn. 319 (Gil. 284). In the case cited the plaintiff's wife was preg-

Simonson v. Minneapolis & St. L. R. Co

nant, and was injured by falling from a bridge which the city had negligently permitted to fall into disrepair. She was subsequently delivered of a dead child, caused, as the testimony showed, wholly by the fall of the mother from the bridge, and it was held that evidence of this fact was properly received on the question of damages. But in this case the plaintiff's physical condition was not that of pregnancy, and, except for her subsequent pregnancy, due to an absolutely independent cause, there could have been no malpresentation of her child. Nor has the rule that, if a person is so injured by the wrongful act of another as to render his system more liable to contract or less able to resist disease, which ensues, the consequences thereof are held to flow proximately from such act, any application to this case, for the obvious reason that pregnancy is not a disease within the meaning of the rule. While we are not prepared to hold that in no case can a married woman, who is injured by the negligent act of another, and thereafter becomes pregnant, and a miscarriage follows by reason of the pregnancy and the negligent act, recover from the person committing the act damages for the miscarriage, yet we do hold that upon the record in this case the plaintiff was not entitled to include in her estimate of damages anything on account of the consequences to her of the malpresentation of her child at the time of the delivery thereof. The burden was upon the plaintiff to establish the fact that the malpresentation of her child resulted proximately from the act of the defendant,—that, but for such act, the malpresentation would not have occurred. *Orth v. Railway Co.*, 47 Minn. 384, 50 N. W. 363; *Briggs v. Railway Co.*, 52 Minn. 36, 53 N. W. 1019; *Minneapolis Sash & Door Co. v. Great Northern Ry. Co.*, 83 Minn. 370, 86 N. W. 451. Now, the evidence in this case affords a basis for no more than a mere guess that the particular injury here complained of resulted proximately or otherwise from the act of the defendant. Two physicians were called on behalf of the plaintiff to give opinion evidence as to the cause of the malpresentation. One of them, in answer to a hypothetical question, which assumed, with other facts, that the plaintiff suffered a premature birth of a still-born child, said, "I should attribute the condition in the particular case to the trouble she received from the walk." The malpresentation of the child—the actual difficulty—was not one of the facts included in the question, and the physician expressed no opinion as to its cause, unless he intended to include it in his answer to the question. The other physician answered a similar question as follows: "That is a very difficult question to answer without a good deal of explanation. With all of those assumptions, as it reads, I should say that it was due to exposure, physical exertion, and fright which the testimony shows took place on the night of December 1, 1900." He also gave the following testimony: "Q. And what is the fact, doctor, from a medical

Hamilton, G. & C. Traction Co. v. Parish

standpoint, as to the likelihood of a malpresentation resulting from the premature birth more than in a proper presentation?

A. The smaller the foetus when the pains come, the more likely is the malpresentation. Q. Then it is more likely to result from premature birth than in the case of a fully developed child? A. Yes, sir. * * * I think the malpresentations are more likely to be found in those who are below par in health for some reasons, but I want to say they are very often found in those who are perfectly healthy. * * *

Q. Doctor, I wish you would explain, as a medical man, some of the reasons why you arrived at the conclusion that the condition of the plaintiff, as you have stated, was attributable to the walk which she took. Give your reasons to the jury. * * *

A. The hypothetical question assumes that the patient was well up to that date under consideration, and that she has not been well since; that is to say, she has been in this nervous condition since. I assume that the neurasthenic condition brought on at that time continued at the time of the pregnancy. She ought not to have become pregnant, but, becoming pregnant in that neurotic condition, the pregnancy aggravated the condition, and combining the two conditions was the cause of her trouble during pregnancy, or the probable cause of the trouble during pregnancy and during her confinement." It is patent from his statement that malpresentation was more likely to result from premature birth than in the case of a fully developed child, that the unwarranted assumption in the hypothetical question that the plaintiff suffered from "a premature birth of a still-born child" was an important factor in determining his answer. Three physicians called by the defendant gave it as their opinion that the malpresentation was not the result of the walk, and, further, that the causes of malpresentation, so far as any accurate knowledge goes, are unknown. This conclusion is supported by the undisputed facts in this case that malpresentations are very often found in women who are perfectly healthy. It follows that it was error for the trial court to submit the claim of the plaintiff for damages on account of the malpresentation of her child, and that the court was right in granting a new trial.

Order affirmed.

HAMILTON, G. & C. TRACTION CO. v. PARISH.

(*Supreme Court of Ohio, Nov. 18, 1902.*)

[65 N. E. Rep. 1011.]

Eminent Domain—Street Railways—Consent of Abutting Owners—Property Rights.

The consents of owners of lots abutting on a street to the construction and operation of a street railroad on such street are not property rights that can be appropriated under the power of eminent domain.

Street Railways—Consent of Abutting Owners.

Such consents are not property rights, but rights in their nature personal to each owner of an abutting lot.

Hamilton, G. & C. Traction Co. v. Parish**Same—Same—Legislative Check on Municipal Authority.**

Such personal rights were bestowed by the general assembly on owners of abutting lots as a check upon the power of municipal authorities to authorize street railroads to be constructed and operated against the wishes of the owners of lots on such street.

Same—Same—Compensation—Public Policy.

The owners of abutting lots are free to give or withhold such consent, upon such terms as to them severally may seem proper, and there is no public policy in this state against giving such consent for a valuable consideration moving from the street railroad company to such lot owner.

(Syllabus by the Court.)

Error to circuit court, Butler county.

Action by O. V. Parish against the Hamilton, Glendale & Cincinnati Traction Company. Judgment for plaintiff, and defendant brings error. Reversed.

Said defendant in error, as plaintiff below, filed his petition in the court of common pleas against said plaintiff in error, and after the proper preliminary averments as to the incorporation of said company, his ownership of a lot on Third street, along which said company was about to build its street railroad under an ordinance passed by the board of control of the city of Hamilton, averred as follows: "Plaintiff says that said ordinance is void, and never went into operation, for the reason that the written consents of the owners of more than one-half of the feet front of the lots and lands abutting on said Third street from High street to Maple avenue, for the construction of said railroad, were never obtained or filed with said board of control, and that, therefore, said board of control had no jurisdiction to pass said ordinance, and the franchise granted thereby is void. Plaintiff further says that the written consents of the abutting property owners that were procured and filed by said defendant to the construction of said street railroad on said Third street were procured by purchase for money or other valuable consideration, which inured to the exclusive benefit of the said abutting property owners, and that said written consents so purchased by money or other valuable consideration were the consents of owners of lots and lands abutting on said Third street, along which it is proposed to construct said railroad under said pretended ordinance, and that said owners immediately before and at the time they so signed said written consents were opposed to the construction of said street railroad along and over said route and in said street, and that they did not believe that the same so constructed over said route and on said street would be in the interest of themselves as property owners and of the public; that said abutters so signing for a consideration would not have signed said consent but for said consideration so paid, or things furnished them for so consenting; that said considerations were substantial, and in most instances large, sums of money paid to obtain said con-

Hamilton, G. & C. Traction Co. v. Parish

sents; that said payments and promises were made by and on behalf of said defendant's company to said property owners, and plaintiff says that without the consents of said property owners, so obtained by purchase and other substantial considerations and promises, the consents of the owners of one-half of the feet front of the lots and lands abutting on said Third street, along which it is proposed to construct said railroad, could not have been obtained and presented to said board of control; that the opposition of said abutting property owners so receiving said consideration to the construction of said street railroad was conscientious, and in good faith. Plaintiff further says that, before said ordinance was passed by said board of control granting said franchise, that members of said board of control who voted in favor of said ordinance, to wit, Joseph J. Pater, C. E. Mason, Conrad Semler, and Joseph Strategier, had knowledge of the fact that, in order to secure the written consents of a majority of the feet front abutting on said Third street, that said defendant had procured the same by purchase or other valuable consideration. Plaintiff therefore says that by reason of the premises that said ordinance is illegal, null, and void." Plaintiff below prayed that the construction and operation of said street railroad be perpetually enjoined.

The traction company answered, denying the material allegations of the petition, and, after pleading the expenditure of over \$35,000, justified as follows: "Defendant further admits and alleges the fact to be that the said board of control of the city of Hamilton duly passed an ordinance granting and giving to this defendant the right to build said road along said route on said streets, and in pursuance of said grant made by the said city of Hamilton it is now engaged in constructing its said route, and was so engaged when enjoined herein. Defendant further says that the action of plaintiff is not brought in good faith as an abutting property holder, and for the benefit and protection of his said property, but is brought solely in the interest of rival street railroad companies, known as the Hamilton & Lindenwald Electric Transit Co. and the Southern Ohio Traction Co., of which said plaintiff is a stockholder and director, and for the purpose of preventing defendant from constructing its said track, and thereby preventing it from entering into competition with the said Hamilton & Lindenwald Electric Transit Co. and the Southern Ohio Traction Co., and solely in the interest and at the expense of said rival street railroad plaintiff is maintaining this action, and for no other purpose whatsoever. Defendant further says that the citizens of Hamilton and the public in general are desirous for said road to be constructed; that the same will be of great public advantage and benefit to the citizens and business men of the city of Hamilton; and that, if said plaintiff should prevail in this action, the same will be detrimental to the public interest,

Hamilton, G. & C. Traction Co. v. Parish**Same—Same—Legislative Check on Municipal Authority.**

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Hamilton, G. & C. Traction Co. v. Parish

sents; that said payments and promises were made by and on behalf of said defendant's company to said property owners, and plaintiff says that without the consents of said property owners, so obtained by purchase and other substantial considerations and promises, the consents of the owners of one-half of the feet front of the lots and lands abutting on said Third street, along which it is proposed to construct said railroad, could not have been obtained and presented to said board of control; that the opposition of said abutting property owners so receiving said consideration to the construction of said street railroad was conscientious, and in good faith. Plaintiff further says that, before said ordinance was passed by said board of control granting said franchise, that members of said board of control who voted in favor of said ordinance, to wit, Joseph J. Pater, C. E. Mason, Conrad Semler, and Joseph Strategier, had knowledge of the fact that, in order to secure the written consents of a majority of the feet front abutting on said Third street, that said defendant had procured the same by purchase or other valuable consideration. Plaintiff therefore says that by reason of the premises that said ordinance is illegal, null, and void." Plaintiff below prayed that the construction and operation of said street railroad be perpetually enjoined.

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Hamilton, G. & C. Traction Co. v. Parish

prevent defendant from constructing said road, and thereby deprive the citizens and people of Hamilton of the advantages and benefits of said street railroad line, and in addition thereto will cause a loss to this defendant of not less than \$—— by reason of the purchases as aforesaid made, the work done, obligations incurred, and defendant would be required to restore streets to their original condition. Defendant further says it has constructed a line and has the same completed from the village of Glendale, in Hamilton county, to the north corporation line of the city of Hamilton, on East avenue, and that with the construction of the present line now proposed it will be able to carry passengers direct from Third and High streets, in said city of Hamilton, to Fifth and Walnut, in the city of Cincinnati, without change of cars, and at a greatly reduced rate in fare, and in a much shorter time than is now charged or consumed by the other company; and the same will be the only route by which passengers can travel directly from Third and High streets, in Hamilton, to Fifth and Walnut, in the city of Cincinnati, without transfer or change of cars."

The substance of the reply is as follows:

"He denies that this action is not brought in good faith. He denies that it is brought solely in the interest of rival street railroad companies known as the Hamilton & Lindenwald Electric Transit Co. and the Southern Ohio Traction Co., and for the purpose of preventing defendant from constructing its track, and thereby preventing it from entering into competition with said street railroad companies; but avers that the action is brought in good faith by him as an abutting property holder, and for the benefit and protection of his property. He admits that he is one of the stockholders and directors of the Hamilton & Lindenwald Electric Transit Co. and the Southern Ohio Traction Co."

Upon trial in the circuit court on appeal that court, after finding that said O. V. Parish is the owner of an improved lot on Third street, and that he commenced and prosecuted the action in good faith as an abutting property owner, found the further facts as follows:

"The total frontage on Third street from High to Canal street, now called 'Maple Avenue,' is 760.50 feet. A majority of the feet front is 381 feet. Of this number property owners representing 232.90 feet voluntarily signed their consent to the construction of the road in Third street. That the consent of 39 feet was signed 'Alexander Gordon, by J. L. Blair, His Agent,' subject to Alexander Gordon's approval; and that said Alexander Gordon never, although duly notified, disapproved of said written consent, and is therefore deemed to have approved the same. That the following written consents were procured by purchase for money consideration, to wit:

Hamilton, G. & C. Traction Co. v. Parish

George Herold	30.00 ft.	\$400
Clement Snider.....	20.00 ft.	
Caroline Snider.....	25.00 ft.	
Pauline Schwartz.....	18.50 ft.	50
Margaret Schwartz.....	75.00 ft.	250
Fred Fries.....	52.00 ft.	100
	<hr/> 220.50 ft.	

"And that when said written consents were filed with the board of control, to wit, August 10, 1901, said board of control knew that the same had been procured by purchase. The court also find that at the time of the commencement of this improvement up until August 9 and 10, 1901, when said consents were procured by purchase, the said George Herold, Clement Snider, Caroline Snider, Pauline Schwartz, Margaret Schwartz, and Fred Fries had been opposed to the construction and operation of said street railroad in and along and upon said Third street. The court finds that at the time said ordinance was passed there was not on file with the city clerk, nor was there presented to the board of control, the valid written consents of the owners of a majority of the feet front of the property abutting upon said Third street from High to said Maple avenue, because of said consents so purchased."

As its conclusions of law upon the above facts the court found: "First. That the plaintiff was entitled, as an abutting property owner, to maintain this action. Second. The court finds as a conclusion of law that the said written consents procured by purchase of the abutting property owners are invalid, null and void, and against public policy, and that the same cannot be counted to determine the majority of the feet front on said street, and that, therefore, at the time said ordinance was passed, there was not produced and filed with said board of control the written consents of the owners of the majority of the front feet on said part of said Third street, and that said board of control never acquired jurisdiction to pass said ordinance making said grant.

Proper exceptions were preserved throughout. The circuit court rendered judgment in favor of the plaintiff below against the traction company perpetually enjoining the construction of said street railroad on said part of Third street, and for costs. Thereupon the traction company came here seeking to reverse the judgment of the circuit court.

Burch & Johnson, M. O. Burns, and J. W. Warrington, for plaintiff in error.

Shepherd & Shaffer, Shotts & Millikin, and H. R. Probasco, for defendant in error.

BURKET, C. J. (after stating the facts). The contention in the pleadings and finding of facts as to whether Mr. Parish brought and prosecuted the action in good faith is of no importance, because, if he had a legal right which he sought to protect by an action in a court of justice, the motive which

Hamilton, G. & C. Traction Co. v. Parish

induced him to bring the action cannot be inquired into. To sustain his action, if brought in good faith, and defeat it if brought in bad faith, would be to control his morals by means of a lawsuit. That cannot be done. Unless restrained by statute, a man may direct his moral conduct as he pleases. In *State v. Board of Education of City of Columbus*, 35 Ohio St. 368, the following appears on page 382: "If it is apparent that the relator is legally capable of prosecuting this proceeding, and that he has a clear legal right to the remedy he is seeking, we cannot stop to inquire whether he is moving of his own volition or at the request of some third party." To the same effect are *Lewis v. White*, 16 Ohio St. 444, *Frazier v. Brown*, 12 Ohio St. 294, and *Letts v. Kessler*, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177. And it can make no difference whether his right is clear or not, only so that it exists. The fee of the land occupied by highways outside of municipalities is in the owner of the adjoining lands. *Railroad Co. v. Williams*, 35 Ohio St. 168; *Daily v. State*, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578; *Phifer v. Cox*, 21 Ohio St. 248, 8 Am. Rep. 58; and *Callen v. Light Co.*, 66 Ohio St. 166, 64 N. E. 141. But in municipalities the fee of the streets is in the city or village, in trust, however, for street purposes. Section 2601, Rev. St.; *Swan & C.* Rev. St. p. 1483; *Cincinnati & S. G. A. St. Ry. Co. v. Incorporated Village of Cummins ville*, 14 Ohio St. 523; *City of Columbus v. Agler*, 44 Ohio St. 485, 8 N. E. 302; and *Callen v. Light Co.*, 66 Ohio St. 166, 64 N. E. 141. The fee being in the municipality in trust for street purposes, the abutting lot owner, in addition to his easement in the street for passage and repassage in common with the general public, has a special easement in the street appendant and appurtenant to his lot for ingress and egress; and when the street becomes vacated the public thereby surrenders, or, more properly speaking, legally abandons, the public use thereof for travel, but the private or special use or easement adheres to the abutting lots, and becomes part and parcel of them as by accretion, so as to preserve the right of ingress and egress to the lots over the land that formerly formed the street or part thereof. The reason that a street, when vacated, becomes a part of the abutting lots, is not because the owner of the lot owned the fee of the street, but because it must go there by necessity, to preserve his easement of ingress and egress, which in many cases is a valuable property right, and without which the lots might be of little value. The street being vacated and abandoned, the public no longer owns it, and it must either revert to the original owner, or adhere to the abutting lots as by accretion. As the original owner is presumed to have received full value for the street when he sold the lots, there is no just reason why he should have the street, when vacated, restored to him. And as the lot owners and those in the line of title have paid an

Hamilton, G. & C. Traction Co. v. Parish

increased price for lots by reason of the easement in the street, it is only just that when the street becomes vacated the easement should be preserved to them by adding the vacated street to the lots; and therefore this doctrine of accretion in such cases has been adopted in this state, and generally elsewhere. While the abutting lot owner has this right of public travel on the street, and the right of ingress and egress from the street to his lots, the public authorities retain the right to improve the street, and place such means of travel thereon as, in their judgment, shall best conserve the public welfare. And so long as his easement of ingress and egress is not materially injured, he is without remedy, because he is not wronged, said easement—all the property right he has in the street—not being interfered with. If, however, his easement of ingress and egress should be materially injured by the building and operation of the street railroad, then he must be first fully compensated for such injury. This, in substance, is the holding of this court in *Cincinnati & S. G. A. St. Ry. Co. v. Incorporated Village of Cumminsville*, 14 Ohio St. 523, and subsequent cases on this subject. His easement of ingress and egress being the only property right he has in the street, the city authorities had the power, under the constitution, to construct and operate a street railroad on and along the street without his consent and against his will, unless restrained by statute, provided they caused no material interference with his easement of ingress and egress.

The general assembly at an early day foresaw that the public authorities, in the exercise of the power to grant franchises for street railroads, with a liability to make compensation only in cases of interference with the property right of ingress and egress, might act oppressively, or against the wishes of the abutting lot owners, and therefore imposed a further check upon that power, and required that the consent in writing of the owners of a majority of the feet front on the street should be obtained and produced to the proper officer. This was done, as held by this court in *Roberts v. Easton*, 19 Ohio St. 86, "to protect owners of property on the streets of cities * * * from the exercise of arbitrary power on the part of the city authorities in permitting the streets to be used for street railroads." But this additional check did not have the effect to vest the fee of the street in the abutting lot owner, nor to give him a right to compensation, unless his easement of ingress and egress should be injured. It therefore gave him no more property rights than he had before the statute as to such consents was enacted. Such consent is, therefore, not a property right adhering to the lot, but is a personal right in the owner of the lot, a power or sword in his hands with which to protect his lot against the arbitrary powers of the city authorities. A majority of consents by the feet front is a condition precedent to jurisdiction to pass a street railway ordinance, and each abutting lot owner is free to aid in con-

Hamilton, G. & C. Traction Co. v. Parish

ferring such jurisdiction, and free to withhold such aid. His actions cannot be controlled in that regard by others on the street, nor by courts of justice in their behalf. Such a condition, such consent, in the nature of things, cannot be appropriated under the power of eminent domain. The consent must be given or withheld at the option of the lot owner. He cannot be forced to give it, nor forced to withhold it. Section 3439, Rev. St., provides for this written consent, and it imposes no conditions or restrictions, but leaves the lot owner free to give or withhold his consent. And section 344 goes further, and provides that: "Nothing herein contained shall affect the rights of property owners to give or withhold their consent." So that our statutes, while granting this power of consent, and providing for the giving or withholding of the same, impose no conditions or limitations on such power, but expressly provide that the statutes shall not affect the rights of property owners to give or withhold such consent. We cannot approve the Illinois cases on this question, but regard the New York and New Jersey cases on the question as stating the correct rule. As the general assembly, while having the subject before it, imposed no conditions or limitations upon the exercise of this power, can this court amend the statute by construction, and add conditions or limitations not imposed by the legislature? We think not. In some other like statutes the general assembly has imposed conditions and limitations, and, if it had regarded them necessary in this statute, it would have inserted them into the act, as was done in the Two-Mile Pike act, now section 4836, Rev. St. It is, therefore, clear that the general assembly did not regard it wise or necessary to impose conditions or limitations upon the exercise of the power of consent in such cases.

But it is urged that outside of the statute, and independent of it, the purchase of such consents for value is against public policy, and this seems to be the ground upon which the circuit court based its judgment; because that court found as a conclusion of law that the "consents procured by purchase are invalid, null and void, and against public policy." As they are not shown to be defective in form or substance, and are not prohibited by statute, there can be no reason for holding them "invalid, null and void," unless they are against public policy. We will therefore address ourselves to the matter of public policy, as the case was argued here upon that ground. In *Probasco v. Raine*, 50 Ohio St. 378, 34 N. E. 536, this court held: "If a statute is constitutional, it is valid, and cannot be set aside by a court as being against public policy or natural right. There can be no public policy or right in conflict with a constitutional statute." In the case at bar the effort is, not to invoke public policy to override a valid statute, as was attempted in the *Probasco Case*, but rather to bring forward a public policy to supply a rule of decision as to a statutory matter as to which the general assembly has

Hamilton, G. & C. Traction Co. v. Parish

been purposely silent. In *Vidal v. Girard's Ex'rs*, 2 How. 127, 11 L. Ed. 205,—a case from Pennsylvania,—the supreme court of the United States laid down the rule as to public policy in such cases as follows: "Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its constitution and laws and judicial decisions make known to us. The question, what is the public policy of a state, and what is contrary to it, if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will complexionally differ. * * * We disclaim any right to enter upon such examinations beyond what the state constitutions, laws, and decisions necessarily bring before us." No decision of this court is cited, and we know of none, recognizing or establishing the public policy contended for in this case, and we think it safe to hold that there is none. Under a system like ours, where the fundamental rights of the people are defined and guarded by a written constitution, where all crimes are statutory, and our civil rights and procedure also regulated by statutes, there is but little room for public policy outside of our statutes and constitution. In this regard our system is very different from that of England, where the doctrine of public policy in earlier days had a wide scope, and from which it was brought to this country, and has often been indiscriminately applied by courts here without observing the distinction between the systems of the two countries. The supreme court of the United States in the *Girard Will Case*, *supra*, states the rule as to public policy correctly, and, tested by that rule, we find nothing in our constitution, statutes, or decisions sustaining the public policy contended for.

It is urged that to purchase consents for value is a species of bribery, and an expression to that effect in *Makemson v. Kauffman*, 35 Ohio St. 444, is cited, and relied upon. But upon turning to our bribery statute we do not find it to cover the case, and, as we have no common-law crimes, but all defined by statute, we must conclude that such purchase of consents is not a species of bribery, because under our system what is not prohibited is tolerated. Again, title I, c. 8, of our Penal Code, from section 6929 to 7017, is devoted to "Offenses against Public Policy," and it is only fair to presume that, if the general assembly had intended to prohibit the purchase of such consents, it would have done so in this chapter 8 or in the street railroad sections.

It is also urged that the abutting lot owners as to these consents, act in a public capacity, or perform a public function, and that they must, therefore, act from pure motives for the benefit of the public, or at least for the good of all on the street, and that their action for or against the street railroad

In re Opening of Ludlow St. in Yonkers

cannot be influenced by considerations of gain; and some cases are cited supporting this view. But here again we are asked to amend the statutes by construction, and to create a public policy which is not deducible from our constitution and statutes. This court cannot control the morals of litigants, unless so provided by statute. And when the evil results flowing from a given course of conduct have not been of a grave enough character to attract the attention of the general assembly, this court cannot, by construction, provide a new remedy under the plea of public policy.

The cases cited by counsel on both sides have been fully considered, but their review has not been found necessary in this opinion.

With this view as to such written consents, the questions growing out of section 3439a, p. 475, 95 Ohio Laws, are immaterial, and are not here decided. The judgment of the circuit court will be reversed, and judgment entered upon the finding of facts in favor of the plaintiff in error.

Judgment reversed, and judgment for plaintiff in error.

SPEAR, DAVIS, SHAUCK, PRICE, and CREW, JJ., concur.

In re OPENING OF LUDLOW ST., IN CITY OF YONKERS.

(*Court of Appeals of New York, Dec. 9, 1902.*)

[65 N. E. Rep. 494.]

Railways—Laying Highway across Track—Notice.

Laws 1897, c. 754, amending the railroad law (section 61), and requiring notice of intention to lay out a street across a steam railway to be given to a railroad company, requires such notice to be given in proceedings commenced before the passage of the act, under a city charter which did not require such notice, where the petition is not acted upon until after the passage of the act.

Appeal from supreme court, appellate division, Second department.

In the matter of the proceedings for the opening of Ludlow street, in the city of Yonkers. From an order (68 N. Y. Supp. 1046) affirming an order vacating the appointment of commissioners of estimate and assessment, James B. Ludlow and others, executors of Thomas W. Ludlow, appeal. Affirmed.

James B. Ludlow and B. Learned Hand, for appellants.
Ira A. Place and Robert A. Kutschbock, for respondents.

PARKER, C. J. In pursuance of the charter of the city of Yonkers, certain property owners on November 23, 1896, filed a petition with the common council of that city praying that a street be so laid out that it should cross the steam surface railroad of the respondent. The petition was on that day duly referred to the board of street opening, which reported thereon

In re Opening of Ludlow St. in Yonkers

on December 27, 1897, approving the petition. In the meantime, however, chapter 754 of the Laws of 1897 was passed,—taking effect July 1, 1897, some months before the report was made,—which act so amended the railroad law that the first part of section 61 was made to read as follows: “When a new street, avenue or highway, or new portion of a street, avenue or highway shall hereafter be constructed across a steam surface railroad, such street, avenue or highway, or portion of such street, avenue or highway, shall pass over or under such railroad or at grade as the board of railroad commissioners shall direct. Notice of intention to lay out such street, avenue or highway, or new portion of a street, avenue or highway, across a steam surface railroad, shall be given to such railroad company by the municipal corporation at least fifteen days prior to the making of the order laying out such street, avenue or highway by service personally on the president or vice-president of the railroad corporation, or any general officer thereof. Such notice shall designate the time and place and when and where a hearing will be given to such railroad company, and such railroad company shall have the right to be heard before the authorities of such municipal corporation upon the question of the necessity of such street, avenue or highway. If the municipal corporation determines such street, avenue or highway to be necessary, it shall then apply to the board of railroad commissioners before any further proceedings are taken, to determine whether such street, avenue or highway shall pass over or under such railroad, or at grade, whereupon the said board of railroad commissioners shall appoint the time and place for hearing such application, and shall give such notice thereof, as they judge reasonable, not, however, less than ten days, to the railroad company whose railroad is to be crossed by such new street, avenue or highway, or a new portion of a street, avenue or highway, to the municipal corporation and to the owners of land adjoining the railroad and that part of the street, avenue or highway to be opened or extended.” The remaining part of the section has no direct bearing upon the question before the court.

After a careful examination of the section in the light of the object sought to be accomplished by the law-making power, our conclusion is that the legislature intended to require the steps named therein to be taken by municipalities in the laying out of streets across railroads, in addition to the requirements of their several charters and existing general law. The procedure provided for by the various charters throughout the state, differing as they do in detail, was to be left in force, as furnishing the general basis for laying out and opening new streets throughout the several municipalities; but in view of the public importance of the attempt to gradually do away with grade crossings, especially in dangerous locations, and of the fact that one-half of the expense was to be borne by the

Chicago & E. R. Co. v. Keith

railroad corporation to be crossed by the new highway, it was deemed but just that the railroad corporation interested should have an opportunity to be heard before the municipal authorities on any such proposed new road; so this act was passed, providing that notice should be given of an intention to lay out such a street, avenue, or highway, and that it should be given by service personally upon the president or vice president of the railroad corporation, or any general officer thereof, and that such railroad corporation should have the right to be heard before the municipal authorities upon the question of the necessity of such street, avenue, or highway.

In our view, as we have already suggested, it was the legislative purpose that this statute should apply to all the various charters of the state, imposing the additional requirements named therein upon the several municipalities seeking to open new highways across railroad tracks; so, after the board of street opening made their report, and the common council took the proceedings required by the charter to open and lay out the highway, giving the notice required by the charter, and taking the other steps, as it did, strictly in conformity therewith, there should have been observed, in addition thereto, the requirements of section 61, *supra*, under which notice of the intention to lay out this street should have been given to the respondent, and an opportunity for hearing afforded in the manner pointed out by the statute. In the event of a determination by the municipal authorities to lay out the highway, then, as required by the statute, and before any other proceedings were taken, application should have been made to the board of railroad commissioners for them to decide whether the street should be carried across the railroad, over or under or at grade. These steps having been omitted by the local authorities, it follows that the subsequent proceedings had by direction of the municipal authorities, viz., the application for the order at special term appointing commissioners to estimate and assess the expenses of the improvement and the amount of damages and the benefits, and all subsequent proceedings in pursuance thereof, were without authority. The courts below therefore properly held that upon the application of the respondent those proceedings should be set aside.

The order should be affirmed, with costs.

O'BRIEN, BARTLETT, HAIGHT, MARTIN, VANN,
and CULLEN, JJ., concur.

Order affirmed.

CHICAGO & E. R. CO. v. KEITH *et al.*

(*Supreme Court of Ohio, Dec. 2, 1902.*)

[65 N. E. Rep. 1020.]

Railroad Right of Way—Drainage—Constitutional Law.

Section 3342, Rev. St., requiring railroad companies to construct and keep open ditches of sufficient depth, width, and grade to conduct

Chicago & E. R. Co. v. Keith

to some proper outlet the water which accumulates along the sides of such roadbed from the construction or operation of such road, is a valid statute in so far as the accumulation of water is injurious to the contiguous lands or detrimental to the public, but invalid where such water is not injurious to such lands or the public.

Constitutional Law.

In so far as sections 16 and 19 of article 1 of the constitution conflict with the common law, these sections must prevail over that law; and this is so whether the conflict is as to the right or remedy.

Taxation—Notice.

It is necessary to the validity of an assessment on real estate, other than general taxes, that somewhere along the line of the proceedings notice be given to the owner and an opportunity afforded him to be heard in opposition or defense.

Railroad Right of Way—Drainage—Constitutional Law.

Sections 3343-3346, Rev. St., are in conflict with sections 16 and 19 of article 1 of the constitution, and are void, for the reason that they attempt to authorize the taking of private property for private purposes and without due course of law.

(Syllabus by the Court.)

Error to circuit court, Allen county.

Petition for an injunction by the Chicago & Erie Railroad Company against Priscilla Keith and others. Judgment for defendants was affirmed by the circuit court, and plaintiff brings error. Reversed.

The Chicago & Erie Railroad Company, plaintiff in error and also plaintiff below, filed the following petition in the court of common pleas against Priscilla Keith and Theo. D. Robb, as probate judge of Allen county:

"Now comes the plaintiff, the Chicago & Erie Railroad Company, and says that it is a corporation duly organized under the laws of the state of Indiana, and for cause of action against the defendants, Priscilla Keith and Theo. D. Robb, as judge of the probate court of Allen county, Ohio, avers as follows, viz.: That on May 9, A. D. 1899, there was served by the sheriff of Allen county, Ohio, upon one F. C. McCoy, the agent of plaintiff at the city of Lima, Ohio, a notice, signed by Theo. D. Robb, as probate judge for Allen county, Ohio, and bearing the seal of the probate court of said county, and purporting to be the copy of an order, judgment, or decree entered in case No. 7,442 of said court, entitled 'Priscilla Keith, Plaintiff, v. The Chicago & Erie Railway Co., a Corporation, Defendant,' the said defendant in said cause No. 7,442 of said probate court of Allen county, Ohio, being the plaintiff in this proceeding; and by the terms of said judgment, order, or decree this plaintiff, as said defendant, was directed to construct a drain, or drains and ditches, of sufficient capacity to conduct to some proper outlet the water accumulated along the side of plaintiff's roadbed, by reason of the construction and operation of said roadbed, situate within the limits of section thirty-five (35) of said roadbed, and adjoining lands owned or occupied by Priscilla Keith, said lands being in section twelve (12), township four (4) south, range four (4) east, in Allen county, Ohio; and said notice further

Chicago & E. R. Co. v. Keith

declared that unless said defendant (the plaintiff herein) should comply with the requirements thereof within 30 days from said May 9, 1899, then that said Theo. D. Robb, as said probate judge of Allen county, Ohio, would forthwith proceed and advertise for the letting, and proceed and let the contract for draining said accumulated water from the side of said roadbed along the points and places above described to the lowest bidder, in accordance with law. That prior to said May 9, A. D. 1899, this plaintiff, as defendant in said proceedings in case No. 7,442 of the probate court of Allen county, Ohio, had no notice or summons of any kind directed to it, requiring it to appear before said probate court and have judicially determined whether or not the land described in said proceedings could be properly drained and the costs thereof assessed against plaintiff herein as said defendant, or whether or not the roadbed of the defendant was constructed and maintained at said points and places through swamp lands, so as to exempt plaintiff, under the statute, from the cost and expense of draining said lands; and plaintiff, without fault on its part, was prevented from tendering any issue that might have been tried or determined in said cause. That the time named within the notice served by the sheriff upon the agent of plaintiff on May 9, A. D. 1899, has expired, and the defendant, Theo. D. Robb, as probate judge of Allen county, Ohio, is threatening to proceed and advertise for the letting of a contract for draining the lands above described at the points and places above described; and, unless restrained by an order of this court, said Theo. D. Robb, as said probate judge, will advertise and let said contract, and thereafter will charge the cost and expense of the same against the property of plaintiff, and will thereby deprive plaintiff of its property without due process of law; and for all of which wrongs and injuries plaintiff has not an adequate remedy at law. That said plaintiff in said cause No. 7,442 of the probate court of Allen county, Ohio, is proceeding under the alleged authority of an act of the legislature of Ohio, passed May 7, 1869, entitled 'An act to require railroad companies to drain water from the sides of their roadbeds in certain cases,' and which alleged law is now designated as sections 3342, 3343, 3344, 3345, and 3346, Rev. St. Ohio, and is (as plaintiff herein believes) contrary to the provisions of section nineteen (19), art. one (1), of the constitution of Ohio. That said probate court of Allen county, Ohio (as plaintiff believes), has no authority in law to enter the order and notice served upon plaintiff as herein alleged, or, upon failure of plaintiff to comply with said order, to advertise for the opening of said ditches and drains and let the contract therefor, or to certify the cost and expense thereof and place the same upon the tax duplicate against plaintiff, for that thereby plaintiff is deprived of its property without due process of law and without any judicial determination that the same is for the public welfare. Wherefore plaintiff

Chicago & E. R. Co. v. Keith

prays that a temporary injunction may issue directing said Theo. D. Robb, as said judge of the probate court of Allen county, Ohio, and his successors in office, to refrain from advertising the letting, and to refrain from the letting, of a contract to dig said ditches and drains described in these proceedings, and to refrain from certifying the cost and expense of said proceedings, so that the same may be placed against the property of plaintiff on the tax duplicate of Allen county, Ohio, for collection, until the legality of said acts of said probate court may be inquired into, and until the constitutionality of said act of the legislature of Ohio may be judicially determined; that plaintiff may have any other and further orders necessary to fully protect its rights and give adequate relief in equity; and that upon the final hearing of this cause said injunction may be made perpetual."

To this petition the defendants filed a general demurrer, which was sustained by the court of common pleas; and, the plaintiff not desiring to further plead, the court dismissed the petition and rendered final judgment against the plaintiff, to which the plaintiff excepted. The circuit court affirmed the judgment, and thereupon the railroad company filed its petition in error in this court, seeking to reverse the judgments of the courts below.

W. O. Johnson and Ridenour & Halfhill, for plaintiff in error.

Hoagland & Lippincott, for defendants in error.

BURKET, C. J. (after stating the facts). The object of the action is to test the constitutionality of the sections of the statute mentioned in the petition. The original statute was passed in the year 1869, and its provisions have been carried into the Revised Statutes. The sections are as follows:

"Sec. 3342. There shall be constructed and kept open, along the roadbed of every railroad, except where the road extends through or by swamp land, by the company or person operating the road, ditches or drains of sufficient depth, width, and grade to conduct to some proper outlet the water which accumulates along the sides of such roadbed from the construction or operation of such road.

"Sec. 3343. If, after ten days' notice or request to any ticket or other agent of the company or person operating a railroad, to provide such drain or ditch, preferred by the persons authorized to institute the proceedings hereinafter provided for, the provisions of the foregoing section be not complied with, any owner or tenant of land contiguous to such railroad feeling aggrieved by such neglect may give notice of the fact, in writing, to the probate judge of the county in which such neglect occurs, designating in such notice the place or places on such road where such drains or ditches have not been made; and upon the receipt of such notice the probate judge shall appoint a commission of three disinterested

Chicago & E. R. Co. v. Keith

freeholders of such county, who together with the county surveyor, shall proceed to the place designated in the notice, and, if upon inspection, it is found that the provisions of the preceding section are not complied with, the commission or a majority thereof, shall report the same to such probate judge, who shall keep a record of such proceedings; and the probate judge shall designate a time within which such ditches or drains shall be made or opened and shall forthwith notify the company or person operating such road, in writing, whose duty it shall be to make or open such ditches or drains within the time specified.

“Sec. 3344. If such company or person neglect to comply with the notification of the probate judge, he shall forthwith, by advertisement for three consecutive weeks, in one or more of the weekly newspapers published in such county, give notice that the work of making or opening the ditches or drains will be let to the lowest bidder at such time and place as shall be designated in the advertisement.

“Sec. 3345. The probate judge shall, at the time and place specified in the advertisement, sell the job or jobs of making or opening such ditches or drains to the lowest bidder, and take from such bidder a sufficient bond, with surety, for the performance thereof, and upon the completion thereof to the satisfaction of the probate judge, he shall give the bidder a certificate therefor, stating the amount due for the work; and upon presentation of the certificate to the auditor of the county, he shall place the amount so certified forthwith upon the tax duplicate of the county, against the company, together with all the costs and expenses for inspection by the commission and surveyor, notices, advertisements, sale of work, making contract therefor, approval of the work, and other costs, and interest on the amount certified to be due for the work from the time the work is approved until the amount can be collected by the treasurer of the county; and such tax shall be collected as other taxes, and be paid to the persons entitled thereto on the warrant of the county auditor on the county treasurer.

“Sec. 3346. The probate judge, commissioners, and surveyor shall be entitled to receive for their services such costs, fees and expenses as are provided by law for costs, fees, and expenses of county commissioners and others under proceedings relating to ditches.”

That a duty may rest upon a railroad company to remove such water as accumulates along the sides of its roadbed from the construction or operation of its road, to the injury of contiguous lands, or to the detriment of the public health, convenience, and welfare, seems clear, and that such railroad company may be compelled by statute and upon proper proceedings to discharge such duty and remove such water is equally clear; but where such water so accumulates on the right of way and along the sides of such roadbed, and does no

Chicago & E. R. Co. v. Keith

injury to contiguous lands, and is not detrimental to the public health, convenience, and welfare, the railroad company cannot be compelled by statute to remove the same, because it has the right to use its right of way, its property, as it pleases, so long as such use does no injury to the public or to private persons. The right to store water on the right of way may in certain cases be a valuable right, and when no injury results from such storage the right cannot be curtailed. Where an accumulation of water along the sides of such road-bed is not detrimental to the public health, convenience, or welfare, but is injurious to contiguous lands, the injury arising from such accumulation is not an injury to the public, to be by it redressed or prevented, but is a private injury to the contiguous lands, to be redressed by the owners by an action for damages, or other proper action, in the court of common pleas; the probate court not having jurisdiction of such actions.

The ditch act of May 1, 1854, was held unconstitutional for the reason that it authorized the entry upon lands of others, and the construction of drains, when demanded by private interest merely, without reference to public interests, convenience, or welfare. *Reeves v. Treasurer*, 8 Ohio St. 333, 346. And in *McQuillen v. Hatton*, 42 Ohio St. 202, this court again held that ditches could be constructed only in the interest of the public, and that the fact that larger crops could be raised on lands to be benefited by a ditch was a private, and not a public, interest, and would not warrant the establishment of the proposed ditch. The sections in question do not in the least provide for the protection of the public health, convenience, or welfare, but are solely for the redress of grievances of private persons, the owners of lands contiguous to the railroad; and said sections are so broad that under them railroads might be compelled by the owner or tenant of contiguous lands to drain off all such accumulations of water, even though not injurious to such lands or the public, and accumulated and stored on the right of way for the use of such railroad. The general assembly has not the power to impose or enforce such a duty. By these sections authority is attempted to be given for the lowest bidder to enter upon the right of way of the railroad and construct a ditch for the sole benefit of a private individual, without reference to the interests of the public. The costs of such ditch and all costs of the proceedings are to be assessed against the railroad, placed upon the tax duplicate, collected by the county treasurer as other taxes, and paid over to such bidder upon the warrant of the county auditor; and all this is done, not in the interest of the public, but in the interest of private persons. It is not so much a case in which private property is taken for public use for which compensation must be first made in money, as it is a taking of private property for private use, and therefore in violation of that part of section 19 of the bill

Chicago & E. R. Co. v. Keith

of rights which says: "Private property shall ever be held inviolate, but subservient to the public welfare." The money required to pay the assessment is the private property of the railroad company and cannot be taken from it for the private welfare of another. The sections in question provide solely for the relief of the lands of private individuals in their private interests, and seek to impose a burden by way of assessment, to be collected as taxes from the railroad company for the private benefit of such individuals, and for that reason are unconstitutional. Assessments and taxes can be levied and collected only for public purposes.

There is another reason why these sections are unconstitutional: An assessment is attempted to be authorized upon the railroad company without an opportunity to be heard. The owner or tenant of land contiguous to the railroad may give ten days' notice to any ticket or other agent of such company to provide such ditch, and upon failure to do so he may give notice in writing to the probate judge of the county, and the judge thereupon appoints a commission to inspect the part of the road in question and report to him. Thereupon the judge notifies the railroad company in writing to open such ditch within a time specified. If not opened, the probate judge, upon three weeks' notice by advertisement, lets the work of opening such ditch to the lowest bidder. After the work is completed, the cost thereof and all costs of the proceeding are to be certified to the auditor, placed on the duplicate, collected as other taxes, and paid over to the person who did the work. The railroad company is notified by the owner or tenant to open the ditch, and is also notified by the probate judge to open it, but no notice is given to it of any hearing, and no provision whatever is made for a hearing at any stage of the proceeding. It may be that the railroad extends through or by swamp land, in which case the statute by its terms is not applicable. It may be that the ditches already provided are of sufficient depth, width, and grade to conduct the water to a proper outlet. It may be that the accumulation of water does not arise from the construction or operation of the road, but from the natural lay of the land. It may be that no public interest is to be conserved, for which alone an assessment can be made. It may be that the accumulation of water is not injurious to contiguous lands or the public. As to all these, and other material matters, the railroad company has a right to be heard before it is condemned to suffer and pay an assessment. Reasonable notice, and an opportunity to be heard in defense or opposition, are prerequisites to jurisdiction; and an assessment made without such notice and opportunity to be so heard is void, not only for want of jurisdiction, but also because there was not due process of law. While taxes are laid without notice, the statutes being regarded as sufficient notice, and section 4858 as sufficient remedy, special burdens by way of special assessments can-

Chicago & E. R. Co. v. Keith

not be laid on property without notice and an opportunity, somewhere along the line, to be heard in opposition or defense. Special assessments cannot exceed the special benefits. *Walsh v. Barron*, 61 Ohio St. 15, 55 N. E. 164, 76 Am. St. Rep. 354. And if there is nothing else available to the landowner, this question may arise in every case, and therefore the landowner is entitled to notice before any burden by way of special assessment is laid on his property. The rule in such cases is well stated in *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289, as follows: "A law imposing an assessment for a local improvement, without notice to and a hearing or an opportunity to be heard on the part of the owner of the property to be assessed, has the effect to deprive him of his property without due process of law, and is unconstitutional. The law may prescribe the kind of notice and the mode in which it may be given, but cannot dispense with all notice. It is not enough that the owner may by chance have notice, or that he may as a matter of favor have a hearing. The law must require notice and give the right to a hearing."

It is urged by counsel for defendant in error that the sections in question are enacted under the police power, and do no more than to require the railroad company to so use its property as not to injure that of another, and cite *Cooley*, Const. Lim. *573. While the general assembly under the police power may restrict and regulate the conduct of persons and the use of property within reasonable bounds, it must do so under the limitations of the constitution, and cannot, under the guise of that power, take the private property of one person and bestow it upon another for his private use and benefit. Neither can it lay an extra burden on property without notice to the owner and an opportunity to be heard. The regulation and restriction under the police power in behalf of the public may be enforced by taxation or assessment, but in behalf of a private individual it can only be enforced by action in a court of competent jurisdiction.

It is also urged by counsel for defendants in error, that the accumulation of water along the roadbed is a nuisance, and that the proceedings authorized by said sections are not more than the abatement of such nuisance at the expense of the party creating it, and this seems to have been the view taken by the courts below. *Railway Co. v. Keith*, 12 O. C. D. 208, 21 Ohio Cir. Ct. R. 669, and *Lawton v. Steele*, 119 N. Y. 226, 23 N. E. 878, 7 L. R. A. 134, 16 Am. St. Rep. 813, are cited and relied upon to support this contention. The law of nuisance has no application to the subject-matter of these sections. Nothing is said in them as to nuisances, and there is no declaration in the statute making such accumulation of water a nuisance, and no authority given to abate any such pretended nuisance. The whole object of the statute is to conduct the accumulated water to a proper outlet, so as to protect lands contiguous to the railroad, and for the private

Chicago & E. R. Co. v. Keith

benefit of the owners of such lands. There is nothing in the statute looking to the protection of the public health, convenience or welfare. So that, if the law of nuisance were to be applied to this case, it could not avail, because the nuisance would be to private individuals, and not to the public. Even *Lawton v. Steele*, supra, concedes that a private nuisance cannot be abated by the party inconvenienced without process of law. In *Lawton v. Steele* the statute declared and made the fish nets a public nuisance, and authorized their destruction by any person, and required the game and fish protectors to destroy them. Under that statute the destruction of the nets was upheld as not being a taking of private property for public use without compensation, and also as not being a taking without due process of law. That case was affirmed by the supreme court of the United States in 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; the court holding that the statute came within the police power, and as to the value of the nets, in effect, applied the maxim of "De minimis non curat lex." The exact question has never been passed upon by this court, but from the general trend of our decisions, and the construction of our constitution, it may well be doubted whether the summary destruction of such nets under such a statute would be upheld by this court. In *Edson v. Crangle*, 62 Ohio St. 49, 56 N. E. 647, the statute forbade the use of the nets, and provided that nets set or placed contrary to the act should be confiscated, sold, and proceeds placed in the public treasury; and this court held the seizure of such nets without process of law to be in violation of the constitutional rights of the owners, and compelled the game warden to make compensation. In that statute there was no provision declaring the nets a nuisance, as in the sections under consideration here there is no provision making the accumulated water a nuisance. That which the general assembly has not declared a public nuisance, and authorized its summary abatement in the interest of the public, cannot be construed by a court to be such nuisance and liable to be summarily abated without process of law, even in the interest of the public, and certainly not in the interest of private individuals. This is conceded in *Lawton v. Steele*, supra.

It is also urged that at common law nuisances might be abated, and that our constitution has made no change in this regard. If at common law private property might be taken for private use, or taken for public use without compensation, or taken or destroyed without due course of law, then our constitution has rendered inoperative the common law in that regard, because under our constitution private property shall ever be held inviolate, and where taken for public use compensation therefor must be first made in money, and every person for an injury done him in his land, goods, or person shall have remedy by due course of law. The common law,

Glanz v. Chicago, etc., Ry. Co

in so far as it conflicts with these provisions of the constitution, is inoperative. There is nothing so sacred in the common law that it should override a constitution or statute. Much of our constitution was adopted, and many of our statutes enacted, to get rid of the imperfections and injustice of the common law. While, therefore, said section 3342 is valid as to the duty imposed on such railroad company to construct and keep open ditches as therein provided, where the accumulation of such water is to the injury of contiguous lands, or detrimental to the public, it is invalid when such water is not injurious to such lands or the public, because, if no injury is done by such accumulated water, the railroad company can use its right of way for the storage of such water or other purpose as to it may seem proper. The remedy provided in said sections 3343, 3344, 3345, and 3346 for the enforcement of said duty so imposed by section 3342 is in conflict with section 19 of article 1 of the constitution, and section 16 of the same article, because the private property of the railroad company, the money to pay the assessment, is taken, not for a public, but private, purpose, and thereby the constitutional right of the company to hold its private property inviolate is invaded; and this is done without due course of law, because done without notice and an opportunity to be heard in *défense*, and because, further, that the right of the owner of contiguous lands for redress against the company for failure to construct and keep open such ditches is a private right, to be enforced by proper action in a court of competent jurisdiction, and not by the paternal remedy of assessment and taxation for the protection and benefit of private persons. The power of assessment and taxation can be enforced by the state in the interest of the public only, and not for the redress of private wrongs.

The judgments of the courts below will be reversed, the demurrer to the petition overruled, and the cause remanded to the court of common pleas for further proceedings according to law. Judgments reversed, and cause remanded.

SPEAR, DAVIS, SHAUCK, and CREW, JJ., concur.
PRICE, J., not sitting.

GLANZ v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Iowa, Feb. 11, 1903.)

[93 N. W. Rep. 575.]

Fires—Origin—Sufficiency of Evidence.

Plaintiff's evidence showed that the engine that set the fire on his premises also set another in a cornfield less than 20 rods away, and that sparks "went about 7 rods from the track." There was also some testimony that defendant was using slack coal in its engines, which on account of the dryness of the weather, and the season of the year, was dangerous to use: *held* sufficient to take the case to the jury.

*Glanz v. Chicago, etc., Ry. Co***Same—Injury to Health—Proximate Cause.***

Negligence of railroad company in starting fire on plaintiff's premises would be the proximate cause of injury to his health by overexertion in putting it out.

Appeal—Review.

In the absence of a showing of some necessity for an instruction, it will be presumed on appeal that the court properly refused it.

Appeal from district court, Delaware county; Franklin C. Platt, Judge.

Action at law to recover damages caused plaintiff and her property through a fire set out by a locomotive being operated on defendant's line of road. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals. Affirmed.

J. C. Cook, H. Loomis, and E. C. Perkins, for appellant.
Bronson & Carr, for appellee.

DEEMER, J. The petition is in three counts. In the first, plaintiff asked damages for injuries done her property; in second, compensation for services in extinguishing the fire; and in the third, damages for personal injuries received by her in endeavoring to extinguish the fire. The second count was not submitted, but the first and third were, resulting in a verdict for plaintiff in the sum of \$569, which was reduced by order of the trial court to \$369.

Little or no complaint is made of the rulings of the trial court with reference to the first count of the petition. The rule announced in *Greenfield v. C. & N. W. Ry. Co.*, 83 Iowa, 270, 49 N. W. 95, and other like cases, is, however, again challenged in a general way. Suffice it to say with reference to that case that it has been too long adhered to to justify us now in disturbing it. The doctrine there announced has been established in many other jurisdictions, and seems to be adopted by the text-writers as correct. See *Thompson on Negligence*, vol. 2, §§ 2285–2287, and 2289, and cases cited.

Many complaints are made of rulings as to the third count. The trial court instructed with reference to this that there was no presumption of negligence on the part of the company in setting out the fire, and that the burden was on the plaintiff to show that the fire occurred by reason of negligence on the part of the defendant, either in the construction or the operation of its engine. Right or wrong, this must be accepted as the law of the case. It was given, no doubt, in view of the change made in the "fire statute" by the Code of 1897. Compare section 2056 of that Code and section 1289 of the Code of 1873. We are not required or permitted at this time to express our views regarding this change, but must accept the

*See notes at end of case.

As to whether there can be a recovery for personal injuries resulting from a fire originating through the negligence of another, the decisions are conflicting. They are not numerous; and it may be useful to devote some space to the illustrations, and in quoting from the opinions.

law as given by the court as a correct interpretation of the new statute.

Defendant contends that there is no evidence to sustain that part of the verdict awarding damages for personal injuries. In answer to special interrogatories, the jury found that there was mismanagement of the engine, and that the coal used in the locomotive which set out the fire was not such as reasonable care and prudence demanded. It also found that the engine was properly equipped with spark arresters, and that these devices were in good repair at the time the fire was set out. The trial court, in its instructions, practically eliminated the statute, in so far as the third count of the petition was concerned, and submitted this count on the theory of defendant's common-law liability; and, in determining the sufficiency of the evidence to support the verdict on this count, we must be governed by common principles and rules. Before the enactment of the fire statute, we had uniformly held that negligence would not be presumed from the proof of the setting out of the fire alone. See *McCummons v. C. & N. W. Ry. Co.*, 33 Iowa, 187; *Gandy v. C. & N. W. R. R.*, 30 Iowa, 420, 6 Am Rep. 682. We quote the following from the *Gandy Case*, as stating the rule for this case in this state, in the absence of statute: "The plaintiff must aver negligence, and, of course, the burden of proving it is upon him; and, as the mere fact of injury does not in any other case prove negligence or other wrong upon the defendant, so it does not in this. But as, in the nature of the case, the plaintiff must labor under difficulties in making proof of the fact of negligence, and as the fact itself is always a relative one, it may be satisfactorily established by evidence of circumstances bearing more or less directly upon the fact of negligence, which might not be satisfactory in other cases, free from difficulty, and open to clearer proofs; and this upon the general principles of evidence, which hold that to be sufficient or satisfactory which ordinarily satisfies an unprejudiced mind. 1 Greenl. on Ev. 2. The absence of a spark arrester; the failure to use the best; the employment of a drunken engineer; the use, at the time, of an excessive amount of steam; an ordinarily heavy train; an unlawful rate of speed; the defect or want of repair in the engine; the stopping of the engine or stirring of the fire in it in a place of peculiar peril; the repeated and unusual dropping of coals, or excessive and continued emission of sparks, etc.,—are severally facts tending more or less satisfactorily, according to the circumstances, to establish the fact of negligence. See 4 West. Jur. 333, 429." We have to determine then, whether or not, in the light of this rule, there was sufficient evidence of negligence to justify a verdict for plaintiff on the third count of her petition. The verdict was based on a finding that the coal used in the engine was not such as reasonable care and prudence demanded, and that the engine was not properly managed. Plaintiff introduced evi-

Glanz v. Chicago, etc., Ry. Co

dence to show that the engine which set out the fire in question also set out another fire in a cornfield within 20 rods of the place where the fire on plaintiff's premises started, and that sparks "went about 7 rods from the track." This was all the evidence (save a matter hereinafter referred to) adduced by plaintiff on the issue of defendant's negligence. We are constrained to hold, in view of the difficulties under which a plaintiff labors in such cases of producing evidence of negligence, that this was sufficient to take the case to the jury. *Slossen v. B., C. R. & N. R. Co.*, 60 Iowa, 215, 14 N. W. 244; *West v. R. R.*, 77 Iowa, 654, 35 N. W. 479, 42 N. W. 512. True, in these cases there was evidence of several fires, while here the testimony shows but two. But this goes to the weight, rather than to the sufficiency, of the evidence. These two fires were so close to each other, were at such a distance from the track, and were at such a place, that we think the jury might have concluded from these facts alone that there was negligence. The number of fires set out by the particular engine is, of course, material, but the circumstances and conditions under which they were set out also have an important bearing. See, as sustaining our conclusions on this branch of the case: *McTavish v. R. R.* (N. D.) 79 N. W. 443; *Patton v. R. R.*, 87 Mo. 117, 56 Am. Rep. 446; *Butcher v. R. R.*, 67 Cal. 518, 8 Pac. 174; *Huyett v. R. R.*, 23 Pa. 373; *Jacksonville R. R. v. Peninsular Land Co.* (Fla.) 9 South. 661, 17 L. R. A. 33.

Defendant introduced evidence to show that the engine was properly equipped and skillfully operated, and that the fire was a mishap for which it was not responsible. But appellee argues that from the testimony the jury was warranted in finding that defendant at the time in question was using slack coal in its engines, which, on account of the dryness of the weather and the season of the year (it being in November), it was dangerous to use, and that ordinary care would have dictated the use of fuel less conducive to the emission of sparks. There is some direct testimony from which such an inference might possibly be drawn, although not in itself sufficient to show negligence on the part of the defendant in this respect; but, taken in connection with the other evidence to which we have referred, we think it was sufficient to justify the submission of the case to the jury. *Hockstedler v. R. R.*, 88 Iowa, 236, 55 N. W. 74.

2. Appellants contend that plaintiff's injuries were not the proximate results of the setting out of the fire, and that the court should have so instructed the jury. The testimony shows that there was a high wind blowing; that the fire was coming directly toward the house and barn on plaintiff's premises, and that in the barn there was a large amount of personal property belonging to plaintiff and her husband; and that, had the barn caught fire, the house would also have been burned. It also appears that plaintiff and her husband,

Glanz v. Chicago, etc., Ry. Co

with others, undertook to extinguish the fire, or to stay its progress for the purpose of saving this property, and that in so doing plaintiff's clothing was partially destroyed, her person burned, and she made sick and disabled from work. The court instructed, in effect, that, if defendant was negligent in setting out the fire, it would be liable to plaintiff for any such personal injuries received by her as were the natural and direct result of her exertions in trying to extinguish the fire and save her property, to which she did not by her own negligence contribute, and on the question of contributory negligence gave the following: "In respect to the question of whether the plaintiff was or was not guilty of negligence which contributed to her alleged injuries, you are instructed that the plaintiff had the right to make such reasonable exertions for the protection of her property as a reasonably prudent person would have done under like circumstances. But if she exerted herself to a greater extent or more violently than an ordinarily prudent person would have done under like circumstances, and her injuries, if any, resulted from such exertions, then, even though she acted in good faith, or under the belief that what she did was necessary, she cannot recover for such injuries, if any, to her health. (7) In determining whether the plaintiff was or was not guilty of negligence that contributed to the alleged injury to her health, you would not be justified in finding that she was free from any negligence that contributed to her injuries, if any, from the facts alone (if they be facts) that the danger to her property was great, or appeared to be great, and that she acted in good faith, in an honest purpose to prevent the spread of the fire, and thus protect her property from destruction or injury, for her motive or conduct, however honest or well intended, cannot be made the basis of a recovery, if, as a matter of fact, she did not act as a reasonably prudent person would have acted under like circumstances. In determining this question, however, you should take all the facts and circumstances concerning the fire, and the act of the plaintiff as disclosed by the evidence, into consideration." It is contended that the fire was not the proximate cause of plaintiff's injuries and sickness, and that, as these results were brought about by her own volition, she cannot recover. The question of proximate cause is always difficult, and, but for the case to which we shall presently refer, we should have difficulty in determining the proposition here presented. In *Liming v. R. R. Co.*, 81 Iowa, 250, 47 N. W. 66, the exact question before us was considered; and it was there held that a stranger who received injuries in attempting to extinguish a fire set out by a railway company, to save property from destruction, might recover from the company; that defendant's negligence in such a case was the proximate cause of an injury to the person who attempted to save property from the consequences thereof; that the injured party was entitled to recover, provided he did not negligently

Glanz v. Chicago, etc., Ry. Co

contribute to the results. In that case it is said, in effect, that one who, acting with reasonable prudence, voluntarily exposes himself to danger for the purpose of protecting his property, may recover for the consequent injuries he receives from the person whose wrong caused the injury to himself, and the danger to the property he sought to protect. See, also, *McKenna v. Baessler*, 86 Iowa, 197, 53 N. W. 103, 17 L. R. A. 310. In attempting to extinguish the fire in question, plaintiff was in the strict line of her duty; and, if she acted with ordinary care and prudence, there is no reason, in justice or law, why she should not recover for the injuries received. Bound as she was by law to save herself from the consequences of defendant's negligence, the defendant should not be permitted to say that her act was entirely voluntary, and that the injuries she received did not follow proximately from its original wrong. The *Liming Case* is not without support in other jurisdictions. See *Rajnowski v. R. R. Co.*, 74 Mich. 20, 41 N. W. 847; *Id.*, 78 Mich. 681, 44 N. W. 335; *Berg v. Great Northern R. Co.* (Minn.) 73 N. W. 648, 68 Am. St. Rep. 524. Defendant attempts to distinguish the *Liming Case* from the one at bar on the ground that in the former *Liming* was injured by the fire itself, while here the plaintiff's sickness was due to overexertion. Admitting the difference in facts, it does not follow that there is any distinction in principle. In either case the injury was the result of the fire, unless the party injured was doing a negligent and reckless act in attempting to extinguish the fire. Whether or not he was guilty of contributory negligence was a question for the jury, under proper instructions. It should not be said that defendant could not anticipate the wrong complained of. If it negligently set out a fire which endangered property, it knew that the owner was bound to make all reasonable efforts to save himself from harm; and if, in the exercise of reasonable care in the performance of this duty, he received an injury, the original fault of the defendant is something more than a condition. It was, as we view it, the efficient cause of the injury. That injury may result from an actual contact with the fire, or from overexertion, and in either case is a proximate result.

3. The fifth instruction is complained of for the reason that the injuries complained of by plaintiff as a result of her exertions, rather than as a result of the fire set out by the defendant, are referred to and emphasized. Taken alone this instruction was erroneous; but when considered with the sixth and seventh, which we have quoted, and the evidence to which we have referred, there was no prejudicial error of which defendant may justly complain.

Defendant asked an instruction as to the value to be placed upon the testimony of witnesses relating to the value of property destroyed. The instruction announced a correct rule of law, but the record does not contain the evidence bearing on

Notes

this subject, and, so far as shown, there was no conflict therein. If the defendant's experts gave the same evidence as to value as did plaintiff's, then there was no occasion for giving the instruction. In the absence of a showing of some necessity for the instruction, it will be presumed that the trial court was justified in refusing it.

There is no prejudicial error in the record, and the judgment is affirmed.

NOTES.

LIABILITY OF RAILROAD COMPANIES FOR PERSONAL INJURIES RESULTING FROM FIRES SET BY LOCOMOTIVES.

Injury Sustained While Trying to Save His Home—Damages Too Remote.

Where the complaint charges the company with negligence in allowing sparks to enter his house and there start a fire, there can be no recovery for injuries caused by plaintiff burning his hands in an effort to stop the fire, as such damages are too remote. *Hinchy v. Manhattan R. Co.*, 17 J. & S. (N. Y.) 406.

Girl Killed in Attempt to Extinguish Fire—Anticipation of Result.

The case of *Seale v. Gulf, Colorado & S. F. R. Co.*, 65 Tex. 274, is a case where the action was brought for death ensuing from an attempt to extinguish fire set out by a railroad company. It appeared that sparks emitted by the locomotive of a passing train of cars set fire to combustible material which the railway company had allowed to accumulate upon its right of way. A strong wind was blowing at the time which caused the fire rapidly to spread, and, when it reached near to and was threatening the fence that enclosed the premises of S., which were contiguous to the company's right of way at that point, C., fifteen years old and daughter of S., attempted to extinguish the fire. In the effort, the clothes on her person caught, and she was so severely burned that she, in a few hours thereafter, died. S. brought suit, under the statute, against the railway company for damages for the death of C., charging that her death was caused by the negligence of the company in permitting dry brush, weeds, and other combustible material to accumulate and remain upon its right of way, and in failing to provide proper appliances for preventing the emission of sparks from its engine, etc., and alleging that deceased was in the exercise of due care. The defendant demurred to the petition. It was held that whether C. was or was not negligent in her attempt to extinguish the fire, that attempt on her part, and not the negligence of the railroad company in starting the flames was the proximate cause of her death, that one exercising due care and incurring no risks should, in extinguishing a fire, have the flames communicate to her clothes and hereby lose her life, is something so improbable that the anticipation of it should not be charged to the defendant under such circumstances, that whilst the railroad company might have anticipated such an accident in the event of negligence on the part of the person killed by the flames, yet it was not bound to act in such case upon the theory, that persons who might be affected by its conduct, would be injured through their own negligence, and was therefore not obliged to take it into contemplation.

Exposure to Obvious Risk to Save Property.

One who voluntarily exposes himself to evident risks of injury from a fire caused by another's negligence cannot recover against the latter for bodily injuries resulting from such exposure even though the exposure was for the purpose of saving property or the life of an animal. *Cook v. Johnston*, 58 Mich. 437, 25 N. W. 388.

Notes

Suffocation, Cold, and Necessity of Sleeping on Floor Liable for Direct Results.

Defendant railroad company was liable for damages that directly resulted to plaintiff and his family from suffocation, and from cold in being compelled to leave the burning building at night, thinly clad. Damages resulting from their sleeping on a neighbor's floor, however, were too remote. *Serafina v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.), 42 S. W. 142.

Attempt to Save Property of Another.

In *Liming v. Illinois Cent. R. Co.* (Iowa), 45 Am. & Eng. R. Cas. 581, it was held that one who, acting with reasonable prudence, voluntarily exposes himself to danger, for the purpose of saving the property of another in danger of destruction by fire negligently set out by a railroad company, may recover from the railroad company for the consequent injuries he received. In this case it is said in the opinion: "It is admitted that the damages in question were caused by a fire which the defendant set out in operating its railway, but it is said that the fire was not the proximate cause of the injuries sustained by plaintiff. It is further said that but for the intervention of his own voluntary act he would have sustained no injury, and therefore that his own act was the proximate cause of his injuries. The question presented for our determination is not free from difficulty. Defendant is not liable unless its wrongful act was the proximate cause of the damages in suit. * * * In this case the plaintiff did not receive the injuries of which he complains in any attempt to protect human life, nor in trying to save his own property. So far as we are advised by the record, he was under no legal obligation to protect the property of his neighbor; yet his attempt to do so was entirely lawful, and was most praiseworthy. If he had failed to make a reasonable effort to save it, he would have merited the censure and contempt of his neighbors; and this would have been so notwithstanding the fact that defendant may have been liable for all loss which could occur, and that what he accomplished would inure to its benefit. It is the duty of every one, according to the requirements of an enlightened and just public sentiment, to use reasonable efforts to preserve the property of others from threatened destruction; and, as is well known, it is a duty which people generally are quick to discharge. Defendant could have foretold, with almost absolute certainty, when it set the fire in question, that plaintiff, being near, would use every reasonable means in attempting to save Oremen's horses from the flames, and there was nothing surprising or unusual in the attempt he made. Under the circumstances of the case, it was the natural and probable result of the wrong of defendant. A person would not be justified in exposing himself to as great danger in saving property as he would in saving human life, and whether the person injured acted with reasonable prudence would, in most cases, be a question of fact depending upon the circumstances under which the act was done."

Same—Voluntary Act Proximate Cause.

In case of *Pike v. Grand Trunk R. R. Co.*, 39 Fed. 255, 38 Am. & Eng. R. Cas. 336, it appeared that plaintiff's intestate was not in any danger from the proximity of the fire, but that she voluntarily advanced towards it, going a distance of about 50 rods, and attempted to extinguish it. It also appeared that the intestate had no interest in the property which was on fire. The court held, that the proximate cause of her death was her voluntary act in attempting to extinguish the fire, and that there could be no recovery. In this case, it is said in the opinion: "The rule of law is that a person is liable for all the consequences which flow in ordinary natural sequence from his negligence, or, according to another view, he is liable for all the consequences which could be foreseen as likely to occur; but he is not

Notes

liable for the independent act of an intelligent stranger, because that would not follow as an ordinary natural sequence from his negligence, and such interference by a stranger could not be foreseen. The spontaneous action of an independent will is said, therefore, to break the causal connection. This is in truth the intervention of a new force outside of the regular natural sequence of the primary cause, and which cannot be a subject of precalculation. It is elemental law, therefore, that when such new, independent, and intelligent force intervenes, it breaks the train of causation, and it becomes the proximate cause, and the original act of negligence the remote cause. The statement of the principle is easier than its application. Each case must be governed by its own facts and circumstances, but, if the case comes clearly within the rule, the court should not hesitate to enforce it.

"We have stated the rule, and have said that in our opinion Mrs. Pike comes within its general terms, but does not her case come under some of the exceptions or limitations to the rule which had been recognized by the courts? The intervening cause is not the proximate cause, unless the person acted of his own free will. The first cause does not cease to be the proximate cause if such intervening stranger is imbecile, or acts under compulsion, or under a sense of imminent peril; or, in other words, under such circumstances, produced by the first cause, as would give no opportunity for the exercise of free volition on the part of such stranger. Now, to my mind, there is no evidence going to prove that Mrs. Pike's act was not a strictly voluntary one. There is no evidence going to prove that her act was one of compulsion, or that she acted under the fear of imminent peril to herself, or that the circumstances were such as to destroy her power of volition. Each case must be controlled by its own circumstances. Upon the evidence it cannot be doubted that Mrs. Pike had every opportunity to escape. Neither the direction of the wind, nor the proximity of the fire, nor the dryness of the season, upon the plaintiff's own evidence, placed the intestate in peril for the time being. Instead of escaping from the danger, whatever it was, she voluntarily advanced towards it, going a distance of about 50 rods towards and into the place where the fire was burning. Her act may have been praiseworthy, but it was not the less voluntary, and it does not relieve her from the consequences which ensued. Mrs. Pike had no legal or equitable interest in this property, and consequently in this action her administrator cannot invoke the principle that it was her duty to approach the fire, and endeavor to put it out. Even in a supposed action brought by the owner of the property against the railroad company, for damages caused by fire, the failure of this lady, 72 years of age, though she was active and strong for her age, to voluntarily endeavor to put out a fire 30 or 40 rods distant from the dwelling, could hardly be urged as contributory negligence on the part of the owner of the property. In the present case, I can see nothing in the situation of Mrs. Pike towards the property which was on fire which called for the action she took."

Loss of Life—Absence of Contributory Negligence.

In *Rajnowski v. Detroit, B. C. & A. R. Co.*, 74 Mich. 20, 41 N. W. 847, 78 Mich. 681, 44 N. W. 335, it was held that if through the negligence of a railroad company, sparks and cinders escape from its engine and set fire to a house, the company is liable, not only for the property destroyed, but also for any loss of life caused thereby without any contributory negligence on the part of the party bringing action.

Sparks from Locomotive Causing Destruction of Powder Mill—Question for Jury.

An engine was hauling a heavy train up a grade near a powder mill, and immediately after it passed an explosion occurred, killing plaintiff's intestate, who was employed in the mill. The evidence

Ft. Worth & R. G. Ry. Co. v. Southwestern T. & T. Co

showed that a heavy smoke settled over the mill, and tended to show that the explosion was caused by sparks from the locomotive. There was a conflict of evidence as to whether the stack used on the engine was of the most approved type. It was held that the question of the company's liability should have been left to the jury, and it was error to dismiss the complaint. *Babcock v. Fitchburgh R. Co.*, 46 N. Y. S. R. 796, 64 Hun 636, 19 N. Y. Supp. 774.

A. R. Y.

FT. WORTH & R. G. RY. CO. v. SOUTHWESTERN TELEGRAPH & TELEPHONE CO.*(Supreme Court of Texas, Jan. 8, 1903.)*

[71 S. W. Rep. 270.]

Right to Condemn Railroad Right of Way for Telegraph Line.*

Under Rev. St. arts. 698, 699, authorizing corporations created to construct telegraph lines to set their poles and wires along and upon any public roads, streets and waters, and to enter on any lands, whether owned by private persons or by any corporation, and to appropriate so much of said lands as may be necessary, and to condemn lands for the use of the corporation,—a telegraph and telephone company has the same authority to condemn a right of way over the property of a railway company that it would have to condemn the property of others.

same.

The mere fact that a telegraph and telephone company could obtain a right of way over other property or in other ways, furnishes no defense to proceedings instituted by it to condemn a right of way over the land of a railway company.

Certified questions from court of civil appeals of Third supreme judicial district.

Condemnation proceedings by the Southwestern Telegraph & Telephone Company against the Ft. Worth & Rio Grande Railway Company. On the appeal of the railway company for a judgment in favor of the telegraph and telephone company, the court of civil appeals certified certain questions.

Geo. H. Fearons and N. L. Lindsley, for appellant.

McLaurin & Wozencraft, for appellee.

WILLIAMS, J. Certified questions from the court of civil appeals for the Third district, as follows:

"This is a condemnation proceeding instituted by the Southwestern Telegraph & Telephone Company against the Ft. Worth & Rio Grande Railway Company, and resulting in a judgment in favor of the telegraph and telephone company, in accordance with and subject to the limitations stated in its petition, and an appeal by the railway company. The essential averments of the plaintiff's petition are as follows:

"That the plaintiff is a corporation duly incorporated, and is duly authorized and empowered to do business as a telegraph and telephone company in the state of Texas, having

*Postal Tel. Cable Co. of Montana v. Oregon Short Line R. Co. (C. C. Mont.), 3 R. R. R. 432, 26 Am. & Eng. R. Cas., N. S., 432.

Ft. Worth & R. G. Ry. Co. v. Southwestern T. & T. Co

complied fully with the requirements of the law relative to foreign corporations in that regard, and holding a permit from the state of Texas to do business therein. And plaintiff further says that it is duly and legally authorized and empowered to erect, own, operate, and maintain magnetic telegraph and telephone lines for the use of the public in the rapid transmission of intelligence in the states of Texas, Arkansas, New York, and elsewhere in the United States of America, being duly chartered for that purpose.'

" '(4) That the said defendant is a public highway and post road of the United States; and that plaintiff has, in all things, complied with the acts of congress of the United States in such cases made and provided, and has filed its written acceptance of all the restrictions and obligations imposed by the acts of congress with the postmaster general of the United States, as is required by law, and that plaintiff is entitled to all the rights and privileges conferred upon telegraph companies by the acts of congress of the United States in such cases made and provided.

" '(5) That the defendant is a private corporation, duly incorporated and organized, and transacting the business usually conducted by railway companies in the public service of carrying passengers, freights, and the United States mails for hire, being a post road. This business defendant conducts through and over its railroad known as Ft. Worth & Rio Grande Railroad, by it owned and operated from and between the cities of Stephenville and Brownwood, in the state of Texas, and passing through the cities of Dublin, Comanche, and other towns in the state of Texas.'

" '(7) That plaintiff has already built and is maintaining a system of several thousand miles of telegraph and telephone lines in the states of Texas, Arkansas, and New York, by it now owned and operated for the use of the public for the rapid transmission of intelligence for commercial purposes, and for other public purposes.

" '(8) That, as an addition to the part of the said system of telegraph and telephone lines now maintained and operated by plaintiff as aforesaid, and to be used for the same purposes as said system (to wit, to the service of the public) and in connection therewith, plaintiff desires to build upon defendant's right of way a telegraph and telephone line, hereinafter called "additional line," from the said city of Stephenville, in Erath county, Texas, in a southerly direction, at a distance near to and parallel with (except as hereinafter shown) defendant's main line of railway, to the city of Brownwood, in Brown county, Texas.

" '(9) That plaintiff and defendant, after considering this matter together, cannot agree upon a purchase by plaintiff of a right of way upon, along, and over said lands and property hereinafter more particularly described for said additional line, nor can they agree as to amount of damages that may be

caused to the lands and property of defendant by the construction, operation, and maintenance thereon of the said additional line, hence plaintiff desires to have a right of way along, upon, and over the said lands and property condemned in accordance with law, in order that plaintiff may lawfully construct, operate, and maintain thereon its said additional telegraph and telephone line.

“(10) That plaintiff shall locate said telegraph and telephone (additional line) at a distance of 35 feet from and in a direction easterly of the center line between the rails of the main track of defendant's railway, and parallel with said center line of said railway, except where deflections are made as herein elsewhere shown; that, in order to do so, it will be necessary and most advantageous for plaintiff to build, operate, and maintain, its said (additional) line in, along, upon, and over certain land owned and occupied by the defendant as a right of way for its said railroad, at the place and in the manner herein indicated, which land is hereinafter more fully described, and the points of entering upon and leaving the said land are hereinafter specially given.

“(11) That the poles, wires, and cross-arms shall be so placed upon said land, and at all times thereon so kept and maintained, as not to obstruct any private roadway or railway crossing; and so as not to impede the free use by the said defendant of the said lands for the purpose of accommodating public travel upon said railway; and so as not to impede the defendant in the use of said railroad for any other purpose as a common carrier; and so as not to obstruct the free use of or come in contact with any other telegraph or telephone line now existing upon the said land along and upon the right of way of the defendant over the same, and in such manner as not to interfere with any structure, drain, or ditch upon the defendant's right of way now there existing and by defendant used in its railway purposes, or that may hereafter be there placed by defendant in the necessary use of its right of way for railway purposes.

“And plaintiff shall only have an easement in defendant's right of way for the purpose of building, operating, and maintaining thereon its said telegraph and telephone line, having ingress and egress to and from said lands for that purpose; and the building, operating, and maintaining of said line shall not prevent free passage under the wire to defendant, nor the use of timbers, soil, rock, gravel, or any other material between the poles or beyond the wires from the railway; and if the defendant shall at any time desire to change the location of its tracks, or to construct any new tracks or side tracks, or erect any depots or other structures, or to open any gravel pits or rock quarries, or to remove any material or soil, or in case the poles and wires shall be found to interfere with the running or operating of cars or trains upon defendant's tracks, or to endanger the safety of employees of defendant or

passengers traveling on defendant's trains,—then the plaintiff shall remove the poles and wires from the point of interference, at its own cost, to any point on defendant's right of way, or on the same side of defendant's main track of railway, near and adjacent to the former position occupied by said poles and wires as may be designated by defendant, such removal to take place after written notice for a reasonable time to be given plaintiff by defendant, stating why the removal is desired and the place to which the removal shall be made.

“(12) That, in erecting the said telegraph and telephone line in, along, upon, and over the said tracts of land, it will be necessary and most advantageous for plaintiff to set its poles in the ground in a single line with each other, and parallel with (except as hereinafter shown) the center line, between the rails of the main track of defendant's said railroad, at the distance of 144 1-3 feet each from the next preceding pole in the line, except where different distances between the poles are hereinafter specially given. The poles are to be 25 feet long, 7 inches in diameter at the top, and not exceeding 18 inches in diameter at the lower end, except those poles for which different lengths and sizes are hereinafter specially given. The poles are to be erected perpendicular to the ground, except as to those hereinafter specified, and set into it 6 feet. To each of these poles, at right angles to it, and at right angles to the center line between the rails of the main track of defendant's railway, are to be firmly and securely attached three cross arms, each to be 6 feet long and 4 inches by 4 inches in size, and made fast to the poles at a point equidistant from the ends of the cross-arms; the top edges of the three cross-arms shall be 3 inches, 30 inches, and 52 inches respectively below the top of the poles; and upon each side of the poles plaintiff will string wires attaching them to insulators, made fast to strong and durable wooden pins, which pins are to be attached securely to the cross-arms; and the wires shall be so strung that each cross-arm shall support six wires, three on each side of the pole; and the wires shall be strung taut, as above indicated, from pole to pole, for the transmission of plaintiff's telegraph and telephone messages in the service of the public. In measuring the distance to the said poles, in all cases the measurement shall be made to the center of the pole at the ground. In locating the distance, the telegraph and telephone line is to be built from the railroad, the measurement is to be to the several poles at the ground, from the center line, between the rails of the main track of defendant's railway, along lines drawn at right angles to said center line, and reaching from said center line to the center of the poles which are to support the wires of the said telegraph and telephone line. All poles that are longer than 30 feet shall be set in the ground to the depth of 7 feet. Into each cross-arm shall be securely fastened a durable and strong wooden pin at the point where the wire is to be supported on the cross-arm, and on each pin,

protecting it from the wire, shall be securely fastened an insulator, to which the wire shall be attached. The poles will each occupy a space of 18 inches square, or $2\frac{1}{4}$ square feet of land.'

"The petition accurately describes the boundaries of appellant's property, and embraces allegations as follows:

" 'The appellant's property upon which appellee seeks to condemn a right of way is certain property held by appellant for right of way purposes for its railway, in the counties of Erath, Comanche, and Brown, in the state of Texas.

" 'That the lands over which appellee seeks to condemn a right of way "are connected throughout their entire length and constitute one entire and continuous tract or strip of land held by defendant as a right of way for its said railway, and along and upon which the defendant's said railway is built and operated." Within the said strip of land, defendant's right of way, said strip being 100 feet wide from end to end thereof, and practically at the center line thereof, from end to end, lengthwise said strip, is built the main track of defendant's railway.'

"The petition then gives the exact distance from the center of appellant's main track of every one of the few poles not occupying the pole line's specified distance of 35 feet from said main track. It gives also the length of every pole not of the specified height of the poles in the line. It further gives the number and dimensions of the cross-arms, the number of wires, and all the plans, specifications, details, and measurements for the location and structure of the line.

"The petition further stipulates that appellant shall not be liable in damages for injury by fire to appellee's poles, and relieves appellant of any possible obligation to clear away combustible material from about the poles.

"The petition prays that damages be assessed for the condemnation as sought in the petition, and for the building, operating, and maintaining the line at the place and in the manner indicated in the petition, and for such other orders and judgments as the case may warrant.

"The defendant interposed, and the court overruled, the following special exception:

" 'Because plaintiff has no authority and right under the laws of this state to exercise the power of eminent domain in, along, on, and over the right of way of this defendant railway corporation, and parallel with its track, unless not to do so would defeat the object and purpose of its grant; because, before there can be a taking such as prayed for by the plaintiff, it must be shown that it is not practical to construct its line between said points in any other way than upon defendant railway company's right of way.'

"The action of the trial court in overruling this exception is a material question properly presented in appellant's brief for decision, and the court of civil appeals hereby certifies

Ft. Worth & R. G. Ry. Co. v. Southwestern T. & T. Co

that question to the supreme court for decision. In other words, stating the question in a different form: Can there be a condemnation of property already devoted to a public use in the manner described in the plaintiff's petition, for the purpose of devoting it to another and a different use in the manner and under the limitations prescribed in the plaintiff's petition; unless it be shown that it is for the public benefit and of a higher order than the purpose for which it is already used, as well as that it cannot be practically constructed in any other way?"

In the case of San Antonio & A. P. Ry. Co. v. Southwestern Telegraph & Telephone Co., 93 Tex. 313, 55 S. W. 117, 49 L. R. A. 459, 77 Am. St. Rep. 884, it was held by this court that telephone companies were invested with the same power to condemn property for the construction of their lines as that given by the Revised Statutes to telegraph companies. The extent of that power is the subject presented for consideration by the present certificate. It is granted by articles 698 and 699 of the Revised Statutes as follows:

"Art. 698. Corporations created for the purpose of constructing and maintaining magnetic telegraph lines are authorized to set their poles, piers, abutments, wires and other fixtures along, upon and across any of the public roads, streets and waters of this state, in such manner as not to incommode the public in the use of such road, streets and waters."

"Art. 699. Such companies are also authorized to enter upon any lands, whether owned by private persons in fee or in any less estate, or by any corporation, whether acquired by purchase or by virtue of any provision in the charter of such corporation, for the purpose of making preliminary surveys and examinations with a view to the erection of any telegraph lines, and from time to time to appropriate so much of said lands as may be necessary to erect such poles, piers, abutments, wires and other necessary fixtures for a magnetic telegraph, and to make such changes or location of any part of said lines as may from time to time be deemed necessary, and shall have a right of access to construct said line, and, when erected, from time to time as may be required to repair the same, and may proceed to obtain the right of way and to condemn lands for the use of the corporation in the manner provided by law in the case of railway corporations."

The objection urged by appellant to the attempt to condemn a portion of the land previously acquired by it for a right of way is that the property has already been devoted to public use; that the grant of the power of eminent domain in general terms to another corporation does not, upon established principles, include the right to take such property unless it be absolutely necessary to the exercise of the privilege granted; and that, as the statute has not expressly conferred the right of condemnation asserted, the plaintiff must show such abso-

lute necessity, i. e., that its line cannot, in the language of the question certified, "be practically constructed in any other way." The doctrine of the law upon which this contention is founded is thus very well stated by Justice Brown in *Sabine & E. T. Ry. Co. v. Gulf & I. Ry. Co.*, 92 Tex. 162, 166, 168, 46 S. W. 784, 786: "The law (conferring power of condemnation upon railway companies) does not authorize the condemnation of property which has been already dedicated to a public use when such condemnation would practically destroy the use to which it has been devoted. No express authority is given (to railroad companies) by our statutes to condemn such property, and the authority cannot be implied from the general power conferred by the law, unless the necessity be so great as to make the new enterprise of paramount importance to the public, and it cannot be practically accomplished in any other way." The doctrine is further stated on page 168, 92 Tex., and on page 786, 46 S. W.: "The authorities before cited fully sustain the proposition that such property will not be taken in condemnation proceedings when the taking will destroy the use to which it is devoted, unless it be found that the constructing road or the connection sought to be made is of so great importance to the public as to demand that another public use of less importance shall be set aside for its benefit, and that the new enterprise cannot be accomplished in any other practical way. The first occupier of the ground is entitled to all the advantages derived from the establishment of the public use therein, and no question of convenience nor expense to the company seeking condemnation can be considered, unless it be such as to render the performance of the duty enjoined by law practically impossible by any other means which can be used by the constructing company." Obviously, the first question which occurs in the consideration of such cases is whether or not the legislature has expressly conferred the power asserted. The rule of construction laid down in the quotation, and in the authorities generally, is applied in cases where the second use to which the property is sought to be put will destroy, or, at least, materially interfere with, that to which such property has been previously devoted. When this is the situation, courts refuse to hold that the legislature, by a mere general grant of the power to enter upon and condemn land, intended to authorize the destruction or material impairment of an already established public use, unless it appears that the power last conferred can be exercised in no other practical way. In such cases the power is to be implied, and cannot be implied from anything less than practical necessity. But all authority concedes the power of the legislature to authorize the taking of property which has already been condemned to public use, and we must therefore look to the law to see if the power here in question has been conferred.

The power of condemnation granted to telegraph companies

is expressed in language both general and specific. The statute authorizes the construction of telegraph lines upon and across public roads, streets, etc., showing that the legislature thought it proper to grant the privilege with respect to some lands already in use by the public. It then authorizes the condemnation of "any lands, whether owned by private persons in fee or in any less estate, or by any corporation, whether acquired by purchase or by virtue of any provision in the charter of such corporation." It is plain that the characters of estates in lands of corporations thus made subject to the power are the same as those of private persons, i. e., "either in fee or in any less estate." It is equally plain that such estates are meant as have been acquired by corporations in any manner whatsoever. All lands owned by corporations in any kind of estate must have been acquired either by "purchase" or "by virtue of some provision in their charters." If lands are acquired "by virtue of any provision in the charter," they are expressly subjected to such proceedings as this. Rights of way of railroad companies acquired by condemnation proceedings are acquired "by virtue" of provisions either of special charters or charters founded upon the general law, and therefore come within the express provision of the statute. If it be said that the power given is only a general one, and cannot, under the rule of condemnation stated, be held to refer to property held by corporations for public purposes, how can we account for the use of this language, at once so comprehensive and so particular? Other provisions of the statute conferring the power of eminent domain upon other kinds of corporations give the right to take any lands of persons or corporations, and some of them give the right to construct works along and across public roads, streets, waters, etc.; but in none of them did the legislature take the pains to use the specific language employed in favor of telegraph companies. Unless it was foreseen that questions as to the extent of the power might arise out of the characters of estates held and the modes of their acquisition, and ought to be settled by the statute, why should the legislature have referred to those incidents at all? We must assume that this language was used for a purpose, and it can best be subserved by giving to the words of the statute their true and legitimate meaning, rather than by frittering them away by construction. The reasons which actuated the legislature are easily conjectured. Telegraph lines were in existence upon rights of way of railway companies throughout the country, and it was common knowledge that they did not impede, but rather facilitated, the business of the carriers. Whatever might be the effect of the construction of great numbers of such lines along railroads, there has not been at any time such conditions existing in this state as to cripple or impede the carrying business, and to call for closer restrictions by legislation upon the rights granted to telegraph companies. So general has been the

opinion that telegraph lines can exist upon the rights of way of railroad companies, consistently with the rights of the latter, that congress in 1866 gave permission for the construction of such lines along the national post roads, some of which are railroads. The legislature acted upon the knowledge of these well-known facts and conditions, and, in granting power to telegraph companies, employed language materially differing from that used in conferring the right of condemnation upon corporations whose objects required different uses of property employed in their business,—language well chosen to express the power in controversy. Authority to burden such property with another railroad, or a turnpike, or a canal, would involve consequences very different from those flowing from a grant to a telegraph company of authority to maintain its line on the same property, and hence the kinds of estates to be subjected to the power are differently specified in the statute. And, at last, the provisions applicable to telegraph companies, when interpreted as we interpret them, authorized only the doing of that, by authority of law, which was being done every day in various parts of the country either under such authority or by contract. Another evidence that the legislature meant, what we hold it to have meant, is found in article 700:

“Art. 700. No corporation shall have power to contract with any owner of land for the right to erect and maintain a telegraph line over his lands to the exclusion of the lines of other companies.”

The history of the litigation of the country makes it well known to us, as it was doubtless well known to the legislature, that contracts of the character here prohibited were being made between railroad companies and one telegraph company for the exclusive use of rights of way. This was the evil to be prevented by this provision, which presupposes that the legislature intended to confer upon telegraph companies generally the right to use the rights of way of railway companies for the construction of telegraph lines.

Our conclusion does not impute to the legislature a purpose to destroy or impair the use by railway companies of their property for all of the purposes for which it is needed, but rather a recognition of the fact that such use will not be interfered with by the legitimate exercise of the privileges granted to telegraph companies. From this conclusion it results that the appellee has the same authority to condemn a right of way over the property in question that it would have to condemn the property of others, and that the mere fact that it could obtain such right of way over other property or in other ways furnishes no defense to the proceeding. The legislature having itself determined and enacted that such a use of the property is one to which it may be applied consistently with the prior use, no question as to the comparative importance of the two uses is left open for the courts to determine. Many

Southern Cal. Ry. Co. v. Slauson

such condemnations have been had in this state, and have been sustained by the courts of civil appeals, which are the courts of last resort in such cases. In some of the decisions, the point under consideration has been expressly decided adversely to appellant, and in others it was necessarily involved. *Southwestern Telegraph & Telephone Co. v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 52 S. W. 107; *Gulf, C. & S. F. Ry. Co. v. Southwestern Telegraph & Telephone Co.*, Id. 86; *Texas & N. O. R. Co. v. Postal Tel. Cable Co.*, Id. 108; *Houston & T. C. R. Co. v. Postal Tel. Cable Co.* (Tex. Civ. App.) 45 S. W. 179; *Gulf, C. & S. F. Ry. Co. v. Southwestern Telegraph & Telephone Co.*, Id. 152; *San Antonio & A. P. Ry. Co. v. Southwestern Telegraph & Telephone Co.* (Tex. Civ. App.) 56 S. W. 201; *Texas Midland R. Co. v. Southwestern Telegraph & Telephone Co.* (Tex. Civ. App.) 57 S. W. 312.

We answer that the exception was properly overruled by the trial court. What we have said sufficiently answers the question as otherwise stated.

SOUTHERN CALIFORNIA RY. CO. v. SLAUSON.

(*Supreme Court of California, Jan. 17, 1903.*)

[71 Pac. Rep. 352.]

Railroads—Construction of Tracks—Landowner's Consent—Agreement to Build Depot—Failure to Build—Recovery of Possession.

Where a landowner agreed with a railroad company that it might lay its tracks on his land, provided that it would build a good depot on the land, and stop all regular trains there, and that, when such was done, he would give a deed, and the road laid the tracks, but failed to build the depot, etc., the landowner could not recover possession, but his remedy was for compensation and damages, if the road should continue to fail to perform.

McFarland, J., dissenting.

In banc. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by the Southern California Railway Company against J. S. Slauson. There was judgment for defendant, and plaintiff appeals from order denying a new trial. Reversed.

For opinion in department, see 68 Pac. 107.

C. N. Sterry and Henry J. Stevens, for appellant.

Charles Silent and Silent & Campbell, for respondent.

VAN DYKE, J. This is an action to quiet title. It is averred in the first count of the complaint that plaintiff is the owner and in possession of a certain strip of land in the county of Los Angeles, between 30 and 40 feet wide and about 1,300 feet in length, and that defendant claims some title or interest therein which is without right. In the second count it is averred that for more than five years plaintiff and its predecessor in interest have been in the exclusive possession

Southern Cal. Ry. Co. *v.* Slauson

of a right of way over said land for the use and purpose of operating a railroad over the same, claiming to be the owner of said right of way adversely to any right, title, etc., of defendant; and the prayer is that plaintiff's title to such right of way be quieted as against the defendant. In addition to answering the complaint, the respondent filed a cross-complaint, in which he set up his ownership, and prayed for judgment declaring him to be the owner in fee of the land in contest, and restoring him to the possession thereof. The title relied upon by appellant was based on prescription. The evidence shows that during all the times mentioned in the complaint the respondent was the owner in fee of a tract of land which included the premises in contest. It also appears that when the predecessor of appellant (the Los Angeles & Santa Monica Railway Company) contemplated building a road across the land in question, the person whom it authorized to obtain rights of way for such contemplated road, had an interview with respondent, at which the latter agreed that the railroad company might go on and build the road over his land, provided that it would put a good depot on it, at which all regular passenger trains would stop; and that, when that was done, he would make a deed conveying the right of way. The result of the interview was reported to the company, and soon thereafter it began to build the road over the land, and, having completed it, it ran its trains over the same. There was no written contract in the premises, but the railroad company entered upon the land by respondent's permission, and not adversely, and it continued to operate the road after the same was built, but did not construct the depot, or stop its trains, as agreed. It made no demand for a deed for the right of way, nor did the respondent make a demand for the construction of the depot or the stopping of trains. The court below found and adjudged that the plaintiff had not any right or title to the land in question, and that defendant's title to the same be quieted against the claim of the plaintiff, and that he recover from plaintiff the possession of said land and premises in question, and that a writ of possession in his favor be issued, directing the sheriff to place said defendant in possession of the said premises.

The appeal was taken from the judgment, as well as from the order denying plaintiff's motion for a new trial, but, not having been taken from the judgment within the statutory time, the only matter before this court which can be considered is the appeal from the order denying plaintiff's motion for a new trial. The appellant, among other points, in its motion for a new trial and upon the appeal from the order denying the same contends that finding 8, to wit, "that the plaintiff has not any right to or estate in the said railroad property, and its possession thereof is without right, and is wrongful," is not supported by the evidence. We think this contention on the part of appellant is well taken. The evi-

Southern Cal. Ry. Co. v. Slauson

dence in the case fully discloses the fact that the railroad company, the predecessor of the plaintiff, and the plaintiff itself, entered upon the possession of the land in question by the consent of respondent (defendant), and constructed and had operated its railroad for a period of nine years or more before the commencement of the action, with the knowledge and acquiescence of the defendant, and that during such time he had not requested or demanded that the said railroad company should establish or maintain a depot upon the said land in controversy, or stop its trains thereat. The defendant, the owner of the land,—as he had a right to do,—waived compensation in advance for taking, occupying, and using the land in question, and, having permitted the railroad company to enter upon the land, construct and operate its railroad, as the evidence shows it has, the railroad company was lawfully in possession of the land, and the defendant cannot recover the same. He must resort to his action for the value of the land so taken, and damages, if any, arising therefrom.

Since this appeal was taken, this court has had occasion to pass directly upon the point here involved. *Fresno St. R. Co. v. Southern Pac. R. Co.*, 135 Cal. 202, 67 Pac. 773. That was an action of ejectment, brought to recover a portion of the right of way claimed by the plaintiff, and occupied and used by the defendant for railroad purposes, and it appeared that the strip of land in question was entered upon by the railroad company defendant and its predecessor in interest, under certain agreements and stipulations to be thereafter performed, and which were never performed; hence the action to recover possession of the premises in question upon a breach of the contract or agreement under which the railroad company entered upon the same. This court in that case held: "The owner in fee even cannot permit a railroad company to construct and operate its road through his land upon an understanding that compensation shall thereafter be made for the right of way, and then maintain ejectment if the damages be not paid as per agreement. His remedy in such case is an action to recover compensation. * * * A failure to bring an action, where the right exists, until after public interests have intervened, will prevent its successful prosecution. Acquiescence for a considerable period after the railroad company has entered upon its duties will defeat the action to recover possession." A large number of cases were cited by this court in the case referred to, among them the following: *Mitchell v. Railroad Co.*, 41 La. Ann. 363, 6 South. 522, in which the court there says: "Surely, the defendant's act, in openly entering upon plaintiff's land, with plaintiff's knowledge, and in full view of his domicile, and constructing thereon a most important link in their transcontinental railway, could not subject it to such consequences. But this is not an open question, however, as it has been by us twice considered and decided adversely to plaintiff's contention, and in cases cited

Garlick v. Pittsburgh & W. Ry. Co

in plaintiff's brief,"—citing *Bourdier v. Railroad Co.*, 35 La. Ann. 949, and *St. Julian v. Same*, Id. 924. In those cases the matter was fully considered, and in the former case it is said: "If the entry was unlawful, the plaintiffs condoned it. They should at once, and peremptorily, have forbidden the entry of the defendant, if they intended to dispute his right to the roadbed, etc. * * * The landowner may, even by parol, waive the right to prepayment as a condition precedent to the entry for construction; but, having waived it, he cannot treat the company's possession as unlawful." To the same effect were *Railroad Co. v. Allen*, 113 Ind. 581, 15 N. E. 446, *Railroad Co. v. Turner*, 31 Ark. 494, 25 Am. Rep. 564, and *Pryzbylowicz v. Railroad Co. (C. C.)* 17 Fed. 492. A railroad is, in a sense, a public highway, and the construction of a railroad over a strip of land by the consent of the owner of the same, or after condemnation proceedings, as the case may be, is a dedication of the same to a public use, and the operation of the same is in the interest of the public, and cannot be interrupted by an action to recover possession of any part thereof in the interest of a private party.

The appeal from the judgment not being before us, we cannot order the same to be modified in the particular mentioned. Further, the cross-complaint should be amended by asking compensation for the land taken and damages caused thereby, in case the plaintiff fails to perform the conditions under which possession was taken, instead of a recovery of the possession thereof. The only way left to correct the error, therefore, is to reverse the order denying a new trial, and remand the cause, with directions to the court below to grant a new trial, and allow the parties to amend their pleadings so as to conform to the rule herein expressed; and it is so ordered.

We concur: BEATTY, C. J.; LORIGAN, J.

ANGELOTTI, J. I concur in the reversal of the order denying the motion for a new trial. Under the decision of this court in *Fresno St. R. Co. v. Southern Pac. R. Co.*, 135 Cal. 202, 67 Pac. 773, the evidence did not justify the finding "that the plaintiff has not any right to or interest or estate in the said real property, and its possession thereof is without right, and is wrongful."

I dissent: McFARLAND, J.

GARLICK *v.* PITTSBURGH & W. RY. CO. *et al.* (two cases).

SAME *v.* PITTSBURG, Y. & A. R. CO.

(*Supreme Court of Ohio, Dec. 2, 1902.*)

[65 N. E. Rep. 896.]

Estoppel by Deed—After-Acquired Property.

On July 26, 1883, the N. Y., P. & O. R. Co., assuming to have title, but which was imperfect, for valuable consideration received, executed and delivered to the P., C. & T. R. Co., a deed in which

Garlick v. Pittsburgh & W. Ry. Co

the "grantor does give, grant, remise, and release and forever quit-claims unto the grantee, its successors and assigns, forever, all such right and title as it, the said grantor, has or ought to have" in and to certain lands used and to be used for railroad purposes with a railroad constructed thereon, which deed in the habendum clause contains the following recital and obligation: "To have and to hold the premises aforesaid, subject to the hereinbefore recited agreements and stipulations of the said contract of submission to arbitration, unto the said grantee, the said P., C. & T. R. Co., its successors and assigns, so that neither it, the said grantor, nor its successors and assigns, nor any other person claiming title through or under it, shall or will hereafter claim or demand any right or title to the premises herein conveyed, except as in the aforesaid stipulations provided, or any part thereof, but they and every one of them shall by these presents be excluded and forever barred." And on September 6, 1885, the grantor in the above deed received as grantee a conveyance for the same premises from the C. & M. V. Ry. Co., who acquired the said premises by appropriation in the year 1880: *held*, that the N. Y., P. & O. R. Co., the grantor to the first deed of July 26, 1883, is estopped from acquiring the said subsequent title, and that by reason of the above covenant such subsequent title inures to the benefit of its grantee, the P. C. & T. R. Co.

Right of Way—Abandonment.

A railroad company organized under the laws of Ohio may acquire title to lands within the state for railroad purposes either by grant or proceedings in appropriation, and when the right of way is thus acquired, and the company has constructed its railroad thereon, the same becomes such title to and interest in the lands acquired that, without intending to abandon the same, said company may sell and convey to another corporation for like railroad purposes all or a part of the premises so acquired. The question of abandonment is one of intention, and to be determined from the nature of the conveyance itself and the attending facts and circumstances.

(Syllabus by the Court.)

Error to circuit court, Mahoning county.

The Pittsburgh & Western Railway, Thomas M. King, receiver, and the Pittsburgh, Cleveland & Toledo Railroad Company, under favor of section 5779, Rev. St., on April 4, 1899, commenced an action in the court of common pleas against the plaintiff in error, Henry M. Garlick, to quiet their title to certain real estate used as a right of way for railroad purposes, which is described in the petition, being a strip of land in the city of Youngstown about 25½ feet in width and about 502 feet and 7 inches in length. The other defendants in error, the Pittsburgh, Youngstown & Ashtabula Railroad Company and the Pennsylvania Company, were joined with Garlick as defendants, as claiming some right or interest in the premises. The petition recites certain conveyances and certain proceedings in appropriation, which tend to support the title of plaintiff, and which fully appear in the findings of fact made by the circuit court. The commencing of the action followed the service of notice on said companies to institute proceedings in appropriation, and that in default thereof Garlick would bring suit under the statute to compel appropriation. Henry M. Garlick answered the petition, and, after some admissions of matters not disputed, denied that the plaintiff has entered into possession of a portion of the lands described in the petition, but admitted that he claims to own

Garlick v. Pittsburgh & W. Ry. Co

all the said lands, and avers that he is the absolute owner of the same in fee simple. The answer denies that the plaintiffs have any title to or interest in said lands. The Pittsburgh, Youngstown & Ashtabula Railroad Company and the Pennsylvania Company filed an answer and cross-petition, claiming possession and title to a certain portion of said lands, giving the source and nature of their title, and denying the title of Garlick, and ask to have their title protected, and the cloud thereon removed. Garlick answered this cross-petition, denying that the cross-petitioners have any title to or right of possession of the premises described in the cross-petition. The facts of the case made on the petition and this cross-petition and answers thereto were found by the circuit court, and appear in its findings of facts. On the issues joined the court of common pleas found in favor of Garlick and against the plaintiffs and the cross-petitioners, and rendered judgment accordingly, from which an appeal was taken to the circuit court. On full trial in that court the plaintiffs and cross-petitioners prevailed against Garlick, and a decree was made as prayed for. The other material facts are stated in the opinion. To the decree made by the circuit court, Garlick prosecutes error in this court. Affirmed.

Arrel, McVey & Robinson and Hine & Kennedy, for plaintiff in error.

Jones & Anderson and Carey & Mullins, for defendants in error.

PRICE, J. From the lengthy findings of fact made by the lower court we shall endeavor to gather and bring into a smaller compass the salient and material features of the controversy, and briefly state the positions and attitude of the parties concerned in this litigation. The Pittsburgh & Western Railway Company is the lessee of its coplaintiff, the Pittsburgh, Cleveland & Toledo Railroad Company; and the Pennsylvania Company is the lessee of its codefendant and cross-petitioner, the Pittsburgh, Youngstown & Ashtabula Railroad Company; and these lessees assert all the title, possession, and rights of possession which their respective leases confer. All the parties hereto claim under one common source of title,—the Parmlees. The plaintiff in error, Garlick, holds under a quitclaim deed from the Parmlees for a consideration of \$1,000, which deed was executed and delivered to him on January 3, 1899; while the plaintiffs in the lower court claim to hold under conveyances and certain appropriation proceedings made and had long prior to the date of Garlick's deed. The cross-petitioners assert title through conveyances from Parmlees and their successors in the chain of title, all of which were made prior to the deed to Garlick, and under which chain of title they claim possession and occupation of the premises described in their deeds. It seems to be true that the interests and claims of the cross-petitioning railroad com-

Garlick v. Pittsburgh & W. Ry. Co

panies are not adverse to the interests and demands of the plaintiffs, and in considering the questions involved we will follow the natural order presented by the pleadings and the arguments of counsel. Following this order we examine the grounds relied on by the plaintiffs for the relief they demand.

In October, 1880, the Cleveland & Mahoning Valley Railway Company, an Ohio corporation, commenced against the Parmlees, in the probate court of Mahoning county, proceedings to appropriate as right of way for railroad purposes the land described in the petition in this case, and other lands, and as a result of said proceedings the value of the land appropriated was found to be \$13,233.50, which finding was afterwards confirmed, and made a matter of record in said probate court. Subsequently, and after a dispute as to who should receive the sum so found, it was awarded to the Parmlees. Thereupon the New York, Pennsylvania & Ohio Railroad Company, instead of the Cleveland & Mahoning Valley Railway Company, paid the money into court, and at once took possession of the lands thus appropriated. On or about July 26, 1883, the New York, Pennsylvania & Ohio Railroad Company executed and delivered to the Pittsburgh, Cleveland & Toledo Railroad Company a deed duly executed for the lands described in the petition, and perhaps other lands, and the latter company at once took possession of the road so purchased, and constructed thereon its main line of railroad, and has ever since continued in possession. The contents of this instrument are very material to the issues, as we shall presently see. On September 6, 1885, the Cleveland & Mahoning Valley Railway Company duly executed and delivered to the New York, Pennsylvania & Ohio Railroad Company a deed for the lands in dispute and other lands which had been appropriated under the proceedings of the year 1880. Now, if the conveyance of July 26, 1883, from the New York, Pennsylvania & Ohio Railroad Company to the Pittsburgh, Cleveland & Toledo Railroad Company, was a mere quitclaim, without covenant or other obligation contained therein as an estoppel to a title which the former might subsequently acquire, the latter company is without title. But is it merely a quitclaim or general release? We therefore necessarily have before us for examination the contents of this deed; and on its granting clause, and more especially on recitals and solemn covenants found therein, the conveyance of September 6, 1885, it is claimed, inures to the title and benefit of the Pittsburgh, Cleveland & Toledo Railroad Company, which it received under the conveyance of July 26, 1883. The latter deed recites a contract previously made between the grantor and grantee, wherein, among other clauses and stipulations, it is stated that the Pittsburgh, Cleveland & Toledo Railroad Company desired to acquire for the purpose of right of way the lands of said New York, Pennsylvania & Ohio Railroad Company defined on maps,

Garlick v. Pittsburgh & W. Ry. Co

descriptions, and stipulations attached thereto, and which include the tract in dispute, and that the said companies had agreed to have an amicable appropriation made between them, and for that purpose certain arbitrators had been selected and agreed upon to fix the compensation and damages to be paid by the said Pittsburgh, Cleveland & Toledo Railroad Company by reason of the taking of said property; and that the arbitrators had determined the compensation and damages to be \$45,750, which sum was paid to the New York, Pennsylvania & Ohio Railroad Company, the grantor. Then follows the granting clause: "Does hereby give, grant, remise, release, and forever quitclaim unto said grantee, its successors and assigns, forever, all such right and title as it, the grantor, has or ought to have in and to the premises hereinbefore described," etc. But more important is the following language, though found in the habendum clause: "To have and to hold the premises aforesaid, subject to the hereinbefore recited agreements and stipulations of the said contract of submission to arbitration, unto the said grantee, the said Pittsburgh, Cleveland & Toledo Railroad Company, its successors and assigns, so that neither it, the said grantor, nor its successors or assigns, nor any other person claiming title through or under it, shall or will hereafter claim or demand any right or title to the premises herein conveyed, except as in the aforesaid stipulations provided, or any part thereof, but they and every one of them shall by these presents be excluded and forever barred." There are many other stipulations copied into this deed from the agreement to arbitrate the compensation and damages to be paid by the grantee, which show that more than an ordinary quitclaim deed was in contemplation, and that more than such should be made. It is well enough to remember here that the parties had full knowledge, no doubt, of the appropriation proceedings instituted and completed in the year 1880 by the Cleveland & Mahoning Valley Railway Company, and that the grantor, the New York, Pennsylvania & Ohio Railroad Company, had paid the Parmlees the \$13,232.50, found due them in that proceeding, and that it had taken possession of said right of way for railroad purposes. Furthermore, that by virtue of the said proceedings the title which the law confers in such cases had vested in the Cleveland & Mahoning Valley Railway Company.

In the light of these well-known facts and circumstances, the deed we are considering was made, containing the above recitals and obligations. With such broad, sweeping language there ought to be no misunderstanding. The grantor expressly agreed that neither it "nor its successors or assigns, nor any other person claiming title through or under it, shall or will hereafter claim or demand any right or title to the premises herein conveyed, or any part thereof." That no doubt might be entertained about the intention of the par-

Garlick v. Pittsburgh & W. Ry. Co

ties, another clause of strong and forcible words is added: "But they and every one of them shall by these presents be excluded and forever barred." We agree with the circuit court that a conveyance containing such recitals and covenant is much more than an ordinary quitclaim or release. By the terms of the contract quoted in the deed the parties agreed upon amicable appropriation, and so denominate it, and the property to be so disposed of is part of the same property which had been appropriated by the Cleveland & Mahoning Valley Railway Company in the year 1880, and it was by that amicable appropriation to pass to another railroad company for railroad purposes, and upon what had been found to be a fair and satisfactory sum as compensation. This being railroad property, it would seem to be reasonable that the grantor was asked and had agreed to insert in the conveyance which should follow the payment of the award made by the arbitrators some bar against it, subsequently acquiring a title adverse to its grantee, who paid the award. The parties were competent to construct such a bar, and, from the character of the property and the contents of the entire instrument, have they not entirely succeeded? We find no such provisions as we have quoted considered in any case cited for the plaintiff in error. One of these cases is *White v. Brokaw*, 14 Ohio St. 339. In that case there was a division of lands between heirs to an estate in which mutual deeds were executed, and the deed under consideration by the court was in the ordinary form of bargain, sale, and release, and purported to convey to the grantees "all the estate, right and title, interest, claim and demand, both in law and equity," of the grantors, "of, in, and to the said premises, and every part thereof." But the conveyance contained no recital of any particular interest owned or possessed by the grantors, or intended to be conveyed. The covenant read that the grantors agree to "warrant and forever defend the said premises against all persons claiming or to claim by, from, or under them, their heirs or assigns." This court held in that case that under the terms of the deed and in the light of its origin the covenant was only coextensive with the grant, and bound only the vested interests of the grantors in the property at the time, and did not extend to an after-acquired title. In *Boyd's Lessee v. Longworth*, 11 Ohio, 235, also cited, no stronger case was made as to its facts, and Mr. Justice Burchard says on page 253: "An express warranty is the only contract which has the effect to estop the warrantor and those claiming under him from maintaining title under a subsequent purchase. The covenant must be one running with the land." The other Ohio case cited by plaintiff in error is *Hart v. Gregg*, 32 Ohio St. 502. It is sufficient to say of that case that the deed there involved contained no covenant whatever, and is not of the slightest influence upon the present controversy.

The deed in the case now before us contained recitals of

Garlick v. Pittsburgh & W. Ry. Co

interest and estate which it was conveying,—the entire railroad property described therein, whether its extent was a conditional fee or perpetual easement; and the covenant which it contained, runs with the estate conveyed, and it is expressly covenanted that the grantors, their successors and assigns, shall not claim or demand any right or title to the premises conveyed, or any part thereof, “but they and every one of them shall by these presents be excluded and forever barred.” See *Magruder v. Esmay*, 35 Ohio St. 221; *Van Rensselaer v. Kearney*, 11 How. 322, 13 L. Ed. 703. We know of no reason why the courts should not give the effect to this deed, which the parties certainly intended. They appear to have had but one understanding of its meaning, and that is that the deed of September 6, 1885, from the Cleveland & Mahoning Valley Railway Company to the grantor named in the former deed, inured to the benefit of the grantee therein named, the Pittsburgh, Cleveland & Toledo Railroad Company. For over 17 years these companies have acted on this construction, and acquiesced in the occupation and control of the latter company as the legitimate result of the covenant referred to.

But how does the case of *Garlick* stand if this view is not correct? The title would be in the New York, Pennsylvania & Ohio Railroad Company, because it obtained a conveyance from the Cleveland & Mahoning Valley Railway Company, who had gained title from the Parmlees through the appropriation proceedings of the year 1880, while *Garlick*, by a much later deed, claims to hold under the Parmlees. Hence neither aspect of the case gives any title to *Garlick*.

However, the plaintiff in error contends that the title derived from the proceedings to appropriate the right of way on the one hand, and the conveyance from the Parmlees of the right of way for railroad purposes on the other, created but an easement, and not a fee, in the premises thus acquired, and that, as it appears in this case that the railroad companies so acquiring title undertook by deeds to convey the easement to other railroad companies, the attempt to convey worked an abandonment of the title or easement, and the premises forthwith reverted to the original owners, the Parmlees, or their grantee, *Garlick*. This proposition is broadly laid down, and advocated with great ability, and at least apparent confidence. To support this proposition we have been led through the statutes providing for appropriation of lands for railroad purposes under the old and present constitutions of Ohio, and cases have been cited giving construction of such provisions, and the point is made that a fee-simple title is not obtained by the appropriating companies, but at most an easement in perpetuity, or as long as used for railroad purposes. The circuit court concluded, as a matter of law, that by the completed proceeding in appropriation “the Cleveland & Mahoning Valley Railway acquired a conditional fee

in the lands, or at least such an interest therein as that the same could be and was conveyed to the New York, Pennsylvania & Ohio Railroad Company by its deed of September 6, 1885." We do not know that it is necessary or profitable for us to determine whether the estate so acquired is a fee conditional or an easement so long as used for the purposes of the grant or the appropriation. The right to enter into possession and to perpetually use, if desired, the premises for railroad purposes, is authorized by the law; and the only question is, may property thus obtained be conveyed to another company without working an abandonment? As a case of first impression, we see no legal obstacle in the way of such conveyance. It is but common knowledge that such properties are incumbered by mortgage to secure bonded indebtedness, and that foreclosure and judicial sale often occurs, whereby a purchaser at the judicial sale enters into possession, and uses, occupies, and controls the premises for railroad purposes as fully as if the title is one in fee simple. In the case at bar we have one of the plaintiffs and one of the cross-petitioners holding under long-termed leases the premises granted to their lessors. We have also in this case the fact that the lessor and lessee companies, parties hereto, have, to the full knowledge of Garlick, been in possession and use of the premises in dispute before and when he obtained his quitclaim deed in January, 1899. The question of abandonment is eminently one of intention. Treating the title as a mere easement for railroad purposes, what is the law? On page 707 of Washburn's Easements and Servitude, it is said: "It is not easy to define in all cases what would be such act of abandonment as would destroy a right of easement, and each case seems to be a matter for a jury to determine. But nothing short of an intention to so abandon the right would operate to that effect, unless other persons have been led by such acts to treat the servient estate as if free of the servitude, and the same could not be resumed without doing injury to their rights in respect to the same. And in this it is not intended to embrace questions which may arise from a mere nonuser of an easement." The same principle is held in Hatch v. Railroad Co., 18 Ohio St. 121. In Railroad Co. v. Ruggles, 7 Ohio St. 1, this court laid down the rule that: "Where a landowner granted a right of way to a railroad company organized under a charter in perpetuity, and the grant contains no limit as to time, the easement will be perpetual, unless terminated by release or abandonment. Where such railroad, with its appurtenances, is subsequently pledged to the state in security for a loan, and, the pledge being forfeited, is sold by the state, the easement passes by the sale, and is vested in the purchaser. This result is in no way affected by the fact that the purchase is made, mediately or immediately, by another railroad company, if there be legislative authority to make the purchase, and if the original

Garlick v. Pittsburgh & W. Ry. Co

object and consideration of the grant of the easement be not thereby changed or defeated. The entire case is very instructive, and its principles, in large measure, can be applied to the subject before us, and they recognize the right of alienation of such property, either voluntarily or through judicial proceedings. Also, see, Hatch v. Railroad Co., 18 Ohio St. 121.

The right of way is not all there is of a railroad. When it is procured, the construction thereon of the roadbed, and the ties, bridges, and rails, depots, sidings, etc., at great expense, are added, and form a part of the railroad property, and the union of these constitute a railroad, and its property that may be sold and conveyed. The attempts to make the conveyances challenged in this case did not of themselves work abandonment, and it is clear as the sunlight that the grantors had no intention that such a result should follow their acts. Instead of intending to abandon the premises in the legal sense, the grantors, for a consideration, sold and conveyed them to be used for the same purposes, which negatives the idea of abandonment. It is one of the findings of the lower court that intention to abandon the property did not exist in this case. It is urged with much force that this court has decided otherwise in Platt v. Pennsylvania Co., 43 Ohio St. 228, 1 N. E. 420, and the case between same parties in Pennsylvania Co. v. Platt, 47 Ohio St. 366, 25 N. E. 1028. We have given those cases all due consideration, and, if we could go beyond the space allotted to this opinion, they can be readily distinguished from the case at bar. The facts in those cases are materially different, and the questions arose in a different manner, and hence we are not called upon to overrule them in order to decide this case. We are entirely clear, however, that the doctrine of those cases should not be extended beyond the particular facts upon which they stand.

We now come to the questions which pertain to the issues made by the cross-petition of the Pittsburgh, Youngstown & Ashtabula Railroad Company and the Pennsylvania Company and the answer of Garlick thereto. The pleadings and the findings of facts show that on November 23, 1870, Margaret R. and W. S. Parmlee (the common source of title), conveyed to the Liberty & Vienna Railroad Company the lands described therein, of which lands the premises in dispute are a part, and that "the Pittsburgh, Youngstown & Ashtabula Railroad Company has duly succeeded to, and is now possessed of, all the rights, title, and interest in and to said lands conveyed and vested by said deed to the Liberty & Vienna Railroad Company of November 23, 1870." The following is a part of the description in the deed from the Parmlees to the Liberty & Vienna Railroad Company, after giving the points of termini: "Said strip of land to extend from said Spring Common on the south or southeast to the land of said Thorn on the northwest, and in width to extend southwesterly from said staked

Garlick v. Pittsburgh & W. Ry. Co

center line twenty-five feet or a less distance, if less than twenty-five feet shall be sufficient for the slopes of said railroad, and to extend northeasterly from said center line so far as may be needed for the track or tracks of said railroad; the length of said strip of land being about 525 feet." The lower court has found that the grantee in this deed constructed the main track of its railroad on the lands so described, and that the main track has ever since been, and now is being, used and operated in the same place and position over said strip, and without change of grade; and, further, that when said main track was constructed the same at the southeasterly end next to Spring Common, it was constructed on the berme bank of the old canal on a trestle 13 feet in height above the bottom of said canal, which trestle gradually diminished in height toward the northwesterly line of the lands described in the petition, where the main track was constructed on the natural surface of the ground. When the Pittsburgh, Cleveland & Toledo main track was built over its lands, the ground and bed of the old canal was filled up and graded to the level of the main track of the Liberty & Vienna Railroad, with the knowledge of the then occupiers and owners thereof. The surface of the ground and the bed of the canal were such that 23 feet from the center line of said main track was necessary to support the proper slope of the embankment of the southwesterly side of the main track. The height of the embankment and necessary width diminished gradually toward the northwesterly line of the strip, at which point the track was constructed without embankment; and that no embankment or slope was ever constructed on the southwesterly side of said track on any part of the strip described; but that said main track over the lands described in the deed of November 23, 1870, rested so far as needful upon said trestle until the main track of the Pittsburgh, Cleveland & Toledo Railroad was constructed. This trestle was being gradually filled up by the Liberty & Vienna Railroad Company while it owned and occupied the premises, and when the Pittsburgh, Cleveland & Toledo constructed its track the filling up of the trestlework was completed, the latter company occupying 10 of the 23 feet so provided for the slope of the embankment and its support. The full space of the 23 feet has been occupied and in use by these companies either in the process of construction or actual use after construction for many years, and we do not discern any substantial departure from the terms of the grant made by the Parmlees, which, in substance, was 25 feet in width from a certain line, if so much was necessary for the proper construction and support of the slope of an embankment for the railroad bed. Twenty-three feet were found to be necessary, and have been used and occupied at one end of the strip, the height and extent of the slope gradually diminishing towards its northwesterly terminus. There is nothing new in the extent of this occupation, and the ground occupied

Southern Kansas Ry. Co. *v.* Oklahoma City

by the railroad companies is within the boundaries fixed in the deed, all of which was open to the view and knowledge of plaintiff in error when he acquired his title.

What we have said on the question of abandonment we adopt in this branch of the case without repetition.

We discover no prejudicial error in the record, and adhere to the former judgment of affirmance of the judgment of the lower court.

Judgment affirmed.

Case No. 7,214, Garlick *v.* Pittsburgh & W. Ry. Co., and case No. 7,215, Garlick *v.* Pittsburgh, Y. & A. R. Co., are a part of the same record, and are prosecutions in error to the same decree by parties in the original action, and are affirmed for the same reasons.

BURKET, C. J., and DAVIS, SHAUCK, and CREW, JJ., concur.

SOUTHERN KANSAS RY. CO. *et al.* *v.* OKLAHOMA CITY *et al.*

(*Supreme Court of Oklahoma, July 18, 1902.*)

[69 Pac. Rep. 1050.]

Eminent Domain—Right to Compensation—What Constitutes “Property”—Constitutional Law.

Article 5 of the amendment to the constitution of the United States provides: “Nor shall private property be taken for public use, without compensation.” “Property,” within the meaning of this constitutional provision, includes not only real estate held in fee, but also easements, personal property, and every valuable interest which can be enjoyed and recognized as property; and if it is proposed to be appropriated for the public use in such a manner as to deprive the owner of the beneficial enjoyments thereof, or where such appropriation would cause serious impairment or deprivation of such property, then such deprivation would be an appropriation to “public use,” and the owner is entitled to just compensation.

Same—Same—Due Process of Law—Statutory Requirements.

Whenever it is proposed to appropriate private property for a public use, provision must be made for “just compensation” to the party proposed to be injured, and it must be made by “due process of law”; and if the statute of the territory makes provision for the appropriation of such property or the making of compensation therefor, the method of appropriation of such property provided for in the statutes must be pursued.

Same—Statutory Authority—Right of Way—Turn-Outs and Sidings.

The right to occupy and use the lands occupied by the plaintiff company is derived from an act of congress of July 4, 1884, entitled, “An act to grant a right of way through the Indian Territory to the Southern Kansas Railway Company, and for other purposes,” and provides: “That the Southern Kansas Railway Company, a corporation created under and by virtue of the laws of the state of Kansas, be, and the same is, hereby invested and empowered with the right of locating, constructing, owning, operating and maintaining a railway line through the Indian Territory, * * * with the right to construct, use and maintain such tracks, turnouts and sidings as such company may deem it to their interests to construct along and upon the right of way and depot grounds hereby granted. Sec. 2. That a right of way one hundred feet in width through said Indian Territory

Southern Kansas Ry. Co. v. Oklahoma City

is hereby granted for said main line and branch of the Southern Kansas Railway Company, and a strip of land two hundred feet in width, with a length of three thousand feet, in addition to the right of way, is granted for stations for every ten miles of road. * * * Pursuant to this, ground turn-outs and sidings have been constructed upon the right of way outside of the depot and station grounds especially provided for, together with such switching posts and other mechanical facilities as are necessary for the operation of the main tracks, turn-outs, and sidings. The plaintiff company is invested with the right and authorized to construct such turn-outs and sidings upon the right of way throughout the Indian Territory, as well as upon such grounds as have been especially granted for the purpose of stations and depot grounds.

Eminent Domain—Constitutional Law—Turn-Outs and Sidings as Property.

These turn-outs and sidings, together with the switches and other mechanical appliances for their necessary operation, constructed under and by virtue of the grant of authority in the act of congress, having required the expenditure of money, constitute property.

Construction of Highway Crossings over Right of Way—Compensation.

The plaintiff in error is bound by the conditions and limitations contained in its charter, which it secured from congress. The power authorizing the proper authorities to lay out and extend roads and highways over and across the right of way of said railroad is conferred by section 9 of said act, and is a condition coupled with the grant of right of way, and, the company having accepted said grant subject to such conditions, it is the duty of such company, and it may be required by the proper authorities, to open, construct, and maintain, at its own expense, any road or highway crossings, without condemnation proceedings, and without compensation or claim for damages, whenever the same may be done without destroying the use of the improvements made by the company for the purposes for which congress granted their right of way. The right of the public to cross the right of way, roadbeds, tracks, sidings, or other surface improvements is not so inconsistent with the use granted to the railway company as to entitle the company to compensation or damages. Such inconveniences or burdens as are incident to the use of such crossings by the public, the company voluntarily assumes by the acceptance of the grant.

Highway—Definition.

The term "highway" is a general name for all kinds of public ways, including county and township roads, and streets and alleys in cities, towns, and villages.

Construction of Highway Crossing over Right of Way—Right to Compensation.

The trial court specially found that the opening of First street for travel would necessitate the shortening of the side tracks and turn-outs, and the rearrangement of all the side tracks converging into First street. This, then, will, to the extent that the company is required to shorten its side tracks and turn-outs and the rearrangement of the same, be not only a serious impairment, but an actual destruction, of such property rights. The use of the crossings for the public street will, therefore, to that extent, be inconsistent with the use to which the railway company has already appropriated its right of way within the terms of the grant, and to such an extent it would be an appropriation of private property for the public use without just compensation, and is forbidden by the fifth amendment to the federal constitution, and was not contemplated by the conditions imposed in the grant by congress, and is inconsistent therewith.

Same—Same.

Upon the facts found by the court in this case, the city will not be authorized to open First street, until it has condemned, had appraised, and paid for such improvements of the railroad company,

Southern Kansas Ry. Co. v. Oklahoma City

within said street, as it will be found must necessarily be removed in order to permit the public to use said highway or street crossing in common and jointly with the railroad company.

Same—Measure of Damages.

The measure of damages in such proceedings is the value of the expense of removing such switch stands or other structures above the surface of the tracks as must be removed, and the expense of shortening or lengthening such of the side tracks as will necessarily have to be changed, so as to place the turn-outs outside the limits of the traveled portion of such street when opened.

(Syllabus by the Court.)

Error from district court, Oklahoma county; before Justice B. F. Burwell.

Action by the Southern Kansas Railway Company and the Atchison, Topeka & Santa Fe Railway Company against the city of Oklahoma City and others. Judgment for defendants, and plaintiffs bring error. Modified.

This proceeding was an injunction in the district court of Oklahoma county, to restrain the defendants from entering upon the right of way of plaintiffs at First street and California avenue in Oklahoma City, and opening the same to the public travel over and across their right of way, station grounds, tracks, switches, platforms, and improvements, and to prevent the defendants from tearing up the tracks, platforms, and improvements of the plaintiffs at those streets. The plaintiffs averred that the defendant city was threatening to enter upon and remove the structures and property of the plaintiffs from their right of way, and to extend the proposed streets across it, without having taken any proceedings to condemn or make any compensation to the plaintiffs therefor, and that the opening of the streets as proposed would greatly impede the transaction of the plaintiffs' business, and cause great and irreparable injury to plaintiffs' property.

The plaintiffs' railroad was constructed, and the right of way and station grounds acquired, under an act of congress of July 4, 1884 (23 Stat. 73), before the opening of Oklahoma to settlement. Its right of way and station grounds were located upon the east side of the S. W. $\frac{1}{4}$ of section 34, township 12 N., range 3 W. I. M. After the plaintiffs had built their line and occupied their station grounds at the points in question, the territory was opened for settlement, and the town site of the defendant city was surveyed, platted, and entered as a town site. In platting and surveying the town site, only that portion of the S. E. $\frac{1}{4}$ of section 33 lying west of the west line of the right of way and station grounds of the plaintiff was platted. By an act of congress of August 8, 1894, the S. W. $\frac{1}{4}$ of section 34, lying on the east side of the railway tracks and station grounds of the plaintiff, was donated, and was immediately thereafter platted, as an addition to the defendant city. On January 22, 1893, and December 1, 1893, ordinances were passed, by the city council of Oklahoma City, for the opening of First street and California avenue, respectively, and on May 23, 1898, the mayor and city council passed a

Southern Kansas Ry. Co. v. Oklahoma City

resolution that First street and California avenue be opened over the plaintiffs' tracks and right of way. No proceedings were ever taken to ascertain the injury to the plaintiffs' property by reason of the opening of such streets, or to ascertain what compensation was due to the plaintiffs on account thereof. The Choctaw, Oklahoma & Gulf Railroad Company constructed its railroad over and across the track of the plaintiffs at the point where the alley between First and Second streets, prolonged east, would cross the same, in or about the month of May, 1891, and at the time made an agreement in writing, for said crossing, by which said agreement plaintiffs were entitled to have constructed at said crossing an interlocking plant and system; and afterwards plaintiffs brought suit against the Choctaw, Oklahoma & Gulf Railroad Company for a specific performance of that contract, which ripened into a decree August 1, 1898, and such interlocking plant and system was immediately constructed, which suit was brought long before the commencement of this action.

This cause was heard upon oral testimony and an agreed statement of facts, by which it was agreed that the court should take judicial notice of the act of congress of July 4, 1884 (23 Stat. 73). It appears in the evidence that the streets of the defendant city which run east and west, and intersecting the railroad line, right of way, and station of the plaintiff companies, are, beginning north of said station, and lying successively parallel to each other, north and south, as follows: Fourth street, Third street, Second street, First street, Main street, Grand avenue, California avenue, and Reno street; and that the street of said city which runs from north to south one block west of said railway line and station grounds is Broadway; and that the station grounds of said railway companies begin at a point 80 feet south of First street and the intersection thereof with the said railway lines, and runs southward beyond Reno street. That the depot building and platform for the accommodation of passenger traffic of said railway companies is built within said station grounds, and between Grand avenue on the north and California avenue on the south, provided the said streets were extended across the said station grounds, and that said California avenue would, if extended as proposed by said city, cross said railway lines, cause the removal of a large part of the platform of said station grounds, and would pass within a few feet of the building thereof.

Special findings of fact were prepared and submitted by the plaintiffs, which were refused, and the court thereupon made special findings of fact of its own, a part of which are as follows:

"(1) That the right of way and tracks of the Southern Kansas Railway Company and the Atchison, Topeka & Santa Fe Railway Company run north and south through the city of Oklahoma City, as shown by plat introduced in evidence and

Southern Kansas Ry. Co. v. Oklahoma City

marked 'Exhibit C'; that the switch yards of said railway companies extend from a point south of California avenue to a point south on First street, as shown by said plat Exhibit C; that, at and prior to the commencement of this action, the said railway company had one switch stand in said street, which operated three tracks; that since the commencement of this suit the interlocking system and other improvements have been placed across said First street; that on First street, east of the right of way of the plaintiffs, is located the freight depot of the Choctaw, Oklahoma and Gulf Railroad Company, besides an elevator and some other small institutions; that west of said plaintiff's right of way, on said First street, are located several business houses; that First street runs east and west at right angles with plaintiff's right of way, and that Second street is the first street north of First street, running parallel with First street, and that on Second street there is a crossing over plaintiffs' right of way; that Main street is the first street south, running parallel with said First street, and that there is a crossing over the plaintiffs' right of way on said street; that there are also crossings over plaintiffs' right of way on Grand avenue and also Reno avenue, the second and fourth streets south of First street, as shown by Exhibit C; that First street, by reason of the lay of the ground and the condition of the tracks of the plaintiffs' right of way, is the most convenient street to travel in going from any business house on First street, or any of the streets on Broadway or west of Broadway street [Broadway is the first street running north and south west of plaintiffs' right of way, as shown by Exhibit C]; that Main street, Grand avenue, and Second street, nor either of them, are taxed to their fullest capacity to accommodate the travel over them, and that the crossing over the plaintiffs' right of way on each of said streets is not the full width of the respective streets; that all persons located on First street west of plaintiffs' right of way, and west of Broadway street, in order to travel from any point within such limits to the Choctaw freight depot, have to go west to Broadway street, south to Main street, east to Oklahoma avenue, and north to the Choctaw freight depot; that the Choctaw, Oklahoma and Gulf main track and switches run east and west in said defendant city, along the alley between Second street and First street, crossing the plaintiffs' right of way in said alley; that Oklahoma avenue is not open for travel across the right of way of the Choctaw, Oklahoma and Gulf Railroad Company, and that the freight depot of the said Choctaw, Oklahoma and Gulf Railroad Company is on the south side of its tracks; that there is considerable elevation in going from the plaintiffs' passenger depot, located near California avenue and going north to a point above Third and Fourth streets; that this elevation is of considerable advantage to the plaintiff companies in switching cars; that, by reason of this advantage, practically all the switching is done from the north end

Southern Kansas Ry. Co. v. Oklahoma City

of its yards; that the Choctaw, Oklahoma and Gulf Railroad was built long after the construction of plaintiffs' tracks; that the Choctaw, Oklahoma and Gulf Railroad and the plaintiffs' are competitive lines; that there is an increasing demand for the opening up of First street, by the reason of the increase of business industries on First street west of plaintiffs' right of way; that since the commencement of this suit the interlocking system has been placed across First street, but that the contract between the plaintiff corporation and the Choctaw, Oklahoma & Gulf Railroad Company for its erection was made prior to the commencement of this suit, but that no work had been performed looking to the construction of such system until after the suit was commenced; that that part of the interlocking system extending across First street will be operated with more difficulty if the machinery now located in First street were moved further south; that said interlocking system greatly diminishes the probability of a collision between the trains of the respective railway companies crossing the track of the others. * * * If said First street were opened to public travel, it would necessitate the changing of a part of the machinery of the interlocking system, now located on First street, to a point either north or south of said First street.

"(2) The court further finds that, if said First street is opened up for public travel, it would necessitate the shortening of the side track and turn-outs, and the rearrangement of all the tracks converging into First street. The agreed stipulation filed in this case on November 10, 1898, is hereby referred to, and made a part of the findings of fact of the court.

"(3) The court further finds that the street proposed to be opened up across the right of way of the plaintiff corporation on California avenue is not necessary for the accommodation of public travel; that the opening up of said street would greatly impair the convenient operation of the plaintiff company's business; that if said California avenue were opened up for travel, and the ordinances of said city with reference to permitting trains to stand upon said street crossings were enforced, it would be necessary for practically all the trains to be cut in two while remaining at the station at Oklahoma City; that the depot platform of said plaintiff company extends across California avenue, and did extend across said street at and prior to the commencement of this suit; that the piece of ground, located on California avenue, which is proposed to be opened up to travel, crosses the depot grounds and switch yards of the plaintiff corporation, and that the benefit of opening up said street would be small to the public, but greatly damage the plaintiffs, and that the court finds the general issues herein for the plaintiffs, in so far as they relate to California avenue, except in so far as such finding is modified by the special finding above set out, and further finds the issues herein for the defendants, in so far as they relate to

Southern Kansas Ry. Co. v. Oklahoma City

First street, except in so far as they are modified by the special findings above."

"(5) The court further finds that all persons located north of Main street and west of the plaintiffs' right of way have to go south to Main street, east to Oklahoma avenue, and north on Oklahoma avenue, to go to the Choctaw, Oklahoma & Gulf freight depot, and that at least one-half of the population of said city lives north of Main street.

"(6) The court further finds that the plaintiff corporation has no title to the parcel of land on First street sought to be opened up, except the right of way for main line as ceded them by congress; the north end of their switching yards and depot grounds being south of the south side of First street. * * *"

"(8) The court further finds that the opening up of First street across the plaintiffs' right of way is necessary to accommodate the public travel, and for the transfer of freight to and from points east of plaintiffs' right of way, to and from points west of the same, and north of Main street."

The north end of the land taken under the act of congress for station grounds is from 50 to 75 feet south of the south side of First street, but the tracks in First street diverge from First street down to said grounds taken for station grounds. The court rendered judgment in the case, dissolving the temporary injunction as to First street, and making the same perpetual as to California avenue. Both plaintiffs and defendants assigned error, and appealed; the defendants assigning as error that the injunction should have been dissolved as to California avenue, and the plaintiffs assigning as error that the temporary injunction was dissolved as to First street.

Henry E. Asp and J. R. Cottingham, for plaintiffs in error.
John H. Wright, for defendants in error.

HAINER, J. (after stating the facts). The fifth article of the amendment to the constitution of the United States ordains, among other things: "No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

Section 37, art. 3, c. 14, St. Okl. 1893, provides that: "Private property may be taken for public use, or for the purpose of giving the right of way, or other privilege, to any railway company, * * * or for any other necessary purpose; but in every case, the city shall make the person or persons whose property shall be taken or injured thereby, adequate compensation therefor, to be determined by the assessment of five disinterested householders of the city, who shall be selected and compensated as may be prescribed by ordinance, and who shall, in the discharge of their duties, act under oath, * * * and in determining the same, said householders shall consider the benefit resulting to, as well as the damages sustained by, the owner of the property so taken. * * *"

Southern Kansas Ry. Co. v. Oklahoma City

Section 1 of the act of congress approved July 4, 1884 (23 Stat. 73), provides: "That the Southern Kansas Railway Company, a corporation created under and by virtue of the laws of the state of Kansas, be, and the same is, hereby invested and empowered with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway and telegraph and telephone line through the Indian Territory, beginning at a point on the northern line of said territory where an extension of the Southern Kansas Railway from Winfield in a southerly direction would strike said line, running thence south in the direction of Dennison, in the state of Texas, on the most practicable route, to a point at or near where the Washita river empties into the Red river, with a branch constructed from a point at or near where said main line crosses the northern line of said territory, westwardly along or near the northern line of said territory, to a point at or near where Medicine Lodge creek crosses the northern line of said territory, and from that point in a southwesterly direction, crossing Beaver creek at or near Camp Supply, and reaching the west line of said Indian Territory at or near where Wolf creek crosses the same, with the right to construct, use and maintain such tracks, turnouts and sidings as said company may deem it to their interest to construct along and upon the right of way and depot grounds hereby granted."

Section 2 of said act contains the following provision: "That a right of way one hundred feet in width through said Indian Territory is hereby granted for said main line and branch to the Southern Kansas Railway Company, and a strip of land two hundred feet in width, with a length of three thousand feet, in addition to right of way, is granted for stations for every ten miles of road, no portion of which shall be sold or leased by the company with the right to use such additional ground where there are heavy cuts or fills as may be necessary for the construction and maintenance of the road-bed not exceeding one hundred feet in width on each side of said right of way or as much thereof as may be included in said cut or fill: provided, that no more than said addition of land shall be taken for any one station: * * *"

Section 9 of said act reads as follows: "That said railway company shall build at least one hundred miles of its railway in said territory within three years after the passage of this act, or this grant shall be forfeited as to that portion not built; that said railroad company shall construct and maintain continually all road and highway crossings, and necessary bridges, over said railway wherever said roads and highways do not or may hereafter cross said railway's right of way, or may be by the proper authorities laid out across the same."

It will thus be seen that the railway company accepted the charter from the federal government subject to the limitations expressly contained in section 9 of said act above quoted,

Southern Kansas Ry. Co. v. Oklahoma City

The acceptance of the railroad company of this charter, and the subsequent location, construction, and operation of the railroad in accordance with the grant, constitute an irrevocable contract, which cannot be modified or impaired. And the railroad company, having accepted such charter, is bound by all the conditions and limitations contained therein. The power for the proper authorities to lay out and extend roads and highways over and across the right of way of said railroad is expressly conferred by section 9 of said act. But it is contended by the plaintiffs in error that the language of this provision in the charter does not include streets in cities and towns. We do not think so. We think that the term "roads and highways," as used in said act, includes streets. It would indeed be a narrow and unreasonable construction to be placed upon the language of said act to hold that "roads and highways" do not include streets in cities, towns, and villages. Judge Elliott, in his work on Roads and Streets, page 1, in defining what constitutes a highway, uses the following language: "The term 'highway' is a generic name for all kinds of public ways, including county and township roads, streets and alleys, turnpikes and plank roads, railroads and tramways, bridges and ferries, canals and navigable rivers. In short, every public thoroughfare is a highway." And on page 12 the same author says: "A street is a road or public way in a city, town, or village."

We think that section 9 of the act above quoted imposes a condition upon the general grant, and the railway company accepted its grant subject to such conditions, and it is the duty of such company, and it may be required by the proper authorities, to open, construct, and maintain, at its own expense, any highway or street crossings without condemnation proceedings, and without compensation or claim for damages, whenever the same may be done without destroying or materially impairing the use for which congress granted their right of way. The right of the public to cross over the right of way, roadbed, tracks, sidings, or other surface improvements, is not so inconsistent with the use granted to the railway company at points beyond the station limits, as to entitle the company to compensation or damages; such inconveniences or burdens as are incident to the use of such crossings by the public, the company voluntarily assumed by the acceptance of the grant, and with the express condition and limitation imposed by section 9 of said act. In this connection, it must be remembered that the right of way in question was granted across the public domain prior to the opening of public lands in Oklahoma to settlement or occupancy by white persons. The exclusive disposal of such land was in the congress of the United States, and congress had the undoubted power to impose any conditions or limitations upon any rights or privileges, conferred upon any persons or corporation, to the use of any portion of such public domain. It appears

Southern Kansas Ry. Co. v. Oklahoma City

that congress, in its wisdom, foreseeing the opening of this country to settlement, and the necessity for roads, highways, streets, and bridges across and over any railroad that might be constructed on the proposed grant of right of way, wisely made provision for the benefit of the public, and imposed this reasonable condition and limitation upon the railway company, and the railway company, in accepting its grant, became thereby bound by such conditions and limitations, and it is forever precluded from saying that the use of its roadbed, tracks, and sidings for a public highway or street crossing is the taking of its property for public uses without just compensation. But, in our judgment, the provision of the act of congress defining and imposing such conditions must be construed in connection with the purpose of the general grant; and these provisions must be interpreted with reference to the fundamental and paramount rights of eminent domain and due process of law. The grant of the railway company is contained in sections 1 and 2, and, by transposing and bringing the same together, will read as follows: "That a right of way of one hundred feet in width through said Indian Territory is hereby granted for said main line and branch to the Southern Kansas Railway Company, and a strip of land two hundred feet in width, and a length of three thousand feet in addition to right of way, is granted for stations for every ten miles of road, with the right to construct, use and maintain such tracks, turnouts and sidings as said railway company may deem it to their interests to construct along and upon the right of way and depot grounds hereby granted." It will thus be seen that congress makes an express distinction between the "right of way" and the "depot grounds," and gives the railway company the right to "construct, use and maintain such tracks, turnouts and sidings, as said company deem it to their interests to construct along and upon the right of way." Pursuant to this grant, the company had the unquestioned right not only to construct its main tracks, but to construct and maintain such turn-outs and sidings, at any point on its right of way, as it might deem expedient or to its best interests. And in order for the proper and ordinary operation and use of its turn-outs, sidings, and switches, it had the right to construct and erect, on such right of way, such switch stands, posts, and other mechanical appliances as were necessary for a safe and convenient operation of the turn-outs and sidings.

In imposing the condition that the railway company shall open, construct, and maintain all necessary road and highway crossings, we do not think that congress intended that any of the company's property constructed and erected for its use, and within the terms of the grant, should be so appropriated by such crossings as to destroy its use, or materially impair its use, for railway purposes, without just compensation. A crossing may be constructed and maintained across a railway right of way and over and across its roadbeds, tracks,

Southern Kansas Ry. Co. v. Oklahoma City

and sidings without destroying the use of the property, or materially impairing its use for railway purposes. It is true that the opening of a street and extending a crossing over a railway company's right of way may result in inconvenience to the railway company as well as the public; it may occasion delays; it may require additional expenses to maintain gates and flagmen; and it may be difficult to construct approaches, grades, and guards; and yet the company cannot complain of any of these inconveniences or incidental expenses which may result therefrom, because the company accepted the grant subject to such conditions. And hence its grant is burdened with these essential requirements, which are in the nature of police regulations, when the proper public authorities deem it necessary to lay out a public road, highway, or street across the right of way; and these burdens must be borne without additional compensation. In our opinion, such uses by the public are not inconsistent with the prior uses granted the railway company, and the company and the public must enjoy the rights and privileges, and as a consequence must bear the additional expenses, burdens, and inconveniences resulting therefrom.

This, then, is the general rule, but we think this general rule has a clear and well defined limitation, which must be applied to the case at bar. This rule does not apply where the property of the company, which was properly constructed within the terms of its grant, for the operation of its tracks and sidings, will, by the laying out and extending of the street across such right of way, be destroyed or materially impaired, and thereby be required to be removed, and its use abandoned. We have already shown that the company had the right, by the express terms of its grant, to lay the sidings and turn-outs at the point where the city purposes to open First street, and, if necessary, to operate such sidings and turn-outs. It had the right to erect switch stands, and the necessary mechanism for operating the switches. The trial court specifically found that the opening of First street for travel will necessitate the shortening of the side tracks and turn-outs, and the rearrangement of all the side tracks converging into First street. This, then, will, to the extent that the company is required to shorten its side tracks and turn-outs and the rearrangement of the same, be not only a material impairment, but an actual destruction, of its property rights. The use of the crossing for a public street will, therefore, to that extent, be inconsistent with the use to which the railway company has appropriated its right of way, within the terms of the grant, and to such extent, we think, it is an appropriation of private property for public use without just compensation, and is, therefore, forbidden by the fifth amendment to the federal constitution, and was not contemplated by the conditions imposed in the grant, and is inconsistent therewith.

Southern Kansas Ry. Co. v. Oklahoma City

It is true that the fee in the right of way and depot grounds remained, at the time of the passage of the act of congress in question, in the federal government; but it is also true that, for all the purposes specified in the act, the right of the user had been transferred to the plaintiff company, and that this right of user included the authority to locate its property upon the land in question now proposed to be appropriated as a street, and that the plaintiff company was completely invested with the right of fixing thereon, if it deemed it to its interest to do so, its "turn-outs and sidings." These "turn-outs and sidings," located under and by virtue of this grant of authority, required the expenditure of money, and they constitute property.

In *Old Colony R. Co. v. Inhabitants of Plymouth Co.*, 14 Gray, 161, it was said by Chief Justice Shaw: "Nor is it, in our judgment, material whether the property thus taken or appropriated is real estate held in fee, or an easement or lien upon real estate, or personal property. The word 'property,' in the tenth article of the bill of rights, which provides that, 'whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor,' should have such a liberal construction as to include every valuable interest which can be enjoyed as property and recognized as such. Nor is it material whether the property is removed from the possession of the owner, or in any respect changes hands; if it is of such a character, and so situated, that the exercise of the public use of it, as warranted by the legislature, does, in its necessary natural consequences, affect the property, by taking it from the owner, or depriving him of the possession or some beneficial enjoyment of it, then it is 'appropriated' to public use by competent authority, and the owner is entitled to compensation." And it was said in *Pierce*, R. R. p. 193, that "the laying out of a highway across land of a railroad company which is used for a station, or for other purposes than a right of way, is a taking of its property entitling it to compensation. *Railroad Co. v. Brownell*, 24 N. Y. 345; *Philadelphia, W. & B. R. Co. v. City of Philadelphia*, 9 Phila. 563, 5 Am. & Eng. R. Cas., N. S., 720. * * * The state, in authorizing the crossing, simply regulates and adjusts private rights with reference to public interests, and exercises its reserved police power. The crossing should be laid out in a manner to cause as little injury as possible to the previous use, and the railroad company is entitled to compensation where the crossing is so constructed as to result in serious inconvenience. *Northern Cent. Ry. Co. v. Mayor, etc., of City of Baltimore*, 46 Md. 425; *Chicago & N. W. R. Co. v. Chicago & P. R. Co.*, 6 Biss. 219, Fed. Cas. No. 2,665." It is held in *Railway Co. v. Allen*, 22 Kan. 285, 31 Am. Rep. 190, that a railroad company's right of way is property,—an estate in land, the dominant estate,—and that it secures to the

Southern Kansas Ry. Co. v. Oklahoma City

railroad company the exclusive right to the occupancy, use, and control of the property as against all persons, except the owner of the fee, and the paramount right to such occupancy, use, and control, even as against him. And in *Kansas Cent. R. Co. v. Jackson Co. Com'rs*, 45 Kan. 716, 26 Pac. 394, 46 Am. & Eng. R. Cas. 26: "But where any real or substantial loss is suffered, or damages sustained, the railroad company may have adequate compensation." And it was said by the supreme court of Missouri in *Railroad Co. v. Gordon*, 57 S. W. 742, that "a street or road cannot be established across a railroad's right of way except by proper condemnation proceedings in court, and by due process of law, awarding and paying the company just compensation, and an order of a village board opening a street across such right of way is void;" and that "it is immaterial whether the defendant owns the fee to its right of way, or has only an easement thereto.

* * * It is property which cannot be taken away from it without just compensation, and the board of trustees have no power or jurisdiction to determine what that compensation shall be, much less to take the property for street purposes without compensation, and by simple order." The expense of removing the switch stands, shortening the side tracks, and rearranging the tracks at such a point so as to make it possible to construct and maintain a street crossing over the right of way and tracks, is a proper element of damages, and for such expense the company is entitled to just compensation.

In this case the city does not propose to take the land granted to the railroad company for a right of way. It is not proposed to prevent the railroad company from using it, and maintaining its tracks and any other improvements thereon that are not entirely inconsistent with its use as a highway crossing; and its use for all the purposes for which it is held by the company will be interfered with only so far as its exclusive enjoyment for railroad purposes is interfered with, and such use for the purposes of a street being exercised jointly with the use by the company for railroad purposes. The rule as to compensation is necessarily not the same as where the land is taken, or its exclusive use appropriated, or where the owner is under no obligations to open, construct, and maintain the street when ordered open. The railroad company being required to open, construct, and maintain street crossings whenever required to do so by the competent authority, by the terms of its grant, it is only entitled to compensation for such of its property, the use of which cannot be exercised jointly for the purposes of a street, together with the reasonable expense of readjusting its sidings and tracks so as to permit a street crossing at said point. The requirement that the company shall construct and maintain the highway and street crossings, and the approaches within its right of way, is nothing more than a police regulation, and it is proper that the portion of the street or highway which is within the

Southern Kansas Ry. Co. v. Oklahoma City

limits of the railroad should be constructed by the railroad company, and maintained by it, because of the dangers attending the operation of its road.

The rule that the expense of complying with a police regulation is not an element of damages in a condemnation proceeding has been expressly declared by the supreme court of the United States in the case of *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U. S. 266, 17 Sup. Ct. 581, 41 L. Ed. 974, 7 Am. & Eng. R. Cas., N. S., 26, where this subject was discussed in an able and exhaustive manner. Mr. Justice Harlan, in discussing this question, said:

"It is next contended that error of law was committed by the refusal of the court to allow the company to prove that in the event of the opening of the street it would be necessary, in order that the railroad be properly and safely operated, to construct gates and a tower for operating them, plank the crossing, fill between the rails, put in an extra rail, and to incur an annual expense of depreciations, maintenance, and employment of gatemen, etc. It was not claimed that the railroad company could recover specifically on account of such expenditures, but that the proof of their being made necessary by the opening of the street was admissible for the purpose of showing the compensation due to the company. There are some authorities that seem to support the view taken by the railroad company, but we are of opinion that no error was committed in excluding the evidence offered.

"The plaintiff in error took its charter subject to the power of the state to provide for the safety of the public, in so far as the safety of the lives and persons of the people was involved in the operation of the railroad. The company laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety; and as all property, whether owned by private persons or by corporations, is held subject to the authority of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people, it is not a condition of the exercise of that authority that the state shall indemnify the owners of property for the damage or injury resulting from its exercise. Property thus damaged or injured is not, within the meaning of the constitution, taken for public use, nor is the owner deprived of it without due process of law. The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state, by reasonable regulations, to protect the lives and secure the safety of the people. In the recent case of *New York & N. E. R. Co. v. Town of Bristol*, 151 U. S. 556, 567, 14 Sup. Ct. 437, 38 L. Ed. 269, 55 Am. & Eng. R. Cas. 38, this court declared it to be thoroughly established that the inhibitions of the constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property

Southern Kansas Ry. Co. v. Oklahoma City

without due process, or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. 'The governmental power of self-protection,' the court said, 'cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.' See *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Mfg. Co.*, 115 U. S. 650, 671, 6 Sup. Ct. 252, 29 L. Ed. 516.

"In *Railroad Co. v. Deacon*, 63 Ill. 91, the supreme court of Illinois said: 'The state has reserved to itself the power to enact all police laws necessary and proper to secure and protect the life and property of the citizen. Prominent among the rights reserved, and which must inhere in the state, is the power to regulate the approaches to and the crossing of public highways, and the passage through cities and villages, where life and property are constantly in imminent danger by the rapid and fearful speed of railway trains. The exercise of their franchises by corporations must yield to the public exigencies and the safety of the community.' And in *Railroad Co. v. Willenborg*, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862, where the question was whether a railroad company could be required to construct a farm crossing over its road years after the road had been built, the court said: 'The point is made, however, that these provisions are not obligatory on this corporation, because they were enacted many years since it received its charter from the state. This is a misapprehension of the law. The regulation in regard to fencing railroad tracks, and the construction of farm crossings for the use of adjoining land owners, are police regulations in the strict sense of those terms, and apply with equal force to corporations whose tracks are already built as well as those to be thereafter constructed. They have reference to the public security, both as to persons and to property. * * * No reason is perceived why, upon the same principle on which a railroad corporation may be required to fence its track and construct cattle guards, it may not be required also to construct farm crossings.' In *Chicago & N. W. R. Co. v. City of Chicago*, 140 Ill. 309, 317-319, 29 N. E. 1109, 1111, the question was whether, in a case where a city institutes a condemnation proceeding to open or extend a street across a railroad already constructed, the company owning such railroad was entitled to be allowed, as a part of its just compensation, the amount of its expenses in constructing and maintaining the street crossing. In that case it appeared that the railroad was constructed prior to the above act of 1872 for the incorporation of cities and villages, and before the passage of the act of 1874, which required that thereafter, at all railroad crossings of highways 'and streets,' the railroad companies should construct and maintain such crossings, and the

Southern Kansas Ry. Co. v. Oklahoma City

approaches thereto, with their respective rights of way, so that at all times they should be safe as to persons and property. 2 Starr & C. Ann. St. p. 1927. The court said: 'Government owes to its citizens the duty of providing and preserving safe and convenient highways. From this duty results the right of public control over public highways. Railroads are public highways, and in their relations as such to the public are subject to legislative supervision, though the interests of their shareholders are private property. Every railroad company takes its right of way subject to the right of the public to extend the public highways and streets across such right of way. * * * If railroads, so far as they are public highways, are, like other highways, subject to legislative supervision, then railroad companies, in their relations to highways and streets which intersect their rights of way are subject to the control of the police power of the state,—that power of which the court has said that "it may be assumed that it is a power coextensive with self-protection, and is not inaptly termed the law of overruling necessity." Town of Lake View v. Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71. The requirement embodied in section 8, that railroad companies shall construct and maintain the highway and street crossings and the approaches thereto within their respective rights of way, is nothing more than a police regulation. It is proper that the portion of the street or highway which is within the limits of the railroad right of way should be constructed by the railroad company, and maintained by it, because of the dangers attending the operation of its road. It should control the making and repairing of the crossing for the protection of those passing along the street, and of those riding on the cars. * * * The items of expense for which appellant claims compensation are such only as are involved in its compliance with a police regulation of the statute. It is well settled that "neither a natural person nor a corporation can claim damages on account of being compelled to render obedience to a police regulation designed to secure the common welfare." Chicago & A. R. Co. v. Joliet, L. & A. Ry. Co., 105 Ill. 388, 44 Am. Rep. 799, 14 Am. & Eng. R. Cas. 62. It has been held by this court in a number of cases that railroad corporations may be required to fence their tracks, to put in cattle guards, to place upon their engines a bell, and to do other things for the protection of life and property, although their charters contained no such requirements. Railroad Co. v. Loomis, 13 Ill. 548, 56 Am. Dec. 471; Same v. Dill, 22 Ill. 264; Railroad Co. v. McClelland, 25 Ill. 140; Peoria & P. Union Ry. Co. v. Peoria & F. Ry. Co., 105 Ill. 110, 10 Am. & Eng. R. Cas. 129. * * * Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not a taking or damaging, without just compensation, of private property, or private property affected with a public interest.' See, also, Mugler v. Kansas, 123 U. S. 623, 668, 8 Sup. Ct. 273, 31 L. Ed. 205; Boston & M. R.

Southern Kansas Ry. Co. v. Oklahoma City

Co. v. York County Com'rs, 79 Me. 386, 10 Atl. 113, 32 Am. & Eng. R. Cas. 271; Thorpe v. Railroad Co., 27 Vt. 150, 62 Am. Dec. 625; Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. Ry. Co., 30 Ohio St. 604; Railroad Co. v. Deering, 78 Me. 61, 70, 2 Atl. 670, 57 Am. Rep. 784; State v. Chicago, B. & Q. R. Co., 29 Neb. 412, 45 N. W. 469, 42 Am. & Eng. R. Cas. 248; New York & N. E. R. Co. v. City of Waterbury, 60 Conn. 1, 22 Atl. 439, 49 Am. & Eng. R. Cas. 307; Railroad Co. v. Gibbes, 142 U. S. 386, 393, 12 Sup. Ct. 255, 35 L. Ed. 1051.

"We concur in these views. The expenses that will be incurred by the railroad company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated,—if all that should be required,—necessarily result from the maintenance of a public highway under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the state. Such expenses must be regarded as incidental to the exercise of the police powers of the state. What was obtained, and all that was obtained, by the condemnation proceeding, for the public, was the right to open a street across land within the crossing that was used, and was always likely to be used, for railroad tracks. While the city was bound to make compensation for that which was actually taken, it cannot be required to compensate the defendant for obeying lawful regulations enacted for the safety of the lives and property of the people."

Since the facts as found by the trial court show that the construction of a street crossing at First street will necessitate a serious impairment or destruction or removal of valuable property of the railroad company, and of a character it had a right to construct under the express terms of its grant, we are of the opinion that, in so far as such will be the result, the impairment, removal, or destruction of such property without just compensation constitutes a taking of private property for public uses without just compensation, and is therefore in violation of the rights guarantied to the company by the constitution of the United States.

For the reasons herein stated, the judgment of the district court, so far as it relates to the opening of California avenue, is affirmed, and reversed to that part of the judgment dissolving the temporary injunction as to First street; and the cause is remanded to the district court of Oklahoma county with directions to render judgment for the plaintiffs in error on the facts found, and make the injunction perpetual, subject to the right of defendants in error to open said street by making just compensation to the railway company, or after proper condemnation proceedings; the defendants in error to pay the costs in this court.

BURFORD, C. J., and PANCOAST and BEAUCHAMP, JJ., concur. IRWIN and GILLETTE, JJ., absent. BURWELL, J., not sitting.

STATE *ex rel.* VILTER MFG. CO. *et al.* v. MILWAUKEE, B. & L. G. R. CO.

(*Supreme Court of Wisconsin, Dec. 16, 1902.*)

[92 N. W. Rep. 546.]

Street Railways—Franchises—Ordinance as an Attempt to Confer.

An ordinance which grants to an ordinary commercial railroad company, "its successors and assigns," the right to construct an elevated railroad over certain streets, many of which contain surface street railways, and which contemplates the construction of passenger stations, etc., and limits the rate of fare within the city, and requires the carriage of policemen, firemen, and health officers free, and requires the company to build certain bridges for the accommodation of teams and foot passengers as well as its railroad, is an attempt to confer on such company a street railway franchise under Rev. St. 1898, § 1862, and is not a mere regulation by the city of the right conferred on commercial railroads by section 1828 to build their roads across or along any street.

Same—Who May Receive—Commercial Railroads.

An ordinary commercial railroad company organized under Rev. St. 1898, § 1820, has no power to accept a street railway franchise under section 1862, which provides that "corporations for constructing, maintaining and operating street railways may be formed under chapter 86," and that cities "may grant to any such corporation, under whatever law formed," the use of its streets, etc.

Corporations—Persons.

A private corporation is a "person," within Rev. St. 1898, § 3466, which provides that an action may be brought by the attorney general in the name of the state "when any person shall * * * unlawfully hold or exercise * * * any franchise within the state."

Franchises—Quo Warranto.

A street railway franchise is a "franchise," within the meaning of the section, and may be annulled for cause by quo warranto.

Franchises—Acceptance.

An ordinary commercial railroad, which has formally accepted a street railway franchise attempted to be conferred on it by ordinance, is holding and exercising such franchise, within the meaning of the section, as fully as if it had started to build its structure.

Appeal from circuit court, Milwaukee county; Warren D. Tarrant, Judge.

Quo warranto by the state, on the relation of the Vilter Manufacturing Company and others, against the Milwaukee, Burlington & Lake Geneva Railroad Company. Demurrer to answer sustained, and defendant appeals. Affirmed.

This is an action of quo warranto, brought in the name of the state by four owners of real property in Milwaukee for the purpose of testing the right of the defendant to hold and exercise a certain alleged franchise granted to it by the common council of the city of Milwaukee. The complaint charged: (1) That the defendant is a railroad corporation organized under section 1820, Rev. St. 1898; (2) that the relators severally own certain pieces of real estate in said city abutting on the streets named in the franchise attached, and that the construction of an elevated railroad along said streets would greatly damage the said property; (3) that, upon the defendant's application, on the 26th day of August, 1900, the

State v. Milwaukee, etc., R. Co

common council of Milwaukee passed a certain ordinance purporting to grant the right to build an elevated railroad upon certain streets in the city of Milwaukee (a copy of such ordinance being attached), and that the mayor vetoed such ordinance, and that the same was afterwards passed over the veto by said common council September 9, 1901; (4) that the defendant thereafter filed with the city clerk its acceptance of said ordinance, in writing and under seal, and that it holds said franchise so attempted to be granted, and exercises the same by proceeding to act thereunder, and by said written acceptance, and by maintaining its alleged rights to said streets, although no work has been done or money expended; (5) that the defendant has no power or authority under the law to construct the railroad named in said franchise, or to accept or hold such franchise, and that the city has no power to grant the same to the defendant; (6) that an application to bring an action of quo warranto against the defendant has been made to the attorney general, and that he has refused to bring such action, and that the relators have given bond to the state for costs in this action, which has been approved by the attorney general. The prayer is that the defendant show cause by what authority it holds and exercises the said franchise, and, in default of showing cause, that it be adjudged guilty of unlawfully holding and exercising the same, and that it be excluded therefrom. The ordinance aforesaid, a copy of which is attached to the complaint, is entitled "An ordinance granting a right of way to the Milwaukee, Burlington and Lake Geneva Railroad Company," and it provides, in substance, as follows: (1) That there is given and granted to the Milwaukee, Burlington & Lake Geneva Railroad Company, its successors or assigns, the right, permission, and authority to construct, maintain, and operate an elevated railroad with two or more tracks, not exceeding four, as said company, its successors or assigns, may from time to time deem necessary, and such curves, spurs, side tracks, switches, sidings, turnouts, connections, girders and supports, stations, platforms, and stairways, and such telegraphs, telephones, signals, and other devices as the company, its successors or assigns, may deem necessary upon the routes thereafter named; the route authorized being a route commencing on Milwaukee street, at the south line of Michigan street, and from thence running south along and over the streets specifically named to the southern limits of the city. (2) That the authority and privileges granted are upon condition that the railroad shall be an elevated structure, with girders and uprights of iron or steel, built in the most approved manner, and of the best material, and under certain restrictions specifically set forth in the ordinance. (3) That the company, its successors or assigns, shall have authority to construct at such points as it elects, most convenient to the people, all necessary or proper stations, stairs, and depots, and connect

State v. Milwaukee, etc., R. Co

the same with streets, avenues, and alleys by means of stairs, stairways, elevators, and landing places; full provisions being made requiring the proper construction, heating, and lighting of such depots and stairways. (4) That before any part of the structure or any stations shall be commenced the plan thereof shall be submitted to the board of public works, and approved by them. (5) That the city shall at all times have the right to change the grade of any street, and that the company shall thereupon change its structure to conform therewith in case the grade be changed more than 12 inches. (6) That the company be permitted to cross the Milwaukee river and the Kinnickinnic river in certain places provided, and the company agrees to construct new bridges at such places after approved patterns, which also accommodate teams and foot passengers. (7) That the motive power of the road shall be electricity or some other improved mechanical power adapted to rapid transit, other than steam. (8) That the city shall have the right to use the structure for placing thereunder police, fire, and telephone wires. (9) That in consideration of the privileges granted the company, its successors or assigns, shall carry upon all of its cars operated within the city limits all members of the police, fire, and health departments, when in uniform, without charge. (10) That the rate of fare between two points within the city shall not exceed five cents for one person over five years of age, and that children under that age shall be carried free when in charge of persons paying fare. (11) That the privileges granted are upon the express condition that the railroad shall be completed within three years from the acceptance of the ordinance, and upon the further condition (12) that the company, its successors or assigns, shall protect the city against all suits and damages of every kind resulting from the passage of the ordinance or the construction of the road. (13) That the company shall give a good and sufficient bond in the sum of \$100,000, conditioned to perform all of the provisions of the ordinance, and to indemnify the city as aforesaid. (14) That if the company, its successors or assigns, shall not file with the city clerk a formal acceptance of the ordinance within 90 days after the passage and publication thereof, the rights and privileges granted shall be null and void. The answer of the defendant admitted its corporate character as alleged; also that the relators owned property abutting upon the route of said railroad as alleged; but denied that such property is or will be damaged by the construction of the railroad, and that, if any damage does result, the relators have an adequate remedy in law. The answer further admits that the defendant prayed for the passage of the ordinance; that the same was passed; that the defendant accepted the same, and holds it; and that it is the defendant's bona fide intention to build a road to the city of Lake Geneva. The answer further alleges that after said ordinance was passed the defendant expended large sums of

State v. Milwaukee, etc., R. Co

money in surveying its line in the city of Milwaukee and through the country of the state, and in making plans for bridges, amounting in all to \$50,000; that outside of the city of Milwaukee said road is to be a surface railroad, but that, in order to reach its terminus in the city, it will be necessary to come into the city by an elevated road on account of the many street railroads and other railroad tracks upon the surface. To this answer the relators demurred generally. The demurrer was sustained, and the defendant appeals.

O'Connor, Schmitz & Wild (Burr W. Jones, of counsel), for appellant.

McCabe & Dahlman and Timlin, Glicksman & Conway, for respondents.

WINSLOW, J. (after stating the facts). By this action of quo warranto the relators have challenged the right of the defendant corporation to hold and exercise the privileges attempted to be conferred upon it by the common council of Milwaukee by the ordinance of which an abstract appears in the statement of facts. The relators' claim, in brief, is this: The defendant is a commercial railroad corporation organized under section 1820, Rev. St. 1898, and is not authorized by law to operate a street railroad. The ordinance in question is in fact a street railway franchise, and can only be legally granted to a street railway corporation organized under section 1862, Rev. St. 1898. The defendant by accepting such franchise by formal written acceptance, and by insisting upon its right to hold and use the privileges granted by the ordinance, is unlawfully "holding" and "exercising" a franchise within the state, within the meaning of subdivision 1, § 3466, Rev. St. 1898. On the other hand, the defendant claims that, while the ordinance in question has been termed a "franchise," and is framed in language appropriate for a franchise, it is in reality simply a code of regulations made by the city in the exercise of its police powers; not conferring any rights or privileges upon the defendant, but merely regulating the use of its right to build a railroad across or along any street, which right it obtains directly from the state by the provisions of subdivision 5, § 1828, Rev. St. 1898.

The questions upon which the decision of the case depend may be stated as follows: (1) Is the ordinance in question an ordinance granting street railway franchises? (2) If so, can the defendant hold or exercise such franchises? If not, can the relators invoke quo warranto as a remedy?

1. As to the first question: The various provisions of the ordinance leave us no room to doubt that it is, in effect, an ordinance attempting to grant a franchise to operate an elevated street railroad in the city of Milwaukee. The fact that it is called a franchise, and that it is couched in terms frequently used in granting franchises, is not, of course, conclusive as to its character. Such terms might be used, and

State v. Milwaukee, etc., R. Co

yet, if the provisions themselves were simply police regulations, they would not become franchises because they were so called. But, looking over the whole ordinance, it seems to us very clear that the term "franchise" was used advisedly. It bears nearly or quite all the marks usually borne by street railway franchise ordinances. The rights are granted to the defendant, its successors or assigns. It contemplates that almost the entire road within the city limits shall be constructed over and along streets, many of which are much-used business streets, and some containing surface street railways. It also contemplates the construction of stations, stairways, and platforms in the streets for the accommodation of passengers. The provisions as to these stations, stairways, and platforms are elaborate, and seem to be framed with the idea that there will be numerous stations; and this is further made clear by the provision limiting the rate of fare between two points within the city of Milwaukee to five cents, and the provision that policemen, firemen, and members of the health department shall be carried free of charge within the city limits. Unless the supposed railway was expected to be to all practical intents and purposes a street railway with numerous stations, these clauses limiting fares within the city limits, and providing free carriage for city employees, would be absolutely nonsensical. Again, the ordinance provides that in return for the rights granted by the ordinance the company shall build bridges, which shall accommodate teams and foot passengers as well as its railroad, and perpetually furnish the power necessary for opening and closing the same. Here the city definitely proposes to exact from the company in return for its privileges an expensive service to be rendered to the city and its citizens. Whether these exactions could be legally made in the proper exercise of the police power it is not necessary to decide (*State v. City of Sheboygan*, 111 Wis. 23, 86 N. W. 657), but, in any event, they tend very strictly to stamp the ordinance as an attempted franchise. We can come to no conclusion except that the ordinance is, and was intended to be, a grant of the right to build a street railway over streets and bridges in the city of Milwaukee, under the provisions of section 1862, Rev. St. 1898.

2. The second question can be answered with little hesitation. It is very clear that the legislature did not intend that ordinary commercial railroads organized under section 1820, Rev. St. 1898, should be endowed with the power of accepting street railway franchises under section 1862. The intention to keep the two classes of companies separate and distinct could scarcely be more clearly expressed than it has been by the statute. Street railway franchises can only be granted to street railway corporations formed under chapter 86, Rev. St. 1898, for the purpose of building and operating street railways. This is so plain, under the provisions of section 1862, *supra*, that we will spend no further time upon the question.

State v. Milwaukee, etc., R. Co

Indeed, this proposition was not disputed by appellant's counsel.

3. We thus come to the question whether the relators have chosen the proper remedy. Our statute provides (section 3466, Rev. St. 1898) that an action may be brought by the attorney general in the name of the state "when any person shall usurp, intrude into or unlawfully hold or exercise any public office, civil or military, or any franchise within the state," and that such action may be brought by a private person on his own complaint when the attorney general refuses to act. It is alleged in the complaint in the present case that the attorney general, on due application to him, has refused to act, and this is expressly admitted in the answer; hence it is clear that, if it appear by the answer that the defendant is a person usurping or unlawfully "holding or exercising a franchise within this state," no defense to the action is shown. It was held in *State v. Portage City Water Co.*, 107 Wis. 441, 83 N. W. 697, that a private corporation is a "person," within the meaning of this statute, and that a franchise to operate a system of public waterworks in a city, using the streets and alleys for that purpose, while not a corporate franchise in the sense that it is necessary to corporate existence, is still a franchise within the meaning of the section quoted, and may be annulled for cause by quo warranto proceedings. A street railway franchise is of the same nature as the franchise considered in the case just cited. While not a corporate franchise, it is a special privilege granted by sovereign authority, and the state may always inquire into the title by which it is held, and render judgment of ouster if the party assuming to exercise it has no title thereto. High, Extr. Rem. (3d Ed.) § 648. It is well understood that there must be something more than a mere claim of the franchise or privilege in order to justify an action of quo warranto. There must be a usurpation or an unlawful holding or exercising of the franchise, as the statute indicates. Indeed, the very form of the ancient writ demonstrates this. It commanded the defendant to show by what right (quo warranto) he exercised the franchise, having no lawful grant thereof. The principle is well illustrated in *Attorney General v. Railway Co.*, 93 Wis. 604, 67 N. W. 1138, where it was said, quoting from *People v. Thompson*, 16 Wend. 657, "There must be a user or possession of the office or franchise to authorize the information, and a mere claim is insufficient." That was a case where the legislature had passed an act amending the charter of a railroad corporation and granting it additional privileges. The claim on the part of the attorney general was that the corporation, by long nonuser, had surrendered its charter, and ceased to exist, and hence could not exercise the rights attempted to be granted to it by the amending act. There was no allegation in the proposed information that the corporation had accepted the provisions of the amending act,

nor that it had used or attempted to use the rights and privileges in terms conferred by the amending act; and it was held that the vague and uncertain allegation in an unverified statement by way of showing cause (signed only by the attorneys of the company, and in no sense an answer to the information) that it "is exercising and intends to exercise the rights, privileges, and franchises conferred" by the act, did not aid the information, and hence the motion for leave to file the information and bring the action was denied, because it was not shown that there was anything more than a mere claim on the part of the defendant. In the present case, however, the situation is essentially different. The ordinance required the defendant to accept it in writing within a specified time, and the defendant within that time filed a formal written acceptance thereof with the city clerk. Had the defendant been a street railway corporation, and able to accept such a grant, it is well settled that by such acceptance it would have assumed a public trust. It would have thereby become its duty to serve the public by building and operating its road; not simply because of the contract it had made, but because of the public duty involved by the acceptance of a legislative grant. It might be compelled to carry out that duty, or action could be brought by the state to forfeit its franchises and vacate its charter for failure to perform it. *Wright v. Light Co.*, 95 Wis. 29, 69 N. W. 791, 36 L. R. A. 47, 60 Am. St. Rep. 74. In *Stedman v. City of Berlin*, 97 Wis. 505, 73 N. W. 57, where a franchise of a public waterworks company was in question, and no work had been done, and there was no holding or possession of the franchise save that resulting from an acceptance thereof, and the filing of a bond to perform its terms, it was held that in that case the remedy was not by action in equity at the suit of a private party, but by quo warranto or scire facias at the suit of the state, because the party was in the exercise of the privileges conferred. The simple principle is that the defendant in quo warranto must be unlawfully holding or exercising the franchise, or else the action will not lie. In the case of *Attorney General v. Railway Co.*, supra, there was no holding or exercising of the franchises attacked. The company had not formally accepted the act in writing, nor had it accepted it by acting under any of its provisions. The most that could be said was that it had made a mere claim. But in the present case the defendant has accepted the franchise granted by a formal acceptance under seal, as the ordinance required. It has thus not only made a contract with the public to carry out its provisions, but has become charged with a duty so to do (providing it had legal power to accept such a franchise). Under these circumstances we can see no escape from the legal conclusion that it is holding and exercising the franchise as fully as if it had started to build its structure, and removed a few wagon loads of earth, or planted a few foundation stones. It may be re-

Lyons v. Boston & L. R. R

marked in the present case that the answer alleges that the company has already spent large sums in surveying the route in the city of Milwaukee, and in procuring plans for its bridges, so that it appears by the answer itself that there has been an actual acceptance of the ordinance by commencing work under it. However, we prefer to base our conclusions upon the formal written acceptance.

This opinion has perhaps been carried to greater length than necessary. The trial judge decided the case in a brief opinion, which very pithily disposes of most of the material questions involved, and which we cannot forbear quoting in full, as follows: "The defendant is a commercial railroad, not a corporation formed for street railway purposes. The authority of the city of Milwaukee in the premises is confined to such reasonable police regulations as may be proper. The ordinance in question is, by its express terms, a franchise. Authority for such grant from the city is found only in section 1862, Rev. St. 1898, and extends merely to street railway corporations. The franchise granted by the common council is therefore without warrant in law. The action is properly brought, and it is the determination of the court that the defendant holds such franchise unlawfully."

Order affirmed.

 LYONS v. BOSTON & L. R. R.

(*Supreme Judicial Court of Massachusetts, Middlesex, June 17, 1902.*)

[64 N. E. Rep. 404.]

Railroads—Damages by Fire—Insurance—Deduction—Statutes—Operation.

Under Pub. St. c. 112, § 214, as amended by St. 1895, c. 293 (Rev. Laws, c. 111, § 270), providing that, when a railroad company is held responsible for destruction of property by fire, it shall be entitled to the benefit of any insurance effected on the property by the owner, less the cost of premium and expense of recovery, a railroad company is entitled to have the amount of any insurance on the property deducted from the damages found for its destruction, less the cost of premium and expense of recovery, though the insurance was issued before the statute was amended.

Holmes, C. J., and Loring and Hammond, JJ., dissenting.

Action by John Lyons against the Boston and Lowell Railroad. There was a judgment in favor of plaintiff, and defendant brings exceptions. Exceptions sustained.

Geo. L. Mayberry and Chas. F. Stone, for plaintiff.

Richardson, Trull & Weir, for defendant.

KNOWLTON, J. This action was brought under Pub. St. c. 112, § 214, as amended by St. 1895, c. 293 (Rev. Laws, c. 111, §§ 270), to recover for an injury to the plaintiff's property by fire communicated by one of the defendant's locomotive engines. The Public Statutes create a liability in such cases,

Lyons v. Boston & L. R. R

and the amendment provides as follows: "In case such railroad corporation is held responsible in damages, it shall be entitled to the benefit of any insurance affected upon such property by the owner thereof, less the cost of premium and expense of recovery. The money received as insurance shall be deducted from the damages, if recovered before the damages are assessed; if not so recovered the policy of insurance shall be assigned to the corporation held responsible in damages, and such corporation may maintain an action thereon." This statute, as amended, determines the rights and liabilities of property owners and railroad corporations. It is applicable as well when a policy is made payable in case of loss to a mortgagee as when the insurance is for the owner alone. It is unnecessary to consider how the rights of different parties would be enforced in every possible case, as no question of that kind is before us. In this case the plaintiff had been paid a large sum under a policy of insurance, and the only question is whether the judge should have ruled, as requested, "that the railroad corporation was entitled to the benefit of any insurance upon such property, less the cost of premium and expense of recovery, and that such amount should be deducted from the amount found as damages for such burning of the house and barn." The case is plainly within the language of the amendment above quoted, for it is clear that this language refers to the conditions at the time of the fire. It is admitted that the ruling should have been given, except for the fact that the insurance policy was issued before the statute was amended. The statute does not, in terms, recognize any distinction between cases in which a policy existing at the time of a fire was issued only a short time before the fire and after the enactment of the amendment, and cases in which the policy was issued before the change in the law. If there is a difference, it must be for some reason not referred to in the statute. The enactment is for the purpose of fixing the rights and liabilities of railroad corporations and property owners. Formerly there was an absolute primary liability of the railroad company for all damages, and an insurance company compelled to pay a loss would be entitled to be subrogated to the rights of the property owner against the railroad corporation on equitable grounds, even if there were no provision for it in the policy. It is not questioned that the legislature could at any time terminate the liability of railroad corporations for future fires, or limit it, or modify it in any way. The legislature has seen fit to limit it to such amounts as are not covered by insurance, and in cases where there is insurance to leave the primary liability on the insurance company, where it would be if there were no statute imposing a burden on railroad companies. There is no good reason why the law should not be changed as between landowners and railroad corporations as well in cases where there are outstand-

Lyons v. Boston & L. R. R

ing policies of insurance as in cases where there is no insurance, unless such a change would impair the obligation of the contract between the plaintiff and the insurance company. The only part of their contract that is material is found in the Massachusetts standard form of policy, and reads as follows: "And whenever the company shall pay any loss the assured shall assign to it, to the extent of the amount so paid, all rights to recover satisfaction for the loss or damage from any person, town or other corporation, excepting other insurers; or the insured, if requested, shall prosecute therefor, at the charge and for the account of the company." The assured agrees to give the insurance company such rights to reimbursement as he may have at the time of the fire against any party. He does not agree to have any such rights. So far as the existence of such possible rights depends on present or future legislation, both parties to the contract take their chances as to what the law may be when a fire occurs. If, when a policy is issued, other parties are in such relations to the property described that, if the property should be burned, there would be a valuable right of subrogation in favor of the insurer, it may well be that under such a provision in the policy the insured impliedly agrees to do nothing to terminate or modify the right. If, in this case, the law had remained unchanged, and the plaintiff, before the fire, had released the railroad corporation from its liability under the statute, it might be held that his contract with the insurance company was broken, and that he was precluded from recovery under his policy. See *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508-512, 2 N. E. 103, 52 Am. Rep. 728; *Attleborough Sav. Bank v. Security Ins. Co.*, 168 Mass. 147, 46 N. E. 390, 60 Am. St. Rep. 373. But no such effect can be given to a change of the law in reference to the liability of railroad companies for fires. Both the insurance company and the plaintiff knew that such a change was liable to be made at any time, and that it might materially affect the value to the company of the general right of subrogation which was expressly given by the policy. There is no good reason for holding that such an amendment, which is applicable in terms to all fires that occur after it takes effect, is not applicable as well to those fires against which insurance was effected before the passage of the statute as to those where policies were issued after the passage of the statute. The questions that arise as to the method of applying and enforcing the statute are precisely the same in cases where the insurance was effected after the amendment was enacted as in those where it was in existence at the time of the amendment. A like decision was made unanimously under a similar statute in *Leavitt v. Railway Co.*, 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152.

Exceptions sustained.

LORING, J. (dissenting). I regret that I am unable to

Lyons v. Boston & L. R. R

agree with the judgment of the court. This action is brought by the Middlesex Mutual Fire Insurance Company, in the name of the plaintiff, to recover for damage done to the plaintiff's house and barn by a fire set by one of the defendant's locomotives. The action is also brought to recover for damage to personal property not insured, and the judge found that the damage done to the house and barn exceeded the insurance. To that extent the action is also for the benefit of the plaintiff. But there is no dispute as to the action so far as it is an action for the plaintiff's benefit. It is only so far as it is for the benefit of the insurance company that the railroad has set up a defense, and for that reason it must be treated as an action brought by the insurance company for its own benefit, in the name of the plaintiff. The plaintiff's house and barn were set on fire by the defendant on June 15, 1895. At the time of the fire the insurance company was liable to indemnify the plaintiff for this loss under a policy issued September 1, 1893. One of the terms of the policy whereby the insurance company had agreed to indemnify the plaintiff against loss by fire was that whenever it should "pay any loss the insured shall assign to it, to the extent of the amount so paid, all rights to recover satisfaction for the loss or damage from any person, town, or other corporation, excepting other insurers." In compliance with this provision of the policy, the plaintiff did in fact assign his right of action against the railroad on the insurance company's paying him the amounts specified in the policy, to wit, \$1,500 on the house and \$1,000 on the barn; and this action is brought under that assignment. The defendant sets up in defense St. 1895, c. 293, which took effect April 18, 1895. The insurance company contends that that act cannot affect its contract with the plaintiff, which was made a little over a year and a half before the act was passed; and I think that it is right in that contention. Had the policy contained no stipulation as to subrogation, I agree that the legislature could have taken away the common-law right of subrogation against the railroad, and could have transferred the abutter's insurance to the railroad. I think it could have done so on the same ground as that on which it is held that a consignor can agree in a bill of lading to give the carrier the benefit of his insurance, when his policy does not contain any stipulation preventing him from so doing. *Jackson Co. v. Boylston Ins. Co.*, 139 Mass. 508, 2 N. E. 103, 52 Am. Rep. 728. But where it is stipulated in the policy that the insurance shall be subrogated to the rights of the assured, neither the assured nor the legislature can give the railroad the benefit of the insurance against the protest of the insurance company. The risk assumed by an insurance company under a policy issued to an abutter for indemnity from fire set by a railroad, with a clause giving the insurance company the right to be subrogated to the abutter's right against the railroad, is a different

risk from that assumed in case a policy is issued to the railroad for indemnity from the same fires. In case of the first policy, the insurance company has a contract right to be subrogated to the assured's right against the railroad, whatever it may be. If it is absolute, the insurance company, on paying the abutter, can recover from the railroad on proving that the fire was set by it; if the liability of the railroad depends upon its having been negligent, the insurance company must prove negligence on the part of the railroad to make good its claim against the railroad for the loss. But if the company issues a policy to the railroad its liability is final in every event. It has been held for that reason that a consignor who holds a policy containing such a stipulation cannot transfer his insurance to the carrier. *Carstairs v. Insurance Co.* (C. C.) 18 Fed. 473, 16 Am. & Eng. R. Cas. 142; *Fayerweather v. Insurance Co.*, 118 N. Y. 324, 23 N. E. 192, 6 L. R. A. 805; *Insurance Co. v. Easton*, 73 Tex. 167, 11 S. W. 180, 3 L. R. A. 424, 37 Am. & Eng. R. Cas. 671. This conclusion cannot be avoided by holding that St. 1895, c. 293, is an act modifying Pub. St. c. 112, § 114, which makes railroads absolutely liable for fires set by them, in place of leaving the matter at common law, where they were liable for negligence only. I agree that the legislature could repeal Pub. St. c. 112, § 214, and leave the liability of the railroad to be determined by the principles of the common law. For the purposes of this argument I will go further, and admit that the legislature could have provided that railroad companies should not be liable to abutters for fires set by their locomotives under any circumstances. But in passing St. 1895, c. 293, the legislature did not undertake to modify the liability of railroads for fires set by them. What it did undertake to do was to transfer to the railroad company the abutter's insurance. The legislature undertook by this act to do for railroads, in case of the spark risk, what railroads had previously undertaken to do for themselves in other connections, by providing in their bills of lading that they should have the benefit of any insurance held by the consignor. The language of the act indicates that this is what the legislature thought it was doing. The act provides that "in case such railroad corporation is held responsible in damages it shall be entitled to the benefit of any insurance effected upon such property by the owner thereof." This is an act which purports to transfer insurance, and does not purport to be an act modifying the liability of the railroad for fires set by its locomotives. Further, the abutter who is not insured has the right under the amended act to hold the railroad absolutely liable; and, inasmuch as the railroad under the amended act is absolutely liable to the abutter who is not insured, St. 1895, c. 293, is not an act modifying the liability of the railroad. It is an act dealing with the insurance of the abutter, and leaves the liability untouched. But my difficulty goes deeper than either or both of these considerations.

Whether an abutter is insured or not has nothing to do with the liability of the railroad. It is an outside contract of indemnity, which may be made or may not be made, at the pleasure of the abutter and the insurance company. I agree that after the enactment of St. 1895, c. 293, if the abutter and the insurance company elect to contract for indemnity, they must do so in compliance with St. 1895, c. 293. They must provide in their contract that the insurance shall be for the benefit of the railroad as well as of the abutter, if the railroad elects to take it to its own use. But that result comes from the power of the legislature to regulate any and all contracts insuring property within the commonwealth. That power does not affect this contract, which was made over a year and a half before St. 1895, c. 293, was enacted. I also agree that the legislature could have changed the liability of railroad companies, or ended it entirely; and, if it had done so, this insurance company could not have recovered in this action. All that the insurance company stipulated for was to have the abutter's rights against the railroad, whatever those rights might be at the time of the fire. It is said that St. 1895, c. 293, is an act which changes the liability of the railroad. But I cannot persuade myself that that is so. The fact that the abutter is insured is not, in its essence, a fact on which the liability of the railroad for a fire set by its locomotive engines depends. More than that, it is a fact which, in its essence, is such that it cannot be made a condition of the railroad's liability for fires set by its locomotive engines. Apart from the power of the legislature to regulate the terms of future contracts of insurance, and apart from its power to regulate the right of subrogation, the legislature cannot provide that a railroad company shall be liable to A., who is not insured, and shall not be liable to B., who is insured. That is not a law equally applicable to all under the same conditions. It is open to the same objection that a law would be open to which provided that the railroad should be liable for setting fire to all houses painted white, and should not be liable for setting fire to houses painted in another color. Both provisions equally apply to all who come within the definition in each case, but neither is a general law applicable to all under like circumstances; and for that reason neither of them is within the power of the legislature. The effect of the statute is to appropriate the fund created by the policy issued by the insurance company to the extinguishment pro tanto of the liability of the railroad. This case may be taken as an example. In this case the house was insured for \$1,500 and the barn for \$1,000. It was found by the judge, who tried the case without a jury, that the amount of damage done by the fire in case of the house was \$1,600, and in case of the barn \$1,100; and it is admitted that the plaintiff, Lyons, is entitled to judgment for those two sums of \$100. The policy creating the fund stipulated that the insurance company should have

Logan v. Wabash Ry. Co

the rights of the assured against the railroad, and this covenant amounts at least to a covenant that the insurance created by the policy shall not inure to the railroad's benefit. I cannot see how the legislature can appropriate the fund created by such a prior contract to the extinguishment pro tanto of the liability of the railroad, which otherwise remains unchanged, without impairing the rights of the insurance company under the contract contained in the policy, which was made before the act was passed.

For these reasons I am of opinion that the ruling made at the trial was right, and that the exceptions should be overruled.

The CHIEF JUSTICE and HAMMOND, J., also dissent.

LOGAN v. WABASH RY. CO.

(Court of Appeals at Kansas City, Mo., Nov. 3, 1902.)

[70 S. W. Rep. 734.]

Railroads—Fires—Extinguishment—Personal Injuries—Negligence—Proximate Cause.

Where crops were fired by sparks emitted from defendant's engine, and plaintiff, while endeavoring to save some of the property, became surrounded by the flames, and, in seeking to escape, fell, and was severely burned, the negligence of defendant in setting out the fire was not the proximate cause of plaintiff's personal injuries.

Appeal from circuit court, Schuyler county; Nat M. Shelton, Judge.

Action by A. A. Logan against the Wabash Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Smoot, Fogle & Eason, for appellant.

Geo. S. Grover, for respondent.

BROADDUS, J. The plaintiff, Logan, was in charge of a farm belonging to his brother, in which he had an interest in the growing crops and stock thereon. In July, 1900, an engine operated on defendant's railroad, which passed through said farm, by escaping sparks set out a fire near some hay which had been severed from the land, which was partly in ricks,—partly cut. There was also some standing hay. The plaintiff, with the aid of another man, succeeded in saving some of the hay, but while so doing he became surrounded by the flames, and, in seeking to escape, fell, and was severely burned. The court sustained a demurrer to plaintiff's case as thus made, and directed a verdict for the defendant, upon which judgment was rendered, and from which plaintiff appealed.

There was no controversy about the facts. The action is predicated upon the negligent act of the defendant in com-

Logan v. Wabash Ry. Co

municating fire to the premises in question. Defendant, on the trial, admitted the alleged negligence, but denied its liability, except for losses to crops by reason of the fire; but, as they were not in issue, they have nothing to do with the case. The plaintiff bases his right to recover on the ground that after he discovered the fire it became his duty—and one that he owed defendant at common law—to extinguish the fire, if he could, so as to save the defendant from loss for which it would be responsible to him for the destruction of his property. His contention amounts to this: That being in the performance of a duty which the law imposed, and while performing that duty in the exercise of ordinary care, in order to save the defendant, the wrongdoer, from loss threatened from the consequences of its wrongful act in setting out the fire, he is entitled to compensation for the injuries received. In *Douglass v. Stephens*, 18 Mo. 363, it was held that, in case of a tort, if an injured party can protect himself from damage at a trifling expense, or by any reasonable exertions, he is bound to do so. And the rule is illustrated by supposable cases, viz.: “Suppose a man should enter his neighbor’s field unlawfully, and leave the gate open; if, before the owner knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open, and passes it frequently, and willfully and obstinately, or through gross negligence, leaves it open, and cattle get in, it is his own folly. So if one throws a stone and breaks a window, the cost of repairing the window is the ordinary measure of damages. But if the owner suffers the window to remain without repairing a great length of time after notice of the fact, and his furniture and pictures and other valuable articles sustain damage, or the rain beats in and rots the window, this damage would be too remote.” There is no denying the soundness of this principle. It being conceded that it became the duty of plaintiff to use every reasonable effort to extinguish the fire and prevent loss to the defendant, does it necessarily follow that if, while in so doing, he is damaged in his person, the defendant becomes liable therefor? It may be conceded that for his service in that respect he would be entitled to a reasonable compensation, because he was performing a lawful duty,—one which defendant had a right to expect he would perform, for it was in contemplation of law that he should do so. The rule of law in this state is that, unless the damages complained of were properly attributable to the wrongful act, there can be no recovery. In other words, the wrongful act must be the proximate cause of the injury. *Sira v. Railroad Co.*, 115 Mo. 127, 21 S. W. 905, 37 Am. St. Rep. 386, 58 Am. & Eng. R. Cas. 538; *Henry v. Railway Co.*, 76 Mo. 288, 43 Am. Rep. 762, 12 Am. & Eng. R. Cas. 136. In *Brown v. Railway Co.*, 20 Mo. App. 427, it was held that: “The wrongful act must be the efficient cause of the injury. There must also be such connection in the relation of the cause and effect that the influence

Logan v. Wabash Ry. Co

of the wrongful act should predominate over other supervening causes, and combine with them to produce the result." Here the act of the plaintiff in attempting to extinguish the fire appears to have been the cause of plaintiff's injury, and not the wrongful act of defendant in suffering fire to escape from its engine in the first instance. In contemplation of law, the defendant would, as has been said, be liable to him for a reasonable compensation for his services in that respect, but it does not necessarily follow that it became surety for his personal safety. So in the supposed case, where a neighbor wrongfully left open a man's gate, it would be absurd to claim that if, while he was attempting to close it, he should be injured in some way, the wrongdoer would be responsible to him for damages for the injury. In *Seale v. Railway Co.*, 65 Tex. 274, 57 Am. Rep. 602, it was held: "If one has violated a duty imposed upon him by the common law, he should be held to every person injured thereby whose injury is the natural and probable consequence of his misconduct; and this liability extends to such injuries as might reasonably have been anticipated under ordinary circumstances as the natural and probable result of the wrongful act." But "if, subsequently to the original wrongful or negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the misfortune, the former must be considered as too remote." A person who is guilty of a wrongful act is only responsible for the mischievous consequences which may reasonably be expected under ordinary circumstances from such misconduct. *Atkinson v. Railway Co.* (decided by this court, but not yet officially reported) 70 S. W. —; *Insurance Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65. Justice Miller, in speaking of the authorities on the question, uses the following language: "One of the most valued of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote." Applying these authorities to the facts of this case, it seems to us clear that the setting out of the fire by the defendant was not the proximate cause of plaintiff's injury. This injury was not such as, under ordinary circumstances, would reasonably be expected from the act charged,—such, for instance, if he had been asleep in the nighttime in his house, and his house had been set afire by sparks from the defendant's engine, and he had been thereby injured. In the latter instance there would be no intervening agency, and the injury suffered would be reasonably expected, under the circumstances.

For the foregoing reasons, the action of the circuit court is affirmed. All concur.

CHICAGO, B. & Q. R. Co. v. ROBERTS.*(Supreme Court of Nebraska, Sept. 18, 1902.)*

[91 N. W. Rep. 707.]

Frightening Teams—Ordinary Operation of Hand Car.*

A railroad company is not liable for injuries due to horses taking fright at the ordinary operation of a hand car.

Rights at Crossings.†

The same degree of care is required of a railroad company operating its road across a public highway and of persons using the highway. Each is bound to use such care in order to avoid accidents as is commensurate with the danger involved under the circumstances of the particular crossing.

Same.‡

While the rights of the railroad company and of persons using the highway at the crossing are equal, the railroad company has the superior right of passage; and, if otherwise exercising due care, it commits no wrong in running its cars across the highway in front of approaching teams.

Accidents at Crossings—Negligence—View Obstructed by Cars.

If a railroad company, in the ordinary conduct of its business, leaves a row of freight cars upon a side track at right angles to a public crossing, so as to partially obstruct the view of persons passing over it, such fact of itself does not render the company liable for accidents occurring at the crossing, but merely imposes a duty of greater care both upon the company and upon those who use the highway.

Same—Same—Cars Obstructing Highway.

A railroad company may properly leave its cars standing in the highway at a crossing for short periods when necessary in the reasonable conduct of its business. But to leave such cars in or upon the highway longer than is needful for such purpose is negligence.

Same—Same—Same—Proximate Cause.

In order to hold a railroad company liable for an injury received at a crossing where cars were suffered to stand upon the highway longer than necessary in the reasonable conduct of the company's business, it must appear that the negligence in so leaving them was the proximate cause of the injury.

Commissioners' opinion. Department No. 2. Error to district court, Johnson county; Stubbs, Judge.

"Not to be officially reported."

Action by Moses Roberts against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

*As to whether the railroad is liable where teams are frightened by usual and necessary noises, see *Louisville & N. R. Co. v. Penrod's Adm'r* (Ky.), 1 R. R. R. 887, 24 Am. & Eng. R. Cas., N. S., 887, and foot-note.

†As to the mutual obligations of street railways and travelers to avoid collisions at crossings, see *Traver v. Spokane St. Ry. Co.* (Wash.), 22 Am. & Eng. R. Cas., N. S., 759, and foot-note.

‡As to the doctrine applicable in cases against ordinary railroads, see *Rafferty v. Erie R. Co.* (N. J.), 21 Am. & Eng. R. Cas., N. S., 778, and foot-note.

As to the right of way between street cars and other vehicles at crossings, see *Traver v. Spokane St. Ry. Co.* (Wash.), 22 Am. & Eng. R. Cas., N. S., 759, and foot-note.

Chicago, etc., R. Co. v. Roberts

J. W. Deweese, F. E. Bishop, and S. P. Davidson, for plaintiff in error.

L. C. Chapman and George A. Adams, for defendant in error.

POUND, C. Graf is a small station of the Burlington Railroad Company, which was defendant below, and is plaintiff in this court. The track at that point runs east and west. The village and station are on the north side of the main track. There is a side track to the south. Just east of the station a public highway crosses the tracks, which, according to the testimony adduced by the plaintiff, are 12 feet apart at that point. North of the tracks this road becomes the main street of the village. The Central Elevator Company has its scales and office building 8 feet south of the side track, and some 34 feet east of the crossing. Its elevator is still further to the east on the same side of the track. The wagon road from this elevator and its scales runs parallel with the side track about 30 feet distant, and turns into the road very close to the crossing of the side track, necessitating a somewhat sharp turn at that point. The crossing is higher than the road, and at the point where the road from the elevator turns in there is a slight ascent. On the same side of the track, 215 feet west from the crossing, there is another elevator, known as the "Duff Elevator." On August 30, 1898, a number of freight cars were standing on the side track west of the crossing between the crossing and the Duff Elevator. According to the testimony of plaintiff and his witnesses, the car nearest the crossing was within 5 or 10 feet of the planks. The car furthest distant was near the elevator. Plaintiff did not count them, but estimates from his general recollection that there were 12 or 14 in all. The records of the station, however, show clearly that there were 5 only, and this agrees with the distances and the evidence as to where the cars were placed. Late in the afternoon of that day, plaintiff was at the scales east of the crossing with a team and a lumber wagon, and had been weighing a load of coal. He then drove toward the crossing, intending to take the road north across the tracks. As has been seen, his course lay close to and parallel with the tracks, and his view of the main track for some 200 feet east of the crossing was cut off by the cars; nor could he see between them, because he was going toward the end of the car nearest him, not at right angles to the row. When he was about to start, he heard a noise which he supposed was due to a windmill, and seems to have given no more attention. He had been about the crossing for several hours, and knew exactly how the land lay, and how far his view was obstructed by the standing cars. Nevertheless, starting close to the track, with no way of seeing the main track beyond the elevator, as he could have done had he come down the public road from the south, he took no further precaution than inquiring as to the noise, and learning that no train was due. He drove

Chicago, etc., R. Co. v. Roberts

to the crossing, turned into the main road, and was about to cross at what he calls "pretty fair speed." At this point a hand car operated by four laborers in the employ of the company came down from the west on the main track, ran in front of the team, and frightened them so that they turned sharply and ran away, breaking the wagon and injuring the plaintiff. The hand car was running slowly as it approached the crossing,—probably not more than 5 miles an hour,—and was stopped promptly as soon as it was seen that the horses were frightened; not going more than 20 feet according to one witness, or 50 feet according to another. Upon this evidence a jury found for the plaintiff, and a judgment was rendered accordingly, from which error is prosecuted.

We are of opinion that the verdict and judgment ought not to stand. The plaintiff pleads and the evidence shows that the accident was due to his horses becoming frightened at the hand car. But this, of itself, would not make the defendant liable. The ordinary operation of a hand car is one of the incidents of a railroad, and horses must become used to such appliances, as the many others with which modern highways abound. In this era of bicycles, automobiles, trolley cars, traction engines, and steam fire engines, we cannot take the nerves of the horse as the measure of rights in the highway. Unless there is something so unusual and out of the ordinary about an appliance of this sort that, in the proper and reasonable use of public thoroughfares, it has no place on roads frequented by teams, no liability arises from its ordinary operation, even though horses are frightened. *Holland v. Bartch*, 120 Ind. 46, 22 N. E. 83, 16 Am. St. Rep. 307; *Thompson v. Dodge*, 58 Minn. 555, 60 N. W. 545, 28 L. R. A. 608, 49 Am. St. Rep. 533; *Piollet v. Simmers*, 106 Pa. 95, 51 Am. Rep. 496; *Yingst v. Railway Co.*, 167 Pa. 438, 31 Atl. 687; *Patnoude v. Railroad Co. (Mass.)* 61 N. E. 813; *Gilbert v. Railway Co.*, 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592; *Macomber v. Nichols*, 34 Mich. 212, 22 Am. Rep. 522. See, also, *Railroad Co. v. Loree*, 4 Neb. 446. Hence plaintiff must show not only that his horses were frightened by the hand car, but that their fright was caused by some negligence of the railroad company or its servants, and not by the ordinary operation of the car. The same degree of care is required of a railroad company operating a road across a public highway and of persons using the highway. Each is bound to use such care in order to avoid accidents as is commensurate with the danger involved under the circumstances of the particular crossing. *Railroad Co. v. Cody*, 166 U. S. 606, 615, 17 Sup. Ct. 703, 41 L. Ed. 1132; *Railroad Co. v. Talbot*, 48 Neb. 627, 635, 67 N. W. 599. No doubt the rights of the railroad company and of persons using the highway at the crossing are equal. Nevertheless, for obvious reasons, growing out of the necessary mode of operating a railroad and of public convenience, the railroad company has the superior right of

Chicago, etc., R. Co. v. Roberts

passage. It cannot, in the nature of things, be asked to stop its trains, or even its hand cars, to let persons using the highway at a crossing drive over ahead of them. *Improvement Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403; *Black v. Railroad Co.*, 38 Iowa, 515; *Newhard v. Railroad Co.*, 153 Pa. 417, 26 Atl. 105, 19 L. R. A. 563; *Morris v. Railroad Co. (C. C.)* 26 Fed. 22. In consequence, if otherwise exercising due care, it commits no wrong in running its cars across the highway in front of approaching teams. We are unable to perceive in what way the laborers upon the hand car were negligent in its operation. They were going very slowly, and seem to have had the car under good control. No signal could have been given by whistle or bell, because no such appliances are provided for, nor feasible, upon a hand car. The statute requires them upon engines only. As the car went slowly and was easily stopped, the noise it made gave ample warning of its approach; and if plaintiff had investigated the noise he heard, instead of taking a wrong explanation for granted, he could have turned his horses so they would not have been frightened. The cars were left upon the side track in the ordinary course of the company's business, in order to fill them at the elevator. The fact that they partially obstructed the view of persons passing over the crossing does not of itself render the company liable for accidents occurring there, but merely imposed a duty of greater care both upon the company and upon those who use the highway. *Railway Co. v. Williams*, 56 Kan. 333, 43 Pac. 246; *Railroad Co. v. Nelson*, 59 Ill. App. 308; *Haas v. Railroad Co.*, 47 Mich. 401, 11 N. W. 216; *Improvement Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403. Nor is it material that one of the cars may have projected over the line of the highway, though not upon the traveled road. No doubt, the public are entitled to the full width of the highway as established. While a railroad company may properly leave its cars standing in the highway at a crossing for short periods, when necessary in the reasonable conduct of its business, to leave such cars in or upon the highway longer than is needful for such purpose is negligence. *Great Western R. Co. of 1859 v. City of Decatur*, 33 Ill. 382. But this circumstance of itself would not suffice to make the company responsible for all mishaps taking place at the crossing. In order to hold the company, it must appear that the negligence in leaving the car in the public road was the proximate cause of the injury. *Railway Co. v. Talbot*, 48 Neb. 627, 67 N. W. 599. Such was not the case here. The cause of the accident was the horses taking fright at the proper operation of a hand car passing in front of them. A few feet more of clear space at the side of the traveled crossing would not have prevented this, since it would not have sufficed to make the approaching hand car visible to the plaintiff, in the manner in which he went upon the crossing, at an appreciably greater distance. In *Selleck v. Railroad Co.*, 93 Mich. 375, 53 N. W. 556, 18 L.

Hendricks v. Fremont, etc., R. Co

R. A. 154, which goes as far as any case we have found, a freight train obstructed an entire crossing for over 20 minutes, contrary to a statute. While plaintiff, who had been detained wrongfully at the crossing over 10 minutes, was waiting for the train to move so that he could proceed, another train came by rapidly on a track beyond, and exhausted large quantities of steam. Under such circumstances, it might well be said that the obstruction of a crossing where trains were passing, so as to keep persons using the highway waiting in proximity to such passing trains so long a time without opportunity to observe their approach and take measures to prevent horses from taking fright, was the proximate cause of the injury. The case at bar is quite different. The plaintiff admits that one of the horses had run away on a prior occasion. This circumstance, and the well-known fact that all horses are liable to take fright at objects moving in front of them, sufficiently explain an unfortunate accident, for which we are unable to see that the defendant has been shown to be liable.

It is recommended that the judgment be reversed, and the cause remanded for a new trial.

BARNES, C., concurs.

PER CURIAM. The conclusions reached by the commissioners are approved, and, it appearing that the adoption of the recommendations made will result in a right decision of the cause, it is ordered that the judgment of the district court be reversed, and the cause remanded for a new trial.

OLDHAM, C. (concurring specially). I concur generally in every proposition discussed by my learned associate in this opinion, but, as all evidence possible for the plaintiff to procure tending to show actionable negligence on the part of the railroad appears to have been produced at the trial in the court below, I see no good reason for remanding this cause. I think the petition should be dismissed, and further litigation over the matter should be stopped.

HENDRICKS v. FREMONT, E. & M. V. R. Co.

(*Supreme Court of Nebraska, Jan. 8, 1903.*)

[93 N. W. Rep. 141.]

Railroads—Negligence—Frightening Teams.*

A railroad company is not liable for injuries caused by a team taking fright at the ordinary operation of a train upon its road. *Railroad Co. v. Roberts* (Neb.) 91 N. W. 707.

(Syllabus by the Court.)

Commissioners' opinion. Department No. 3. Error to district court, Saunders county; Sornborger, Judge.

Action by Bertin E. Hendricks, as administrator of the

*See foot-note appended to *Louisville & N. R. Co. v. Penrod's Adm'r* (Ky.), 1 R. R. R. 887, 24 Am. & Eng. R. Cas., N. S., 887.

Hendricks v. Fremont, etc., R. Co

estate of Jerry H. Reigel, deceased, against the Fremont, Elkhorn & Missouri Valley Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

M. Newman and Samuel J. Tuttle, for plaintiff in error.

Benjamin T. White, James B. Sheehan, and Good & Slama, for defendant in error.

DUFFIE, C. Jerry H. Reigel was killed on the 17th of March, 1899; being thrown from the seat of his wagon in a runaway caused by his team being frightened by the train of the defendant in error. Hendricks, executor of his estate, brought this action to recover damages on account of his death. After the plaintiff had introduced his evidence and rested, the court gave a peremptory instruction to the jury to return a verdict for the defendant. The plaintiff brings the case to this court on error, claiming that said instruction was unwarranted.

The facts disclosed by the record are that on the day of the accident the south-bound passenger train of the defendant in error, due at Wahoo about 5 o'clock p. m., did not arrive at the station until about 6 p. m.; that about the time it pulled out from the station, going south, the defendant was driving across its tracks some 340 feet from the depot; that the team took fright at the train,—throwing Reigel from his seat, and causing his death. Reigel was employed by the Standard Oil Company to distribute oil through Saunders county. He usually returned home about 5 o'clock in the afternoon, and it was his custom to wait, before crossing the track of the defendant company, until the 5 o'clock train had left the station. The evidence further tends to show that the station, and the train standing at the station, were obstructed from the view of a person approaching the crossing from the east until within some 10 or 12 feet of the track. The negligence charged against the company is that it did not ring the bell or sound the whistle of the engine, and that, Reigel's view of the train being obstructed, he drove upon the track, and the approaching train frightened his team and caused it to run away, thus causing his death.

While there is no direct evidence in the record that the crossing at which the team became frightened was a public street or highway, it was spoken of as "Ninth Street," and, for the purposes of this case, we may assume that it was a public street. The only question, then, that arises in the case, is this: Assuming that it was negligence on the part of the company not to ring the bell or sound the whistle of its engine, was such negligence the proximate cause of the injury? The death of Reigel was undoubtedly caused by his being thrown from the wagon, and this was caused by the running of his team. We must also assume that the team would not run away unless frightened, but it is evident to any one that a failure to ring the bell or sound the whistle was not

Sawdey v. Spokane Falls & N. Ry. Co

a cause from which the team could be frightened. The team undoubtedly took alarm at the movement and noise of the approaching train, but it has been held in many cases that a railway company is not liable for injuries caused by a horse being frightened by the ordinary noise of an approaching train near the highway on which such horse was being driven. *Railroad Co. v. Roberts* (Neb.) 91 N. W. 707, and authorities cited. In *Walters v. Railway Co.*, 104 Wis. 251, 80 N. W. 451, 15 Am. & Eng. R. Cas., N. S., 606, in which the facts were much the same as in the case at bar,—the only difference being that the negligence charged was the neglect of the flagman stationed at the crossing to give a signal of the approach of a train, while here the negligence charged is that the coming of the train was not signaled by the bell or whistle,—the court said: "The failure of the flagman at a street crossing to give warning of the approach of a train which stopped before reaching the street would not render the company liable for injuries received by a traveler as a result of his team becoming frightened at the train." In this case there is no pretext that the defendant's engine came in contact with the plaintiff's team or wagon. The evidence is conclusive that the distance between them was 200 feet or more, and that the accident occurred from the team taking fright at the ordinary operation of the train in the ordinary and usual manner. The authorities are uniform that a railroad company is not responsible for damages occasioned from such a cause.

We think that the order of the district court was right, and therefore recommend the affirmance of the judgment.

AMES and ALBERT, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

SAWDEY v. SPOKANE FALLS & N. RY. CO.

(Supreme Court of Washington, Dec. 6, 1902.)

[70 Pac. Rep. 972.]

Treatment of Injured Employee—Contract.

In an action against a railroad company for injuries from unskillful treatment of an employee by defendant's surgeon for injuries received by the employee after he had finished his work and was going home, evidence *held* to require submission to the jury of the issue as to whether, by the contract of employment, and retention of a part of the employee's salary for a "hospital fund," the company contracted to treat employees for all injuries, or only those received in the course of their employment.

Same—Same—Malpractice.

A railroad company retained a part of the salaries of its employees for a hospital fund, and never informed its employees that it would treat them only for injuries in the course of their employment. An employee was injured while going home after work, and was taken to the company's hospital and treated, without being told that the company only engaged to treat for injuries in the course of employ-

Sawdey v. Spokane Falls & N. Ry. Co

ment, and was treating him gratuitously: *held*, in a suit by the employee for malpractice of the company's surgeon, that the railroad company was estopped to claim that it was only required to treat for injuries in the course of employment, and was treating plaintiff as a charity.

Charitable Treatment—Estoppel.

Under the express provisions of 2 Ballinger's Ann. Codes & St. § 6012, a party is entitled to contradict answers to interrogatories introduced by him.

Same—Same—Liability.

A corporation which contracts, for a consideration, to treat its employees for any injury they may receive while in its employ, is liable for the malpractice of a surgeon employed by it.

Malpractice—Sufficiency of Evidence.

In an action by an employee of a railroad company against the company for malpractice of a surgeon employed by the company to treat its injured employees, evidence considered, and *held* sufficient to require submission to the jury of the issue as to whether there was in fact any malpractice.

Appeal from superior court, Spokane county; Leander H. Prather, Judge.

Action by Fred Sawdey against the Spokane Falls & Northern Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

See 67 Pac. 1094.

Barnes & Latimer; for appellant.

Will H. Thompson and M. J. Gordon, for respondent.

FULLERTON, J. The appellant brought this action against the respondent to recover damages alleged to have been suffered by him because of the unskillful and negligent manner in which he was treated for a fracture in the lower third of the femur of his left leg by the respondent's surgeon. On the trial at the close of the appellant's case the respondent interposed a challenge to the legal sufficiency of the evidence, which challenge the trial court sustained; taking the case from the jury, and directing a judgment for the respondent. The challenge was based upon two grounds: (1) That the respondent undertook to treat the appellant gratuitously, and is liable only for the failure to use ordinary care in selecting the surgeon, and that there was no evidence tending to show that it had been negligent in selecting the surgeon; and (2) that there was no evidence that the surgeon selected treated the appellant in a negligent or unskillful manner.

The facts bearing upon the first ground of challenge are substantially these: The respondent is a railway company, and the appellant was one of its employees. The appellant was injured by falling over a low switch stand in the yard of another railway company while on his way from his place of employment to his home after quitting his work for the day. He was immediately taken to the hospital with which the respondent had arranged for the care of its injured employees, and there placed under the treatment of the respondent's surgeon. The appellant had been in the employ of the re-

Sawdey v. Spokane Falls & N. Ry. Co

spondent for some 2½ years. During that time the respondent had deducted monthly from his wages certain fixed sums, based on the amount paid him, which it had retained and credited on its books to its hospital fund. There was no special contract entered into between the appellant and the respondent defining the respondent's undertaking in consideration of these deductions, nor was it shown whether or not the appellant had rules applicable thereto. The appellant testified that he made no objection to the company's making such deductions, and that nothing was ever said to him concerning its purpose in so doing, but that it was the custom of all railroad companies of which he had knowledge to make such deductions, and that he understood that he was entitled, in consideration thereof, to hospital accommodations and medical and surgical treatment at the respondent's expense for any sickness he should have or any injury he should receive while in the company's employ. It was shown that the company made like deductions from the wages of all of its employees; that these deductions exceeded by a considerable sum the amount expended in the care of its sick and injured employees; that, while a separate account of the fund was kept on the books of the company, the fund itself was not kept separate from the company's general fund, but was commingled therewith, and used in the transaction of the general business of the company; and that the amount of the account, as shown on its books, was, to use the language of one of its officers, "voluntarily reduced at one time." It was shown, also, that the respondent had treated others of its employees who had become sick and injured while in its employ, without question as to the cause or source of the sickness or injury; and certain of these testified that their understanding of the respondent's undertaking was as the appellant had testified. The respondent, however, in answer to certain interrogatories propounded to it by the appellant at the commencement of his action, stated that it undertook to treat only such of its employees as should be injured in the course of their employment, and that, while it had treated certain of them for injuries not so received, it had done so voluntarily,—not because it was obligated to do so. The respondent's contention that it undertook gratuitously to treat the appellant is rested first upon the fact that the appellant was injured after he had ceased his work for the day, and the claim that there was no evidence that it contracted, for a consideration, to treat him for an injury so received. But it seems to us that unless its answer, to the effect that it undertook to treat only such of its employees as should be injured in the course of their employment, is to be taken as conclusive, there was here some evidence from which the jury might have found that its liability was not thus limited. The respondent may, it is true, fix the terms upon which it will receive any one into its service. This it may do by special contract, or by general rules called

Sawdey v. Spokane Falls & N. Ry. Co

to the attention of those seeking employment in its service; but, in the absence of such special contract or general rules, the contract is such as the law implies from the acts of the parties and the surrounding circumstances, and cannot be governed by any secret or undisclosed limitations either of the parties may have in mind. Here the acts of the parties, the surrounding circumstances, and the conduct of the appellant with relation to the fund collected, are as much consistent with the idea of contract to treat the employees for injuries received in whatsoever manner, as it is of one to treat only for injuries received in a particular way; and the question was therefore one for the jury, and not the court. But there is another ground for requiring the question to be submitted to the jury: There was evidence tending to show that the respondent had never made it known that it claimed that its contract was only to treat its employees for injuries received by them in the course of their employment. It had always, so far as shown, acted to the contrary. It took the appellant to its hospital and entered upon his treatment without informing him that its contract was limited, or that it claimed to be treating him gratuitously. Clearly, on the principle of estoppel, it ought not to be heard now to say, in order to escape liability for malpractice, that it was only extending to him a charity. Nor was the answer to the interrogatory conclusive of the question of the respondent's liability, although introduced in evidence by the appellant. Answers to interrogatories are in the nature of admissions. While the party calling for them may put them in evidence for the admissions they contain, he is no more bound by their statements against his interest than he is bound by the statements of a witness he may call, and who may testify in part against his interest. He can still introduce evidence contradictory of such statements, and leave it to the jury to determine wherein the truth lies. Moreover, the right to contradict answers to interrogatories, though introduced by the party calling for them, is expressly granted by statute. 2 Ballinger's Ann. Codes & St. § 6012; *Denny v. Sayward*, 10 Wash. 422, 39 Pac. 119.

The second ground is that the evidence is insufficient to make a case for the jury, under the rule of *Richardson v. Coal Co.*, 10 Wash. 648, 39 Pac. 95. This claim is founded upon the concluding part of the opinion in that case, where this language is used: "But, suppose the contention of the respondent to be true,—that the appellant so conducted itself that it caused the respondent to believe that it was furnishing to him surgical treatment, and that it is estopped from denying that such was the fact; does it follow, under the facts of this case, that it is liable for the malpractice of the physician? We think it does not. This hospital was maintained and the physician provided for the sole purpose of relieving sick and injured employees, without expense to them, and without any intention on the part of the company of making any

Sawdey v. Spokane Falls & N. Ry. Co

profit out of the undertaking. It was therefore a charitable institution, and it was supported by the contributions of employees, and carried on in their interests. And if the company did employ the physician, as claimed by respondent, to look after and treat the sick and injured, it is not liable for his negligence, but is responsible only for want of ordinary care in selecting him." But it must not be overlooked that this expression had reference solely to the facts shown in the record then before the court. In a previous part of the opinion the court stated that there was positive testimony to the effect that the coal company had no physician in its employ, and maintained no hospital; that the doctor whose malpractice was complained of was actually employed by a committee of the employees who contributed the funds; that the hospital where the injured employee was treated was under the control of the same committee; that the respondent in that case knew that there was a doctor at the company's mines, and some kind of a hospital, and concluded from those facts that the company had contracted to furnish him the privileges of a hospital and the service of a physician. In such a case it was, perhaps, proper to say that, conceding the company was estopped to deny that it employed the physician, it could be held only for want of care in selecting him, for the hospital seems not to have been under the company's control, and the court expressly states that there was no intent on the part of the company to make a profit out of the undertaking. In reality, therefore, the company was merely a trustee of the fund. In the case before us it is conceded that there was some form of contract, the evidence being in dispute only as to its extent. Furthermore, the employees here have nothing to do with the hiring of the surgeon or with the maintenance of the hospital; nor is the respondent, in any sense, a trustee of the fund it collects. All of the surplus over and above the cost of treating its employees inures to its benefit, and it recognizes no responsibility to account for it to any one. There is therefore in this case both the element of contract and profit, and if there were no other differences, this alone would distinguish the cases. But the case in question was before this court three times, and from the several opinions filed it can be gathered that the court did not intend to lay down the broad rule the respondent contends for. In the first opinion (6 Wash. 52, 32 Pac. 1012, 20 L. R. A. 338) this language was used: "If, on the other hand, the company was conducting a hospital, with its own physician, for the purpose of deriving profit therefrom, or if it contracted with the appellant to furnish him with the services of a competent physician, and to properly treat him in case of an injury, it would be liable for the negligence or want of skill of its physician in attending him." On the second appeal the opinion in consideration was delivered. On the third appeal (18 Wash. 368, 51 Pac. 402, 1046) it was said that the case was really reversed on the

Sawdey v. Spokane Falls & N. Ry. Co

second appeal because testimony irrelevant to the issues had been admitted on the trial. The only inference that can be drawn from this is that the court concluded on the second hearing that there was not sufficient evidence to justify a finding on the part of the jury that the company was conducting a hospital for the purpose of deriving a profit therefrom, or that it had contracted to treat the injured employee for his injury. It is not authority for the broad proposition that an employer, where he maintains a hospital for profit, or contracts, for a consideration, to treat his sick and injured employees, is not liable for the malpractice of the physician or surgeon he employs, notwithstanding he exercised due care in the selection of such physician or surgeon. On the contrary, the case, as a whole, is authority for the opposite contention, and if in this case the respondent did contract, for a consideration, to treat its employees for any injury they might receive while in its employ, it is liable for the malpractice of the surgeon employed to treat the appellant; and this question, as we say, should have been submitted to the jury.

Was there any evidence of malpractice on the part of the surgeon? The appellant, after being taken to the hospital, was taken in charge by the respondent's surgeon. The surgeon reduced the fracture, and bandaged to the leg, to hold the fractured bones in place, a long splint, reaching from under the arm to the foot; placing the leg, after being so treated, between small sand bags; using no extension or counter extension appliances. It was testified by one of the witnesses that the surgeon stated at the time that this treatment was only temporary, and that he would permanently fix it in the morning, but that in the morning, after an examination, he concluded that it was well enough as it was, and left it in that condition for some three weeks. It further appeared that at the end of that time the surgeon removed the splint, but immediately replaced it, leaving it on the leg for some two weeks more; that he then removed the splint permanently, telling the patient to use the leg as much as possible; that the patient did attempt to comply with the doctor's directions, but found he could not bear any weight upon the leg,—could not bear to have it hang down, or even touch it upon the floor; that the doctor thereupon put it in a plaster of paris cast, whereupon the patient was taken to his home, where he remained in bed some 10 days more, when the cast was removed. The leg at that time proved to be very crooked,—“bowed like a barrel stave,” as a witness expressed it; the foot of the injured leg reaching only to the ankle of the other. A consultation with other physicians was then held, when it was decided that a further operation was necessary. The appellant was then taken back to the hospital, the leg straightened and dressed with suitable splints, and an extension appliance applied thereto. The patient then remained

Sawdey v. Spokane Falls & N. Ry. Co

in the hospital for six weeks more, when the splints were removed, and the leg placed in a plaster of paris cast, which was left thereon some ten weeks. When this was removed the leg was found to be somewhat shrunk in size, something like an inch shorter than the other, and the knee joint affected; not locking or catching as it should, so that when walking it falls back out of a proper line some three or four inches. It was testified by the two expert witnesses called by the appellant that a fracture such as the appellant had, being an oblique fracture in the lower third of the femur, was a difficult one to treat, owing to the difficulty of maintaining the fragments in their proper position; that there were several methods used in practice, and sanctioned by authority, for treatment of such fractures; and that from any of them bad results were not uncommon. It was testified, also, that a shortening of the leg was to be expected, that a shrinking of the limb was almost a necessary consequence, and that the affection of the knee joint was not an evidence of bad surgery. They also said, in effect, that the final result in the appellant's case was not worse than might have been expected from the nature of the injury. One of the witnesses, on cross-examination, said that the treatment of the injury applied by the first surgeon was sanctioned by some authority, and that he thought he had seen very good results obtained by such treatment; the other, that it was not the usual method of treating oblique fractures of the femur in an adult person; that in such cases it is difficult to hold the fracture in place or prevent curvature, and that extension and counter extension appliances are usually employed for these reasons; that there were no splints known that would overcome the ordinary contraction of the muscles in an adult muscular person; and that, the more muscular a patient is, the more difficult it is to overcome or prevent such contraction. It was also shown that the respondent at the time of the injury was about 30 years of age, was unusually muscular, and that he had theretofore always enjoyed good health. It was on this branch of the case that the trial judge sustained the challenge of the respondent to the sufficiency of the evidence. From his remarks when passing upon the motion, it would seem that he reached this conclusion from the fact that the appellant's expert witnesses testified that bad results were liable to follow from this character of injury, no matter how skillfully the injury may be treated, and that the results finally obtained were not worse than might have been expected. But it seems to us that this is not conclusive of the respondent's liability. To secure the result finally obtained, the appellant was obliged to submit to a second operation, with its accompanying dangers, delay in recovery, and consequent pain and suffering. This was claimed as an element of damage in the complaint; and, if it was made necessary by the maltreatment of the surgeon first in charge, it can be recovered for, no matter how successful the final operation was.

Sawdey v. Spokane Falls & N. Ry. Co

The contract implied by law from the mere employment of a surgeon is that he will treat the injury he is employed to treat with ordinary diligence and skill. This requires that he bring to its treatment such a degree of skill and diligence as surgeons practicing in the same general neighborhood, in the same line of practice, ordinarily have and exercise in like cases. He must not experiment in his treatment of the injury. On the contrary, if he desires to avoid liability for his mistakes, he must treat it in some method recognized and approved by his profession as most likely to produce favorable results. If there be more than one of these applicable to the particular case in hand, he is not, of course, liable for an honest mistake of judgment in his selection of the method; but if bad results follow, and liability therefor is to be avoided, it must appear that the treatment applied was approved and recognized, as well as that it was pursued with ordinary diligence and skill. Here the evidence does not fully meet these requirements. While one of the surgeons does say that the treatment first applied was approved by some authority, and that he had seen good results follow from it, he does not say that it was the usual method of treating such fractures, or that he approved of the practice in any case. Much less does he say that it was proper treatment for the case in hand. He was one of the consulting surgeons who advised the second operation, and the one who seems to have had it in charge. It is worth noticing, at least, that he did not, in his treatment of the injury, pursue the treatment adopted by the first surgeon; and it will be remembered that the other surgeon testified unqualifiedly that it was not the usual method of treatment, and that the surgeon in charge seems to have been of the opinion, on first thought, that the treatment was not sufficient for the particular injury. The fact, also, that a second operation was necessary, to obtain the results finally obtained, is some evidence that the original attempt was not performed with that degree of skill which a surgeon ordinarily brings to the treatment of such an injury. On the whole, therefore, we think there was some substantial evidence to the effect that the appellant had been subjected to unnecessary danger, delay in recovery, and pain and suffering, and that for these injuries he was entitled to recover.

In view of the line of argument pursued in the appellant's brief, and the fact that the cause must be remanded for a new trial, it is well to say the respondent did not, by its contract, undertake to effect a cure of the appellant's injury, or restore his broken limb to its normal condition. It was in no wise responsible for the original injury, and it undertook only to bring to its treatment that ordinary diligence and skill which surgeons usually exercise in similar cases; and, if it did this, it is not responsible for the results. But if it did not so treat it, it is responsible only for the injury its failure to do so entailed, not for the injury as a whole. Its liability is measured

Atlantic & D. Ry. Co. v. West

by its own dereliction of duty, not for everything the appellant may have lost or suffered because of the accident. It is well to say, also, that what we have said concerning the evidence is not to be taken as conclusive of the questions discussed. What we mean is that the evidence presents questions upon which the appellant was entitled to the judgment of the jury whether or not he had suffered a damage at the hands of the respondent, not that his right of recovery is conclusively established.

The judgment is reversed and the cause remanded for a new trial.

REAVIS, C. J., and MOUNT, DUNBAR, and ANDERS, JJ., concur.

ATLANTIC & D. RY. CO. v. WEST.

(*Supreme Court of Appeals of Virginia, Dec. 11, 1902.*)

[42 S. E. Rep. 914.]

Appliances—Duty of Master.*

It is the duty of a master to use ordinary care to provide reasonably safe machinery and appliances for the use of his servants.

Same—Evidence.

In an action by a servant for personal injuries, evidence *held* not to show a want of ordinary care on the part of a master in the construction of a platform by the giving way of which the servant was injured, where the defect could not have been discovered by most careful inspection.

Error to circuit court, Norfolk county.

Action by S. B. West against the Atlantic & Danville Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

A. P. Thom, for plaintiff in error.

R. C. Marshall and C. W. Coleman, for defendant in error.

KEITH, P. S. B. West was employed as station master at Shoulder's Hill, on the line of the Atlantic & Danville Railway, and sustained an injury by a fall from the platform on the 20th of March, 1891, for which he brought suit, and upon a demurrer to the evidence the jury rendered a verdict in his favor for \$750, for which the court gave him a judgment, and the case is before us upon a writ of error awarded upon the petition of the railway company.

West had been in the employment of the plaintiff in error as station master at the place where he received his injury for about seven years. There was upon one side of the depot building the main line of the railroad. Upon the opposite side was a switch, and the building and the convergence of the switch and main line formed a small triangle, which was

*See foot-note appended to *Atchison, T. & S. F. Ry. Co. v. King-scott* (Kan.), 4 R. R. R. 528, 27 Am. & Eng. R. Cas., N. S., 528.

Atlantic & D. Ry. Co. v. West

occupied by a platform about $5\frac{1}{2}$ feet in height. Eighteen months or two years before the accident a part of this platform had been cut off, leaving a passageway about $2\frac{1}{2}$ feet in width, supported by planks fastened to two sills, the ends of the planks furthest from the building projecting over the sills from 3 to 6 inches. At the time of the accident West was passing along this passageway from one side of the building to the other in discharge of his duty, and, stepping upon the end of one of the planks, it tilted up, and he fell to the ground, broke an arm, and strained one of his hips. The plank was about 10 inches in width and about 2 inches in thickness. There was nothing in the appearance of the platform to indicate that it was out of repair, or to give any warning of danger. In the plank there was one nail hole, and another hole into which it seemed there had been an effort to drive a nail, which had not penetrated more than $1\frac{1}{2}$ inches; at least it had not gone through the plank. The evidence is not satisfactory as to whether a nail had ever penetrated the sill so as to attach the plank to it, and a jury would perhaps have been warranted in finding, if that were essential to their verdict, that it had not been nailed down at the time of its construction. The platform had been originally constructed some years before the accident. It had been remodeled, and cut down about 18 months or 2 years before the accident. During all that period it had been in constant use, and was apparently well constructed and in good repair.

It is the duty of the railroad company to exercise ordinary care to furnish a reasonably safe place to its employees in which to perform their duties. "It is a general rule of law of master and servant, repeatedly laid down by this court, that the master shall use ordinary care and diligence to provide reasonably safe and suitable machinery and appliances for the use of the servant, and the master will be held liable for an injury to the servant which results from the omission to exercise such care and diligence." *Railway Co. v. Mauzy*, 98 Va. 696, 37 S. E. 285; *Bertha Zinc Co. v. Martin's Adm'r*, 93 Va. 791, 22 S. E. 869; *Robinson's Adm'r v. Dininny*, 96 Va. 41, 30 S. E. 442; and *Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976.

During the year in which that platform had been in existence it had been in daily use, and had been walked upon in safety by perhaps thousands of people. One of the witnesses for the plaintiff says that he had perhaps crossed it more than 100 times, and the plaintiff himself had crossed it more frequently than any one else. Under such circumstances we cannot say that ordinary care was not exercised in its construction to provide a reasonably safe place for those whose duties were to be performed in connection with it. It seems from the evidence, as we have already remarked, that there was nothing about the appearance of this platform at the point where the accident occurred to excite any suspicion of a

Callahan v. St. Louis, etc., Ry. Co

lurking danger, but that it was a defect which would not have been disclosed to the most careful inspection; and any other conclusion upon this branch of the case would only have the effect of involving the defendant in error in the imputation of contributory negligence, for under the rules of the company it was his duty to keep himself advised as to the depot, platform, and grounds belonging to the company, and report upon their condition.

Upon the whole case we are of opinion that there is error in the judgment of the circuit court, for which it should be reversed.

CALLAHAN v. ST. LOUIS MERCHANTS' BRIDGE TERMINAL
RY. CO.

(*Supreme Court of Missouri, Dec. 10, 1902.*)

[71 S. W. Rep. 208.]

Employers' Liability Act—Application.

Rev. St. 1899, § 2873, provides that every railroad corporation in the state shall be liable for all damages sustained by any servant "while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof": *held*, that it was not limited in its application to servants of the railroad company actually engaged in the operation of trains thereon, but included all servants whose work was directly necessary for the running of trains over a track, and therefore it included section hands engaged in repairing the road.

Same—Same.

The statute, as so construed, is not unconstitutional, as subjecting railroad companies to a liability to their employees not imposed on other persons or companies under similar conditions.

Same—Railroad Work.

Where a section hand was stationed in the street below defendant's railroad track to warn other members of the section gang when it was safe for them to throw ties taken from the railroad into the street, and to warn pedestrians, and to remove the ties from the street, and such section hand was injured by being struck by a tie negligently thrown by the gang without being notified that it was safe to do so, while he was engaged in removing a child from a place of danger in the street, such section hand "was engaged in the work of operating such railroad," within Rev. St. 1899, § 2873.

Robinson, J., dissenting.

In banc. Appeal from St. Louis circuit court; Franklin Ferris, Judge.

Action by Thomas Callahan against the St. Louis Merchants' Bridge Terminal Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The following is the opinion in division No. 1:

MARSHALL, J. This is an action predicated upon section 2873, Rev. St. 1899, for damages for personal injuries, by the plaintiff, an employee of the defendant, alleged to have been received in consequence of the negligence of the plaintiff's fellow servants, employees of the defendant. The plaintiff

Callahan v. St. Louis, etc., Ry. Co

recovered a judgment for \$6,500 in the circuit court, and the defendant appealed.

The pertinent allegations of the petition are as follows: "That the defendant was a corporation, and operated a railroad in the state of Missouri. That on the 15th day of November, 1898, the plaintiff was in the service of the defendant, aiding in operating its railroad at or near the bridge approach over Ferry street, in the city of St. Louis. That it was the duty of the plaintiff at said time to watch that people or vehicles were not injured by the fall of ties which were being removed by defendant's employees from its roadbed, and thrown down about 50 feet to the surface of Ferry street; and also to remove such ties from the street. That the rule and custom for doing the work was for the men above, before throwing a tie down to the street, to give notice to the man below that a tie was to be thrown, and then wait for a signal from him, before throwing the tie, that it was right and safe to throw the tie, thus enabling plaintiff to warn passersby out of danger and to keep out of danger himself. That on the day in question, whilst the plaintiff, in the due discharge of his said duty, was warning off and removing a child from said street, where it was in peril of a falling tie, should one be thrown, the defendant's servants above carelessly, and without giving any warning of their intention to throw down a tie, and, without receiving any signal from plaintiff that it was safe to do so, threw down a tie, which struck and injured the plaintiff." There was a further assignment of negligence, in that defendant's acting foreman negligently directed the tie to be so thrown without the usual signals. The answer is a general denial, coupled with the following special pleas: "Further answering plaintiff's petition, defendant states: That the injuries complained of by plaintiff in said petition were produced by the negligence of plaintiff contributing to the cause thereof. That plaintiff's fellow servants gave warning of their intention to lower the tie mentioned in plaintiff's petition, and plaintiff failed to heed the same. That it was usual and customary, in the lowering of the ties mentioned in plaintiff's petition, for plaintiff to notify his co-employees of the approach of pedestrians or vehicles, so that such ties might be held by said co-employees until such pedestrians or vehicles had passed; and plaintiff failed to give such notice in this instance, and by reason of the failure of plaintiff to so warn the employees of defendant of the approach of the pedestrian mentioned in plaintiff's petition, as was his duty, such tie was lowered and thrown down, whereby plaintiff was injured. That plaintiff failed and neglected to take reasonable and ordinary precautions to observe his surroundings, or to avoid the obvious dangers of his said situation, and thereby said injury was directly occasioned by his own omission to use ordinary care at and immediately before the time of his said injury. Further answering, defendant says that the injury

Callahan v. St. Louis, etc., Ry. Co

complained of by plaintiff was occasioned by a danger incident to his said employment, and which plaintiff assumed in entering upon said employment. Further answering, defendant says that, if the injury complained of by plaintiff was occasioned by the negligence of defendant's servants, as alleged in plaintiff's petition, the said servants were fellow servants of plaintiff, and plaintiff and said fellow servants were not, at the time mentioned in plaintiff's petition, engaged in the work of operating defendant's railroad, and therefore defendant is not liable therefor." The reply is a general denial.

The trial disclosed the following facts: The defendant's railroad crosses Ferry street, in the city of St. Louis, by an overhead bridge, which is some 50 feet above the level of the street. The plaintiff was a member of a section gang that was engaged in repairing the railroad by taking out old ties and putting in new ones. When the old ties were taken out, they were thrown down onto Ferry street, instead of being carried away. The plaintiff was stationed on Ferry street to warn passers-by of the danger, and to remove the ties that were thus thrown upon the street. When the gang on the bridge were about to throw down a tie, they notified the plaintiff of their intention, and he signified to them whether or not the "coast was clear," and they did not throw the tie unless he so signified. While so engaged in such work, a small child appeared on Ferry street, and was in a place of peril. The plaintiff went to her, and, while engaged in removing her, the gang on the bridge threw a tie down on the street, which struck the plaintiff on the leg, and injured it so that it had to be amputated. The gang on the bridge gave the plaintiff no notice of their intention to throw the tie, and the plaintiff did not signify to the gang on the bridge that it was unsafe to do so, nor that the child was in peril, nor that he was going to or had gone to the child to remove it from its perilous position.

Two legal propositions present themselves upon this record: First, who are embraced in the provisions of section 2873, Rev. St. 1899? and, second, does the plaintiff come within such classes? and of these in their order.

1. Who are embraced in the provisions of section 2873, Rev. St. 1899? That section is as follows: "That every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad, by reason of the negligence of any other agent or servant thereof: provided, that it may be shown that the person injured was guilty of negligence contributing as a proximate cause to produce the injury." The defendant contends that this law does not embrace every employee of a railroad, but that it applies only to such employees of a railroad as are subjected, by the character of the work they are employed to do, to the hazards incident to the running of a train. And,

Callahan v. St. Louis, etc., Ry. Co

furthermore, the defendant contends that, if the law is construed to cover railroad employees who are not subjected to such hazards, but are only subject to such risks as would be incurred by the employees of any other person or corporation when engaged in similar work, then the law violates the equality clause of the federal constitution, in that it subjects the defendant to a liability to its employees that is not imposed upon any other person or company under similar conditions. On the other hand, the plaintiff contends that the law embraces not only the employees who are actually employed in moving a train, but also all those whose work is directly essential to enable the trains to move; and, as applied to this case, that it embraces a section gang engaged in repairing the track to enable the trains to safely run over it, and that the plaintiff was a member of such section gang, and that his duty was as directly connected with such work as was the work of any of the other members of the gang that were working upon the bridge. This case is one of first impression in this court. The only case bearing on this question that has heretofore been adjudicated in this state is *Stubbs v. Railroad Co.*, 85 Mo. App. 192. In that case the Kansas City court of appeals, speaking through Ellison, J., held that the law embraced members of a section gang that was engaged in removing old rails and putting in new ones, and there one of the gang was permitted to recover for injuries received by the negligence of another member of the gang in suddenly dropping one end of a rail which he and the plaintiff were carrying. It is all-important to keep in mind the language of the statute. It is that the railroad shall be liable for all damages sustained by any agent or servant thereof "while engaged in the work of operating such railroad" by reason of the negligence of any other agent or servant thereof. Defendant contends that this statute was taken from the laws of Iowa, and that the interpretation of the courts of that state construing their law must be borrowed from that state along with the law itself, and that the court of Iowa hold that the law only embraces such employees as are injured by the actual moving of trains, and therefore the same construction should be placed upon our statute. The chief difficulty encountered in such a line of reasoning is that there is nothing to show that our law was borrowed from or modeled after the Iowa law. The language of our law is quite different from the Iowa statute. The first statute upon this subject that was adopted in Iowa was the act of 1862, which was as follows: "Every railroad company shall be liable for all damages sustained by any person, including employees of the company, in consequence of any neglect of the agents, or any mismanagement of the engineer or other employee of the corporation to any person sustaining such damages." Acts 9th Gen. Assemb. p. 198. The courts of that state held that this act was limited to such employees as were injured by the negligence of fellow serv-

Callahan v. St. Louis, etc., Ry. Co

ants while engaged in moving trains, and that any other construction of the act would constitute class legislation, and would violate the equality clause of the federal constitution. *Deppe v. Railroad Co.*, 36 Iowa, 52. Afterwards, in 1873, the legislature of that state amended the law so as to make it read as follows: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employees thereof, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed." Rev. Code 1873, § 1307. In *Foley v. Railroad Co.*, 64 Iowa, 644, 21 N. W. 124, it was argued that this amendment did not change the act of 1862 as to liability for mere acts of negligence, but that it simply superadded a liability for willful wrongs. But the supreme court held otherwise, and said that it could not have been the intention of the legislature to create one liability for negligent wrongs and a different liability for willful wrongs, and then adhered to the rule laid down in the *Deppe Case*. And the same rule had obtained in that state ever since. *Malone v. Railroad Co.*, 65 Iowa, 417, 21 N. W. 756, 54 Am. Rep. 11; *Reddington v. Railroad Co.*, 108 Iowa, 96, 78 N. W. 800. It will be observed that in both of the Iowa acts the railroad was made liable for damages sustained by any person, including employees, "in consequence of any neglect of the agents, or any mismanagements of the engineer or other employee of the corporation to the person sustaining such damages." Our statute is quite different, for it makes the railroad liable to any employee for damages sustained by him, "while engaged in the work of operating such railroad, by reason of the negligence of any other agent or servant." Under the Iowa cases, any employee who is injured by another employee's negligence while moving a train can recover. It matters not what work the injured employee is doing. The test is, was he injured in consequence of the negligence of another employee or engineer in moving a train? Under our statute, to entitle the injured servant to recover, it must be shown that he sustained his injuries, "while engaged in the work of operating such railroad," "by reason of the negligence of any other agent or servant." This is very different from the Iowa statute. Here the injured person must be injured "while engaged in the work of operating such railroad"; injured, not necessarily by the negligence of another employee or engineer while actually moving a train, but injured by the negligence of any other employee of the railroad. In Iowa the injury must have been inflicted by the moving of a train. In Missouri the person injured must have been actually engaged in the work of operating such railroad,

Callahan v. St. Louis, etc., Ry. Co

not necessarily in operating the train. The two statutes, therefore, are almost the antitheses of each other, and our law cannot properly be said to have been taken from or modeled after the Iowa law. The major premise of the defendant's syllogism therefore fails, and hence the conclusion falls with it.

The fellow-servant laws of other states and the judicial interpretations thereof afford interesting and legitimate subjects of reference in construing our law on that subject. The statute of Kansas (Gen. St. 1901, § 5858) is almost identical with the statute of Iowa of 1862. It is as follows: "Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage." The Kansas courts, however, place a very different construction upon their statute from that placed upon the Iowa statute by the courts of that state. The rule in Kansas is that, to entitle an injured employee to recover, it is necessary for him to show that he was injured when performing a service for the railroad that was necessary to the use and operation of the road, and it is not essential that he show that the injury was caused by a fellow servant while moving a train. *Railroad Co. v. Vincent*, 56 Kan. 347, 43 Pac. 251. This case is similar in all essential respects to the case of *Stubbs v. Railroad Co.*, 85 Mo. App. 192. See, also, *Trust Co. v. Thomason*, 25 Kan. 2, where one section hand's negligence caused injury to another section hand while both were on a hand car; *Railroad Co. v. Harris*, 33 Kan. 421, 6 Pac. 571, where one section hand's negligence injured another section hand while the two were taking out old rails and putting in new ones; *Railroad Co. v. Koehler*, 37 Kan. 463, 15 Pac. 567, where the negligence of one employee while unloading a car caused a rail to fall on another employee similarly employed; *Railroad Co. v. Brassfield*, 51 Kan. 167, 32 Pac. 814, where a section gang was unloading ties from a car for the purpose of repairing the track, and one negligently let a tie fall on another employee, and injured him; *Railroad Co. v. Pontius*, 52 Kan. 264, 34 Pac. 739, where one bridge carpenter negligently injured another while loading timbers on a car to be carried to another part of the road to be used in a bridge. The case last cited went to the supreme court of the United States, and is reported in 157 U. S. 211, 15 Sup. Ct. 585, 39 L. Ed. 675. In that case the supreme court of the United States, speaking through Chief Justice Fuller, after setting out the Kansas statute, said: "In *Railway Co. v. Mackey*, 33 Kan. 298, 6 Pac. 291, the validity of this law was drawn in question on the ground of repugnancy to the constitution of the United States, and its validity sustained. The case was brought here on error, and the judgment of the state court affirmed. *Railway Co. v. Mackey*,

Callahan v. St. Louis, etc., Ry. Co

127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107. As to the objection that the law deprived railroad companies of the equal protection of the laws, and so infringed the fourteenth amendment, this court held that legislation which was special in its character was not necessarily within the constitutional inhibition if the same rule was applied under the same circumstances and conditions; that the hazardous character of the business of operating a railroad seemed to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public; that the business of other corporations was not subject to similar dangers to their employees; and that such legislation could not be objected to on the ground of making an unjust discrimination, since it met a particular necessity, and all railroad corporations were, without distinction, made subject to the same liabilities. It is now contended that the plaintiff was a bridge builder; that the legislation only applied to employees exposed to the peculiar hazards incident to the use and operation of railroads; that the railroad company could not be subjected to any greater liability to its employees who were engaged in building its bridges than any other private individual or corporation engaged in the same business; and that the statute has been so construed in this case as to make the company liable to its employees when engaged in building its bridges, notwithstanding bridge building was not accompanied, and had not been treated by legislation as accompanied, by peculiar perils, thus discriminating against the particular corporation irrespective of the character of the employment, in contravention of the fourteenth amendment. But the difficulty with this argument is that the state supreme court found upon the facts that, although the plaintiff's general employment was that of a bridge carpenter, he was engaged at the time the accident occurred, not in building a bridge, but in loading timbers on a car for transportation over the line of defendant's road; and *Railway Co. v. Haley*, 25 Kan. 35, *Railway Co. v. Harris*, 33 Kan. 416, 6 Pac. 571, and *Railroad Co. v. Koehler*, 37 Kan. 463, 15 Pac. 567, were cited, in which cases it was held that a person employed upon a construction train to carry water for the men working with the train, and to gather up tools and put them in the caboose or tool car; a section man employed by a railroad company to repair its roadbed, and to take up old rails out of its track and put in new ones; and a person injured while loading rails on a car to be taken to other portions of the company's road,—were all within the provisions of the act in question; and the court said: 'In this case the plaintiff was injured while on a car assisting in loading timbers to be transported over the defendant's road to some other point. The mere fact that the plaintiff's regular employment was as a bridge carpenter does not affect the case, nor does it matter that the road was newly constructed, nor

Callahan v. St. Louis, etc., Ry. Co

whether it was in regular operation or not. The injury happened to the plaintiff while he was engaged in labor directly connected with the operation of the road, and the statute applies even though it should be given the construction counsel places on it.' And see *Railway Co. v. Stahley*, 11 C. C. A. 88, 62 Fed. 363."

In *Railroad Co. v. Stahley*, 11 C. C. A. 88, 62 Fed. 363, 27 U. S. App. 157, a railroad employee was injured by the negligence of his fellow employees in letting drop one end of a heavy iron driving rod that they were carrying to attach to a new locomotive that was standing in a roundhouse at Horton, Kan., and which they were putting in order for use on the road. Mr. Justice Brewer tried the case on the circuit, and held that, notwithstanding the Kansas fellow servant law was taken from the Iowa statute, the federal courts would follow the interpretation put on the Kansas statute by the courts of that state. Accordingly, a judgment for the plaintiff was allowed to stand, notwithstanding the injury was not inflicted by the negligence of a fellow servant while moving a train.

The fellow-servant statute of Georgia (Civ. Code, § 2321) is as follows: "A railroad company shall be liable for any damage done to persons, stock or other property by the running of the locomotive or cars or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." The court of that state held that an injured employee may recover for injuries sustained by reason of the negligence of a fellow servant if they were engaged in a work that was necessary to be done to enable the railroad company to operate the railroad, and that the right to recover was not limited to cases where the injury was caused by the running of a train. *Thompson v. Railroad Co.*, 54 Ga. 509; *Baker v. Railroad Co.*, 68 Ga. 702; *Railroad v. Ivey*, 73 Ga. 504. In the case last cited one bridge builder was killed by the negligence of another bridge builder, while they were building a bridge across the Oconee river, at Athens, to enable the trains of the railroad to cross the river and land passengers and freight at a new depot in the town.

The supreme court of Wisconsin had the fellow-servant law of that state before it in the case of *Ditberner v. Railroad Co.*, 47 Wis. 138, 2 N. W. 69, and, speaking through Lyon, J., said: "The learned counsel for the defendant maintains that the statute under which this action was brought [chapter 173, Laws 1875] is unconstitutional and void. The statute is as follows: 'Every railroad company operating any railroad or railway, the line of which shall be situated in whole or in part in this state, shall be liable for all damages sustained within this state by any employee, servant or agent of such

Callahan v. St. Louis, etc., Ry. Co

company, while in the line of his duty as such, and which shall have been caused by the carelessness or negligence of any other agent, employee or servant of such company, in the discharge of, or for failing to discharge, their proper duties as such; but this act shall not be construed so as to permit a recovery where the negligence of the person so claiming to recover materially contributed to the result complained of.' It is claimed that this statute violates that principle of constitutional law which prohibits unequal and partial legislation on general subjects, and is therefore void. It is conceded that the act would be a valid exercise of legislative power were its provisions restricted to cases of injury caused by the negligent operation of railways. But it is assumed that the statute is not so restricted; that by its terms it seeks to make a railway company liable for an injury to an employee caused by the negligence of another employee, although the negligent act may have no connection with the operation of the railway of the company. The argument is that, because the same liability is not imposed upon other corporations, the statute is void, within the rule of *Durkee v. City of Janesville*, 28 Wis. 464, 9 Am. Rep. 500. Iowa cases have been cited which seem to assert the doctrine contended for. The statute of that state under which those cases were decided, corresponding with our chapter 173 of 1875, limits a recovery to cases where the injuries were caused by the negligent operation of railways. In view of that limitation, the assertion of the above doctrine in those cases seems to be obiter. It was unnecessary that the court should determine what its ruling would be were a different statute under consideration, or to rule upon a hypothetical statute. We entertain the highest respect for that learned and very able court, and can usually approve its judgments, but are unable to agree with it on this subject. Yet we concur in the judgments of that court in these very cases. We only reject the views stated *arguendo*, and which did not influence or affect the judgments."

The statute of Minnesota (Gen. St. 1894, § 2701) is as follows: "Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof, by reason of the negligence of any other agent or servant thereof without contributory negligence on his part, when sustained within this state, and no contract, rule or regulation between such corporation and any agent or servant shall impair or diminish such liability: provided, that nothing in this act shall be so construed as to render any railroad liable for damages sustained by any employee, agent or servant while engaged in the construction of a new road or any part thereof not open to public travel or use." The supreme court of that state adopts the same rule as that laid down in Iowa, to wit, that the injuries must have been inflicted by the movement of a train, and holds that the statute so constructed is not class legislation, or violative of

Callahan v. St. Louis, etc., Ry. Co

the federal constitution, but says that, if the construction is extended beyond this, it would be subject to those objections. *Johnson v. Railroad Co.*, 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419.

The fellow-servant law of Indiana is the most sweeping and comprehensive of any. It is as follows: "(1) That every railroad or other corporation, except municipal, operating in this state, shall be liable in damages for personal injury suffered by an employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases: First. When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such way, works, tools or machinery in proper condition. Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employee at the time of the injury was bound to conform and did conform. Third. Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf. Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round house, locomotive engine or train upon a railway, or, where such injury was caused by the negligence of any person, co-employee, or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employee or fellow servant, at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having the authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws." This statute came before the supreme court of the United States in *Tullis v. Railroad Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192, and the opinion of Mr. Chief Justice Fuller is so pertinent to the case at bar that it is deemed proper to reproduce it in full. It is as follows:

"The contention is that the act referred to is in conflict with the fourteenth amendment because it denies the equal protection of the laws to the corporations to which it is applicable. In *Railroad Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301, the statute in question was held valid as to railroad companies, and it was also held that objection to its validity could not be made by such companies

Callahan v. St. Louis, etc., Ry. Co

on the ground that it embraced all corporations except municipal, and that there were some corporations whose business would not bring them within the reason of the classification. In announcing the latter conclusion the court ruled, in effect, that the act was capable of severance; that its relation to railroad corporations was not essentially and inseparably connected in substance with its relation to other corporations; and that, therefore, whether it was constitutional or not as to other corporations, it might be sustained as to railroad corporations. In *Leep v. Railway Co.*, 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. Rep. 109, 57 Am. & Eng. R. Cas. 1, and *Railway Co. v. Paul*, 64 Ark. 83, 40 S. W. 705, 37 L. R. A. 504, 62 Am. St. Rep. 154, an act of Arkansas of March 25, 1889, was held unconstitutional by the supreme court of that state so far as affecting natural persons, and sustained in respect of corporations; and in *Railway Co. v. Paul*, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746, that view of the act was accepted by this court because that court had so decided. Considering this statute as applying to railroad corporations only, we think it cannot be regarded as in conflict with the fourteenth amendment. *Railway Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Railway Co. v. Herrick*, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. Ed. 109; *Railroad Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675; *Pierce v. Van Dusen*, 24 C. C. A. 280, 78 Fed. 693, 47 U. S. App. 339; *Insurance Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552. In *Railway Co. v. Mackey* the validity of a statute of Kansas of 1874 providing that 'every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees to any person sustaining such damage,' was involved, and it was held that it did not deny to railroad companies the equal protection of the laws. Mr. Justice Field said: 'The hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liability shall be applied to carriers by canal and stage coaches and to persons and corporations using steam in manufactories.' In *Railway Co. v. Herrick* the same conclusion was reached in respect of a law of the state of Iowa, that 'every corporation operating a railway shall be liable for

Callahan v. St. Louis, etc., Ry. Co

all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding.' In *Railroad Co. v. Pontius*, a bridge carpenter employed by a railroad company, who was injured through the negligence of employees of the company while assisting in loading timbers taken from the false work used in constructing a bridge on a car for transportation to another point on the company's road, was held to be an employee of the company within the meaning of the statute of Kansas, and the validity of that act was again affirmed. In *Pierce v. Van Dusen* a similar statute of the state of Ohio applying to railroad companies was upheld by the circuit court of appeals for the Sixth circuit, Mr. Justice Harlan delivering the opinion of the court. In *Insurance Co. v. Daggs*, in which an act of the state of Missouri in respect of policies of insurance against loss or damage by fire was drawn in question, the objection that the statute discriminated between fire insurance companies and companies engaged in other kinds of insurance was overruled, and it was said that the power of the state to distinguish, select, and classify objects of legislation necessarily had a wide range of discretion; that it was sufficient to satisfy the demands of the constitution if the classification were practical, and not palpably arbitrary, and that the classification of the Missouri statute was not objectionable in view of the differences between fire insurance and other insurance. *Railway Co. v. Mackey* and *Railroad Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585, were cited and approved. And see *Magoun v. Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; *Express Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035; *Railroad Co. v. Matthews*, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909.

"By reason of the particular phraseology of the act under consideration, it is earnestly contended that the decisions sustaining the validity of the statutes of Kansas, Iowa, and Ohio are not in point, and that this statute of Indiana classified railroad companies arbitrarily by name, and not with regard to the nature of the business in which they were engaged; but the supreme court of the state in the case cited has held otherwise as to the proper interpretation of the act, and has treated it as practically the same as the statutes of the states referred to. Indeed, the Iowa statute is quoted from, and the Case of *Beckwith*, as well as that of *Mackey*, relied on as decisive in the premises. As remarked in *Railway Co. v. McCann*, 174 U. S. 580, 586, 19 Sup. Ct. 755, 43 L. Ed. 1093, the contention calls on this court to disregard the interpretation given to a state statute by the court of last resort of the state, and, by an adverse construction, to decide that the state

law is repugnant to the constitution of the United States. 'But the elementary rule is that this court accepts the interpretation of a statute of a state affixed to it by the court of last resort thereof.' This being an action brought by Tullis to recover damages for an injury suffered while in the employment of the railroad company, caused by the negligent act of a fellow servant, for which the company was alleged to be responsible by force of the act, we answer the question propounded that the statute, as construed and applied by the supreme court of Indiana, is not invalid, and does not violate the fourteenth amendment to the constitution of the United States."

It thus appears that everywhere, except in Iowa and Minnesota, the adjudications agree that it is not essential that the injury should have been inflicted by reason of the negligence of a fellow servant while actually engaged in running a car, but that the injured employee may recover if injured by the negligence of a fellow servant while they are engaged in doing any work for the railroad which was directly necessary for the operation of the railroad, and that even so sweeping a statute as that of Indiana was held by the supreme court of the United States not to be repugnant to or violative of the federal constitution. Under the language of our statute it is necessary for the injured employee to show that he was injured "while engaged in the work of operating such railroad." Construed either by its own terms or in the light of the cases cited from other jurisdictions, it results in holding that the right to recover is not limited to cases where the injury is inflicted by reason of the negligence of a fellow servant while actually moving a train or engine, but that the law embraces all cases where the injury is inflicted upon an employee while engaged in the work of operating a railroad by reason of the negligence of any fellow servant who is likewise engaged in the work of operating a railroad, and that the term "operating such railroad" includes all work that is directly necessary for running trains over a track, and that it includes section hands who are engaged in working upon, repairing, or putting in shape the track, roadbed, bridges, etc., over which the trains must run.

2. The next question is whether the plaintiff falls within the class embraced in the act. Section gangs are included. The plaintiff was a member of the section gang that was doing the work. The work being done was directly necessary for the operation of the road. The particular work the plaintiff was doing was to warn passers-by of the danger incident to the negligent manner in which this work was being done, and to remove the ties from the street after the other members of the section gang had thrown them from the bridge to the street. Therefore the work the plaintiff was doing was a part of the work being done by the section gang of which he was a member. It was negligence for the gang to throw the ties from the bridge down onto the street without first learn-

Sankey v. Chicago, R. I. & P. Ry. Co

ing from the plaintiff that it was safe to do so. The practice before the accident was for them to first ascertain that fact from the plaintiff. In this instance they did not do so. They were negligent. The child was in a place of peril. The plaintiff went to it to remove it. He had a right to rely upon it that no ties would be thrown down until he notified the gang that it was safe to do so. He was, therefore, in the discharge of his duty. He was engaged in the work of operating the railroad. He was within the protection of the law. He was not guilty of contributory negligence. He is therefore entitled to recover, and therefore the verdict and judgment of the trial court is right.

The objection that the first portion of the plaintiff's instruction leaves it to the jury to determine as a question of fact whether the plaintiff was engaged in operating the railroad, while such was the question of law, is not tenable. Whether the plaintiff was engaged in operating the railroad at the time he was injured was a mixed question of law and fact. The instruction required the jury to find the fact to be that the defendant was "a section hand laborer, aiding in the work of operating defendant's road," and then declared that, if such was the fact, he was entitled to recover. Properly construed, this instruction only means that the jury must not only find the plaintiff to be a section hand laborer, but that he was at the time of the injury actually engaged in working upon the railroad as such. The instruction, though perhaps not as clearly worded as it might have been, was not erroneous.

Finding no error in the record, the judgment of the circuit court is affirmed.

BRACE, P. J., and VALLIANT, J., concur. ROBINSON, J., dissents.

John H. Overall, for appellant.

A. R. Taylor, for respondent.

MARSHALL, J. The foregoing opinion heretofore rendered by division No. 1 is hereby adopted as the opinion of the court in banc. BURGESS, C. J., and SHERWOOD, BRACE, VALLIANT, and GANTT, JJ., concur. ROBINSON, J., dissents.

SANKEY v. CHICAGO, R. I. & P. Ry. Co.

(Supreme Court of Iowa, Oct. 13, 1902.)

[91 N. W. Rep. 820.]

Negligence—Accumulation of Ice on Switch Track.

It cannot be said, as a matter of law, that allowing snow and ice to accumulate in switch yards or on tracks where brakemen are required to go in the discharge of their duties, so as to expose such employees to danger, is not actionable negligence on the part of a railway company.

Sankey v. Chicago, R. I. & P. Ry. Co**Same—Same—Injury to Brakeman.**

In an action against a railroad company by a brakeman for personal injuries alleged to have been caused by negligently allowing snow and ice to accumulate and remain on a switch track, evidence considered, and *held* sufficient to warrant submission of the issue of defendant's negligence to the jury.

Same—Same—Same—Assumption of Risk—Instructions.

In an action by a brakeman against a railroad company for injuries from snow and ice accumulated on a switch track, defendant alleged that the tracks were in the same condition as all other switch yards on the line, and that plaintiff knew or might have known of such facts, and by remaining in defendant's employ assumed the risk. Evidence was given in support of these allegations. The court instructed that if plaintiff established defendant's negligence, his own injury, and freedom from contributory negligence, he was entitled to recover, and charged as to plaintiff's assumption of all risks necessarily incident to the employment: *held*, that failure to charge as to assumption of the risk arising from defendant's negligence was error; the charge as to assumption of risks incident to the employment not covering the ground.

Same—Same—Same.

In an action against a railroad company by a brakeman for personal injuries alleged to have been caused by negligently allowing snow and ice to accumulate and remain on a switch track, evidence considered, and *held* sufficient to warrant a special finding that plaintiff slipped on ice inside of the rail.

Appeal from district court, Pottawattamie county; W. R. Green, Judge.

Action at law for damages on account of personal injuries occasioned by the alleged negligence of the defendant. Verdict and judgment for plaintiff, and defendant appeals. Reversed.

Carroll Wright and A. L. Preston, for appellant.

Thomas A. Cheshire, for appellee.

WEAVER, J. Plaintiff was in the employ of defendant as head brakeman on a freight train. On the morning of January 6, 1899, the train pulled in upon the side track of the defendant's railroad at the station of Earlham, and plaintiff, in the performance of his duty, undertook to couple the engine to certain cars standing upon such track. In so doing he stepped in front of the moving cars and slipped, as it is claimed, upon a ridge of ice which had formed or accumulated inside of the rail, causing him to fall, and resulting in his feet being crushed beneath the wheels, whereby he was seriously and permanently crippled. This accident, he alleges, was caused by the negligence of the defendant company in so grading and maintaining its yards at Earlham that water would settle and freeze at the point where plaintiff's foot slipped, and where brakemen were required to walk in the performance of their duties, and in permitting the ice to remain thereon and become rough and uneven of surface, thus rendering the yard at that point slippery and dangerous to walk over. The defendant denies plaintiff's claim, and further alleges that the plaintiff had been in its employ for several

Sankey v. Chicago, R. I. & P. Ry. Co

years, and was well acquainted with the condition of the road and tracks with respect to snow and ice; that the condition of the yard and tracks at Earlham at the time of the accident was the same as at other yards generally upon the road where plaintiff worked, and with which he was familiar; that he knew, or with the exercise of reasonable care ought to have known, that ice and snow did at times accumulate thereon, and that, by remaining in the company's employment with such knowledge and means of knowledge concerning the alleged danger, he assumed the risk of all such perils, and waived any right of recovery which he otherwise might have had. Many errors are assigned, but the argument of appellant is confined to a few propositions, which we will briefly consider:

1. It is first urged that defendant cannot be held negligent because of the presence or accumulation of ice and snow upon its tracks and yards. Within certain limitations, this is the correct doctrine. Climatic conditions—heat, cold, rain, snow, and ice—are beyond the control of the employer, and the mere fact of their existence or occurrence does not tend to negative the exercise of reasonable care. But it does not follow that a case cannot arise where the presence or existence of some of these elements is so combined with want of reasonable care by a railroad company in the maintenance of its tracks and yards as to create a danger which is not naturally or necessarily incident to a brakeman's labor. The work of coupling and uncoupling cars, making up trains, taking and discharging freight, opening and closing switches, is done almost exclusively within the yard limits of the stations along the line of road, and, within reasonable limits, the obligation of the master to furnish his servant a safe place in which to work applies to these yards as imperatively as to the repair shops or to the general offices of the company. Reasonable safety, however, does not necessarily mean the absence of danger; for, paradoxical as it may seem, a place of great danger may be "safe," within the terms of the law, if reasonable care has been used to guard against so much of the peril as ordinary prudence would anticipate, and ordinary effort avoid. As we have said, the mere falling of snow or formation of ice is not in itself evidence of negligence on part of the company; but if by reason of the structures or improvements placed upon the yards, or by reason of the method of caring for or maintaining such yard, or by reason of public travel across the same, such snow or ice accumulates in heaps or ridges in places where brakemen are required to go in performing the work required of them, thereby exposing them to danger of slipping beneath the wheels of moving cars, and such obstructions are allowed to remain an unreasonable length of time without effort to remove them, it cannot then be said, as a matter of law, that such company is not negligent. In the case at bar, while the testimony was conflicting, there

Sankey v. Chicago, R. I. & P. Ry. Co

was sufficient to justify the jury in finding that plaintiff's injury was occasioned by his foot slipping upon ice as he was in the act of coupling cars; that this ice had formed several weeks before the accident; and that by reason of public travel, or by reason of the shade of the rail retarding the thawing process at that point, it had assumed the form of an uneven ridge just inside of the south rail, and sloping towards the center of the track. The height of this ridge is variously stated by witnesses as being from two inches to the full height of the rail. Other patches of ice are shown near the same point, but outside of the track; and the evidence, while not entirely clear as to the identical spot upon which plaintiff slipped, is sufficient to sustain the finding of the jury in this respect. There is evidence, also, that it was the custom of the defendant to clear its tracks in station grounds, to some extent, of snow and ice, but this labor, it would seem, was generally confined to "flanging"; that is, to the removal of snow and ice to the width of an ordinary shovel blade just inside of each rail,—a process which the jury might have found would have prevented or removed a ridge of ice of the dimensions and location described by several witnesses. In view of these facts, we think the trial court was right in submitting the question of negligence to the jury. Cities and towns are charged with the duty of providing safe streets and walks for the use of the public. The responsibility of public corporations is in this respect no greater in degree than that which rests upon railroad companies to provide their employees a safe place in which to perform the work required of them. The measure of that duty in each instance is reasonable diligence and care. This is not to be understood as holding the railroad company to the performance of the same acts as may be required of the city or town, but simply that each must exercise the degree of care and caution which reasonable prudence indicates to be necessary in view of the circumstances of the particular case. We have held municipal corporations chargeable with negligence in permitting the accumulation of snow and ice in uneven and irregular masses upon the streets. *Collins v. City of Council Bluffs*, 32 Iowa, 324, 7 Am. Rep. 200; *Hodges v. City of Waterloo*, 109 Iowa, 444, 80 N. W. 523. See, also, *Huston v. City of Council Bluffs*, 101 Iowa, 33, 69 N. W. 1130, 36 L. R. A. 211, and the authorities there cited. The suggestion of counsel that a city is bound to remove snow and ice from its sidewalks, and therefore these authorities are not in point, we think incorrect. It is not correct that cities are "bound to remove snow and ice from their sidewalks." No such duty exists while the snow and ice remain unchanged by the interference of man or other artificial cause. That duty arises only when by reason of such interference with natural conditions the snow or ice becomes ridged or rounded or uneven, or is made to assume some other form or present some other danger than would re-

Sankey v. Chicago, R. I. & P. Ry. Co

sult solely from natural causes. *Huston v. City of Council Bluffs*, 101 Iowa, 36, 69 N. W. 1130, 36 L. R. A. 211; *Broburg v. City of Des Moines*, 63 Iowa, 523, 19 N. W. 340, 50 Am. Rep. 756. That the general principle controlling the cases referred to may, under proper circumstances, be applicable to railway companies, in respect to their care for yards and tracks where trainmen are expected to work, has repeatedly been held; and no court, so far as we have been able to discover, has held to the contrary. *Lawson v. Truesdale* (Minn.) 62 N. W. 546; *Rifley v. Railroad Co.* (Minn.) 75 N. W. 704; *Cregg v. Railway Co.* (Mich.) 52 N. W. 63. The *Rifley Case* is directly in point both in its facts and the legal questions involved. It is there held that a railway company is under obligation to keep its yard in reasonably safe condition for employees who are required to work therein. The Minnesota court having held in earlier cases that, except under peculiar circumstances, a railway company was not chargeable with negligence on account of the filling of cattle guards with snow, it was urged by the defendant in the *Lawson Case* that the same rule was applicable to the care to be exercised over the yards where trainmen and switchmen perform their labors; but the court says that in the cases relied upon in support of such proposition "there is not a word said in either case which can be construed as an intimation that, as a matter of law, a railway employee, when entering service in this climate, assumes all risks which attend the falling of snow or the forming of ice upon or about the tracks and yards, or the removal of the same by the railway companies. Nor have we seen any case in any court laying down that doctrine." In *Fay v. Railroad Co.* (Minn.) 75 N. W. 15, cited by appellant, the plaintiff, under the facts shown, was held not entitled to damages; but the rule by which the company may be held negligent in permitting snow and ice to accumulate in dangerous forms and quantities upon its yards and tracks is distinctly recognized. As we have already suggested, this liability is founded in the familiar rule which required the employer to provide a reasonably safe place to work. The employer cannot remove, and therefore is not liable for, the risks which are attendant upon the operation of natural causes alone; but, when it establishes a yard and side tracks upon which its trainmen are expected to go by day or night to perform a hazardous service with a promptness and speed which ordinarily precludes minute inspection of their pathway, it is but just and right to say that the company shall be held to the exercise of reasonable care in keeping such places free from dangers which ordinary prudence and exertion would eliminate. *Railroad Co. v. O'Brien*, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766; *Kroener v. Railway Co.*, 88 Iowa, 16, 55 N. W. 28. We think, therefore, there was no error in the ruling of the trial court holding that the question of defendant's negligence was for the jury.

Sankey v. Chicago, R. I. & P. Ry. Co

2. By its answer, as we have before stated, defendant alleged, in substance, that the condition of the yard at Earlham in respect to ice and snow was the same as prevailed generally in the yards of the company where plaintiff performed his work; that such condition was open, notorious, and well known to the plaintiff, or, with the exercise of ordinary care, ought to have been well known to him; and that, by remaining in defendant's service with such knowledge and means of knowledge, he assumed the risk arising from such conditions. In stating the issues to the jury the trial court called attention to the issue thus presented, but failed to give any instruction as to the law applicable thereto. The substance of the charge given to the jury was that if plaintiff had established the alleged negligence of the railroad company, the injury to himself by reason thereof, and his freedom from contributory negligence, he was entitled to recover damages. This was a correct proposition, so far as the issue presented by defendant's denial is concerned, but in ignoring the plea of assumption of risk we think there was error. This point is distinctly ruled in *Quinn v. Railway Co.*, 107 Iowa, 710, 77 N. W. 464. The defense being distinctly pleaded, and there being evidence tending to support it, the jury should have been given specific direction in reference thereto. If it be true, as alleged, that the condition of the yard at Earlham was the same as universally prevailed in all the yards along the line, that plaintiff had been for years in the same service, and that he knew, or, as a reasonable man, ought to have known, that defendant was making no effort to prevent or remove obstructions of the kind complained of, then by remaining in such service with such knowledge and means of knowledge he assumed the risk of all the injuries resulting to him by reason of such want of care on defendant's part. The trial court did charge the jury as to the plaintiff's assumption of all risks which are naturally or necessarily incident to the service in which he was engaged, and as to the bearing of his knowledge of the custom and practice of the company upon the question of contributory negligence, but this, we think, does not obviate the objection raised by appellant. The assumption of risk by virtue of his employment is a matter which inheres in plaintiff's case, and the question is sufficiently raised by the defendant's denial of negligence; but assumption of the risk arising from defendant's negligence, if negligence be established, can only be raised by an affirmative plea, and defendant assumes the burden of its proof. It is entirely possible for the jury, in a proper case, to find the defendant chargeable with negligence, and the plaintiff to be free from contributory negligence, and yet to find that, by remaining in the service with knowledge or means of knowledge of the conditions of which he complains, the plaintiff has waived his right of action. It is this latter principle which the charge of the court overlooked.

Central of Georgia Ry. Co. v. Vining

The jury, in response to a question submitted, found specially that plaintiff slipped upon ice inside of the rail. It is strongly urged that this is without support in the evidence. As we have already stated, the testimony in this respect is not clear. Plaintiff in one portion of his testimony states it to be his impression that he was outside of the rail, but has not distinct recollection. Again he says that he might have been between the rails, for all that he knows. He says that he was in the act of making the coupling, and, while he would lift the pin without stepping over the rail, yet it was necessary also to pull open the "knuckle," which was a movement requiring him to go in between the cars. The unexpected and sudden character of the accident, the quick sequence between the fall and injury, and the pain and excitement accompanying it, sufficiently account for his inability to speak with certainty as to his precise position; but the fact that he did slip and fall; that such fall left him with his feet within the rail; that there was a ridge of ice immediately inside of the rail, sloping in the direction his feet appear to have slipped; and that the patches of ice outside of the rail appear to have been somewhat further away,—are circumstances which fairly tend to sustain the jury's finding.

For the error indicated in the second paragraph of this opinion, there should be a new trial, and the judgment below should be reversed.

CENTRAL OF GEORGIA RY. CO. v. VINING.

(*Supreme Court of Georgia, Aug. 9, 1902.*)

[42 S. E. Rep. 492.]

Injury to Employee—Contributory Negligence—Speed—Minimum Time Cars—Rules.

A card furnished by a railroad company to its engineers, and containing a column headed "Minimum time freight trains between stations," but relatively to which there is no rule of the company making it an engineer's duty to regard this minimum time, is not legally binding upon the engineer, so as to forfeit the right of his widow to recover, if he, while attempting to run his train between two stations in less than the time given in the column mentioned, is killed by the negligence of his co-employees.

Same—Same—Burden of Proof.

The plaintiff having clearly showed negligence on the part of the company, it was incumbent on the latter to show that the engineer was negligent. On this point the evidence was conflicting, and the jury having determined the issue in favor of the plaintiff, and the trial judge having approved their finding, this court will not control his discretion in refusing a new trial.

Rulings.

There was no material error in the rulings of which proper complaint is made in any of the other grounds of the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Early county; H. C. Sheffield, Judge.

Carroll v. New York, N. H. & H. R. R

Action by Emma D. Vining against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. D. Kiddoo and Lawton & Cunningham, for plaintiff in error.

Hardeman, Davis & Turner, Hoke Smith, and H. C. Peeples, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

CARROLL v. NEW YORK, N. H. & H. R. R.

(*Supreme Judicial Court of Massachusetts, Worcester, Oct. 31, 1902.*)

[65 N. E. Rep. 69.]

Exceptions.

Exceptions not argued will not be considered.

Injury to Employee Working under Car—Assumption of Risk—Warning.

While plaintiff was working in a car on a side track, a train was pushed violently against it without warning, injuring plaintiff. It was customary to give warning when trains were moved on the side track: *held*, that plaintiff did not assume the risk of the failure to give warning.

Same—Excessive Speed.

Plaintiff also had a right to assume that the train would not be backed on the switch track at an unreasonable rate of speed.

Same—Notice of Claim.

St. 1894, c. 389, § 1, provides, in an action for bodily injury, for a written notice, "which notice shall refer to the injury sustained, and claim damages or payment therefor." A notice stated that plaintiff was injured by defendant's negligence and was signed by a firm of lawyers, but there was no explicit claim of damages: *held*, the requirement that the notice should "claim damages or payment therefor" merely meant that it must appear from the notice that it was intended as a basis of claim, and that the notice given was sufficient.

In Charge of Trains—Absent Conductor.

The conductor of a freight train may properly be found to be in charge or control of it, though he is at the time temporarily absent, if nothing is done meanwhile contrary to his orders.

Exceptions from superior court, Worcester county; Francis A. Gaskill, Judge.

Action by Thomas F. Carroll against the New York, New Haven & Hartford Railroad. Judgment for plaintiff, and defendant brings exceptions. Exceptions overruled.

Dodge & Taft, for plaintiff.

Arthur P. Rugg, for defendant.

LATHROP, J. This is an action of tort, under St. 1887, c. 270, § 1, cl. 3, for injuries received by the plaintiff on May 1, 1900, while in the defendant's employ. The declaration contained five counts. The plaintiff at the trial waived the first and last counts, and the other three counts were submitted to the jury, and a verdict in favor of the plaintiff was

returned on the second and fourth counts. The first of these charges negligence of a conductor in charge of a train, in not warning the plaintiff of the approach of the train, whereby the plaintiff, being in the exercise of due care, was injured. The other count charges the negligence of the conductor to have been the pushing and driving of his train with unreasonable and unnecessary force, and at unreasonable and unnecessary speed, against a car standing on the track of the defendant, in which the plaintiff was then engaged in the course of his employment. The case is before us on the defendant's exceptions.

The plaintiff was employed by the defendant at its Millville station, in Blackstone, to carry the mail, and do work about the cars and freight station, loading and unloading freight. At this station there are four tracks, running north and south, between the passenger station on the east and the freight station on the west of the tracks. The track nearest the passenger station is called the "north-bound track," and the next westerly is called the "south-bound track," these being the main tracks. Next westerly is the so-called "middle track," which connects with the main track at both ends, and next to the freight station is the "house track," so called, which connects with the middle track at both ends. The plaintiff had been in the employ of the defendant two years as a freight handler. At the time of the injury he was in a freight car standing near the southerly end of the house track, engaged with one Hartnett in piling up empty beer kegs in the car. This car stood alone, with its brakes set. From 20 to 50 yards north of the car in which the plaintiff was working were 3 cars, with their brakes set. While the plaintiff was at work piling up the beer kegs in the car standing by itself, a local freight train, bound north, consisting of a locomotive engine, 11 cars, and a caboose, came into the station on the north-bound track, ran about half a mile north of the station, and then backed down onto the house track with such speed that it came into collision with the 3 cars coupled together, and drove them down upon the car in which the plaintiff was working, with sufficient force to send this car from 25 to 30 feet down the track, throwing some of the kegs in the car against the plaintiff, thereby causing the injuries complained of, and throwing other kegs out of the car door. There was evidence that, when a train was coming on the house track, there was a rule or custom that the conductor of the train coming should give a warning, and that no warning was given on this occasion. The fact that it was customary to give a warning does not appear to have been disputed. If we assume that the testimony of the conductor shows a warning to Hartnett, or in his presence, this testimony was contradicted, and so the question was for the jury.

There was contradictory evidence on the question whether the conductor left the train before or after the accident. The

conductor and some other witnesses testified that he left the train when it was opposite the station, going north. A witness for the plaintiff testified that the conductor was on the top of the rear car when the train was backing down, and that the witness saw the conductor give the motion to stop while the latter was on the train. This was of importance only on the question of whether a warning was given.

At the close of the evidence the defendant asked for several instructions which were not given. The first of these (that, on all the evidence in the case, the plaintiff cannot recover) was not argued, and we regard it as waived.

The second request was as follows: "If the jury believe that the injuries suffered by the plaintiff were due to the want of warning of the approach of the cars under the control of the conductor, then this want of warning was one of the risks which the plaintiff assumed in his employment, and he cannot recover." We are of opinion that the judge rightly refused so to rule, and that the question was for the jury. The plaintiff assumed the risk ordinarily incident to the work he was doing, but he had a right to assume that a warning would be given when a train was about to back down on the house track, if, as the testimony showed, it was customary to give such warning. *Davis v. Railroad Co.*, 159 Mass. 532, 34 N. E. 1070. He also had the right to assume that the train would not be driven in on the house track at an unreasonable rate of speed.

The fourth request was: "No sufficient notice, as required by law, was given by the plaintiff to the defendant, and the defendant is entitled to a verdict." The notice is addressed to the defendant, described, in part, as having a usual place of business in Worcester, in the county of Worcester. It is dated May 19, 1900, and proceeds as follows: "I, Thomas F. Carroll, of Blackstone, in said county, hereby give you notice that on the first day of May, 1900, at about 9:45 a. m., while in your employ at the Millville station, on the Providence & Worcester Division of your railroad system, and engaged in loading a freight car, by reason of the negligence of a person in your employ, having charge or control of one of your locomotive engines and trains upon said railroad at said station, a car was so negligently pushed or driven against said car in which I was employed at that time that I was thrown down, and the barrels or kegs in said car in which I was then working were thrown upon me, whereby I was greatly bruised and injured." This was signed: "Thomas F. Carroll, by Dodge & Taft, His Attorneys." The statute in force at this time was St. 1894, c. 389, the first section of which reads as follows: "In an action to recover for bodily injury, or damage to a person in his property, hereafter sustained, no defendant shall avail himself in defense of such action of any omission to state in the written notice now required by law, the time, place or cause of the injury or damage, unless,

Carroll v. New York, N. H. & H. R. R

within five days after the receipt of a written notice given by the person entitled to give the same within the time now required by law, which notice shall refer to the injury or injuries sustained and claim damages or payment therefor, the person or corporation receiving such notice, or some one in his or its behalf, shall give to the person injured, or to the person giving or serving such notice in behalf of the person injured, or to the executor or administrator of the person injured, a notification in writing that the notice given is not in compliance with the law, and requesting forthwith a further written notice which shall comply with the law. And if the person legally authorized to give such notice shall, within five days after the receipt of such notification and request for a further written notice, give a further written notice complying with the law as to the time, place and cause of the injury or damage, such notice shall be of the same legal effect as if it had been given at the time of the original notice, and shall be considered as a part thereof." The objection made to the notice is that it does not comply with the words of the statute above quoted,—“which notice shall refer to the injury or injuries sustained, and claim damages or payment therefor.” It is obvious that, under any construction of the statute, the notice does refer to the injuries sustained. It still is to be considered whether the plaintiff's case should be thrown out of court because the notice does not, in terms, claim damages. The sentence in question is a parenthetical one. The object of the statute is to require the person or corporation notified, if there is any omission in the notice to state the time, place, or cause of the injury or damage, to give within five days a notification that the notice given is not in compliance with the law, and request a further written notice which shall comply with the law. Then if the person legally authorized to give the notice shall within five days give a further written notice complying with the law as to the time, place, and cause of the injury or damage, such notice shall be of the same legal effect as if it had been given at the time of the original notice. It is much more reasonable to suppose that the parenthetical sentence was intended as a statement of the existing law, than as a new enactment. If the defendant's contention is correct, the legislature has put the insertion in a notice of a claim for damages on a higher plane than the statement of the time, place, and cause of the injury. We cannot suppose that this was the intent of the legislature, or that the parenthetical clause means anything more than that it must appear from the notice that it was intended as a basis of a claim against the person to whom the notice is given. Such has been held to be the law since a notice was required to be given. *Kenady v. City of Lawrence*, 128 Mass. 318; *Taylor v. Inhabitants of Woburn*, 130 Mass. 494. In *Lyman v. Hampshire Co.*, 138 Mass. 74, 77, it is said by Chief Justice Morton: “It was held under St. 1877, and is equally true of

Illinois Cent. R. Co. v. Atwell

written notices under St. 1879, that the notice itself should show, either by a form of words, or by the circumstances under which it is given, that it was intended by the party giving it as a notice for the purpose of fixing his right of action." The notice in that case was no more explicit on this point than the one before us, yet it was held to be sufficient. See, also, *Driscoll v. City of Fall River*, 163 Mass. 105, 39 N. E. 1003. In the present case the notice was signed by a firm of lawyers, and was served by a deputy sheriff. There can be no doubt that this sufficiently informed the defendant that the plaintiff claimed damages.

The sixth request for instructions is as follows: "There is no evidence to warrant a recovery upon counts 2 and 4 of the declaration." As to count 2, the defendant contends that, at the time it was possible for the conductor to give the warning, he was not in charge or control of the train. But a conductor of freight train may be found to be in charge thereof, although he is temporarily absent upon a duty incident to the proper management of the train, and nothing is done meanwhile contrary to his orders or expectation of what would be done. *Donahoe v. Railroad Co.*, 153 Mass. 356, 26 N. E. 868, 20 Am. & Eng. R. Cas., N. S., 526.

As to the fourth count, the defendant contends that the testimony of the conductor indicates that he gave the signal to stop in ample season to stop the train, and that one Burns testified that he saw the conductor giving the signal to stop as soon as he saw the train coming down the track. We are unable to find any such testimony given by Burns. Whatever the testimony of the conductor may indicate, he did not testify to the fact, and, if he had, the jury were not bound to believe him. There can be no doubt that the jury were warranted in finding that the conductor was in charge or control of the train. He himself testified: "I was directing the train by motion. The engineer responded to the motion I gave him." There is also no doubt that the jury were warranted in finding that the speed of the train in backing down was unreasonable and unnecessary, and in finding for the plaintiff on this count.

Exceptions overruled.

ILLINOIS CENT. R. CO. v. ATWELL.

(*Supreme Court of Illinois, Oct. 25, 1902.*)

[64 N. E. Rep. 1095.]

Injury to Sectionman—Contributory Negligence—Hazardous Work.*

Where sectionmen were working by a hand car which was on the track when the whistle of an engine was heard, and they were directed to remove the hand car, and the order was improper as expos-

*See foot-note appended to *Cogdell v. Southern Ry. Co. (N. Car.)*, 4 R. R. R. 39, 27 Am. & Eng. R. Cas., N. S., 39.

Illinois Cent. R. Co. *v.* Atwell

ing the men to great peril, whether obedience to the order involved so great hazard that a man of ordinary prudence would not have undertaken it was a question for the jury.

Same—Same—Obeying Improper Orders—Fellow Servants.†

Where the death of a railroad section hand was due to an attempt to obey an improper order of the foreman, his administrator might recover, the foreman not being a fellow servant with regard to the exercise of his power to command.

Measure of Damages—Instruction.

In an action against a railway company for damages for causing the death of an employee, it was not error to omit to specially instruct on the measure of damages, in view of improper evidence by the widow of the employee that she was in poor health and had no means of support, defendant not having objected to the evidence or requested an instruction.

Appeal from appellate court, Fourth district.

Action by Laura Atwell, administratrix, against the Illinois Central Railroad Company. From a judgment of the court of appeals (100 Ill. App. 513) affirming a judgment for plaintiff, defendant appeals. Affirmed.

W. W. Barr and J. M. Dickinson, for appellant.

Wm. A. Schwartz and Andrew S. Caldwell, for appellee.

CARTWRIGHT, J. The appellate court for the Fourth district affirmed a judgment recovered by appellee, as administratrix of the estate of George Atwell, deceased, against appellant, in the circuit court of Jackson county, for pecuniary damages resulting to the widow and next of kin from the death of said George Atwell, which was alleged to have been caused by the negligence of appellant. The defendant offered no evidence, but at the conclusion of the evidence introduced by plaintiff asked the court to direct a verdict of not guilty. The court refused the request, and the question whether the court erred in such refusal is the principal question in the case.

The facts proved on the trial were, in substance, as follows: George Atwell was employed by the defendant as a section hand at Carbondale. Between 3 and 4 o'clock on the morning of February 8, 1901, he was called by the section foreman, and directed to call some of the other section hands, which he did. The occasion for calling out the men at that time in the morning was to repair a broken switch about three-quarters of a mile from the depot, in the north yards, and they went with the foreman to that place on a hand car. When they

†See *Doran v. Cedar Rapids M. C. Ry. Co.* (Iowa), 3 R. R. R. 929, 26 Am. & Eng. R. Cas., N. S., 929; *Bryan v. Southern Ry. Co.* (N. Car.), 21 Am. & Eng. R. Cas., N. S., 542; *Southern Ry. Co. v. Mauzy* (Va.), 20 Am. & Eng. R. Cas., N. S., 647; *Chattanooga Elec. Ry. Co. v. Lawson* (Tenn.), 12 Am. & Eng. R. Cas., N. S., 669; *Bradley v. Chicago, M. & St. P. Ry. Co.* (Mo.), 8 Am. & Eng. R. Cas., N. S., 729; *Goodwell v. Montana Cent. Ry. Co.* (Mont.), 4 Am. & Eng. R. Cas., N. S., 419; *Illinois Cent. R. Co. v. Bolton* (Tenn.), 9 Am. & Eng. R. Cas., N. S., 868; *Northern Pac. R. Co. v. Charles* (U. S.), 4 Am. & Eng. R. Cas., N. S., 128; *Northern Pac. R. Co. v. Peterson* (U. S.), 4 Am. & Eng. R. Cas., N. S., 117.

Illinois Cent. R. Co. v. Atwell

arrived it was found that a new switch point was needed, and by direction of the foreman they went farther north with the hand car to get the necessary tools and the switch point. They first went to the toolhouse, about 500 feet north of the place where the switch was torn up. There they got the necessary tools, and put them on the car, and went back south about 200 feet, where they left the hand car on the track and went to get the switch point, which lay among some railroad iron about 40 feet east of the track. The switch point was about 15 feet long, and weighed 260 pounds. They had brought it part way, and were all helping to carry it when a whistle was blown, and the foreman called to them that the train was coming, and to come and get the car off the track quick. It was then 20 minutes after 4 o'clock of a dark and foggy morning, and there was a coalhouse situated so that the men could not see an approaching train from the place where they were. They ran to the track, and the foreman and three of the men got over on the west side, and pulled one end of the hand car off. Two of the men did not attempt to cross, as there was not time enough, but Atwell, who was behind, came running and passed them, and just as he stepped one foot over the east rail of the track to get hold of the car the train struck him. The men on the other side jumped back at the same time and escaped injury. The train was running about 35 or 40 miles an hour, and the hand car was demolished, and Atwell was thrown about 35 feet and killed. The men could not see the train, on account of the coalhouse, until they reached the track.

The first count of the declaration charged the defendant with carelessly and improperly driving and managing the locomotive engine and train, and there was no evidence tending to support that charge. The second count charged the defendant with negligence of its section foreman in negligently and improperly commanding the section laborers to run and get the hand car off the track, and we think it manifest, from the above statement of facts proved, that the court was right in refusing to direct a verdict upon the issue formed under that count. The order was improper, and was negligently given by the foreman, without due regard to the safety of the men under his command. By the order he exposed them to great peril, and it resulted in the death of Atwell. This does not appear to be denied, but it is urged that the evidence failed to show that Atwell was in the exercise of ordinary care for his own safety. Counsel say that the hazard and risk involved in obedience to the order were so great that a man of ordinary prudence would not have undertaken it, and that the command was unreasonable and the peril and danger so great that Atwell was not bound to obey it. It is true that the servant must act with that degree of care which an ordinarily prudent man would exercise under the same circumstances, but he is to be judged by all the circumstances and in view of

Illinois Cent. R. Co. v. Atwell

the order of the master. The servant owes the duty of obedience to the commands of the master, and if he is ordered to perform an act he does not assume the risk of obeying the order unless the risk is so great that a man of ordinary prudence would not encounter it. *Offutt v. Exposition*, 175 Ill. 472, 51 N. E. 651; *Gundlach v. Schott*, 192 Ill. 509, 61 N. E. 332, 85 Am. St. Rep. 348. The jury were to judge of Atwell's conduct by considering the order given; the habit and duty of obedience to orders generally; the suddenness with which he was called upon to act, with the consequent lack of time for deliberation; the darkness and fog; the fact that from his position he was unable to see the approaching train and all the surrounding conditions. The court would not have been justified in taking the case from the jury on the ground that the evidence did not tend to prove ordinary care on his part.

Again, it is insisted that the negligence charged is the negligence of a fellow servant, and therefore plaintiff could not recover. While the foreman and Atwell may have been, in many respects, fellow servants, they were not in that relation as to the exercise of authority by one over the other. The injury resulted from the improper exercise of the foreman's power to command, and in respect to the exercise of such power they were not fellow servants. *Railroad Co. v. May*, 108 Ill. 288.

There was no error in refusing to direct a verdict.

There are some general criticisms of the instructions given at the request of the plaintiff, but they were the usual and approved statements of the law in cases of this character. It is not complained that the courts refused any instruction asked by the defendant, and the only thing really insisted upon with respect to the instructions is that the court ought to have enlightened the jury more particularly on the question of the measure of damages in view of misleading and prejudicial evidence before the jury affecting that question. The evidence referred to was the testimony of the plaintiff, who was the widow of Atwell, to the effect that her health was bad and that she had no income or means of support from any source. The evidence was incompetent, and if it had been objected to would certainly have been excluded. *Railroad Co. v. Baches*, 55 Ill. 379; *Railway Co. v. Powers*, 74 Ill. 341; *Railroad Co. v. Moranda*, 93 Ill. 302, 34 Am. Rep. 168; *Railroad Co. v. Woolridge*, 174 Ill. 330, 51 N. E. 701. Defendant might have prevented such evidence going to the jury, but made no objection to it, and did not prepare or ask for any instruction with respect to it. It was not the duty of the court, of its own motion, to instruct the jury specially for the purpose of obviating the effect of evidence admitted without objection. Defendant might have asked and obtained such proper instructions concerning the evidence, or its proper relation of the question of damages, as it saw fit.

There is no error in the record, and the judgment of the appellate court is affirmed. Judgment affirmed.

BURNS v. SOUTHERN RY. CO.*(Supreme Court of South Carolina, Feb. 19, 1903.)*

[43 S. E. Rep. 679.]

Accident at Crossing—Contributory Negligence—Climbing over Obstructing Cars.*

A complaint alleged that plaintiff climbed between two box cars of a train blockading the public crossing, without waiting for it to get out of the way, and without attempting to go around it, and without notice to any one of his intent so to do, and that, without any warning, the servants in charge of the train recklessly moved it, injuring plaintiff: *held*, that a demurrer on the ground that the complaint showed plaintiff guilty of contributory negligence was properly overruled.

Same—Application of Ordinance—Station Yards—Instructions.

In an action for injuries received at a crossing, a refusal to charge that a city ordinance relating to the obstruction of crossings by trains did not apply to the station yard of the defendant was proper, as being a charge on the facts; the question whether the point was a public crossing being in issue.

Same—Signals—Gross Negligence.†

Recovery may be had for injuries occasioned by failure to give the statutory signals unless the gross negligence of the party injured contributed to the accident, as the proximate cause thereof.

Pleading.

Where defendant fails to move to strike out allegations in the complaint which he deems inappropriate, he cannot object to the consideration of the issues raised thereby.

Appeal from Common Pleas Circuit Court of Oconee County; Purdy, Judge.

Action by W. L. Burns against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

T. P. Cothran, for appellant.

J. R. Earle, for respondent.

GARY, A. J. This is an action for damages alleged to have been sustained by the plaintiff, through the negligence of the defendant, while attempting to cross between two box cars at Seneca, S. C., on the 6th of April, 1899. The case was first tried before his honor Judge Aldrich, who granted an order of nonsuit, which was reversed by the Supreme Court. 61 S. C. 404, 39 S. E. 567. A new trial was had before his honor Judge Purdy and a jury. The verdict was in favor of the plaintiff for \$949.50.

As one of the questions raised by the defendant's exceptions arises out of a demurrer to the complaint, we will set out these allegations that are material in the consideration of that question. Paragraph 1 alleges the corporate existence of the defendant. Paragraphs 2 and 3 are as follows:

"(2) That on the 6th day of April, 1899, the defendant corporation negligently and unlawfully allowed one of its trains,

*See notes at end of case.

†Contributory negligence as affected by failure to give signals, see foot-note appended to *Atchison, T. & S. F. Ry. Co. v. Judah* (Kan.), 4 R. R. R. 937, 27 Am. & Eng. R. Cas., N. S., 937.

Burns v. Southern Ry. Co

consisting of a locomotive and a number of freight cars, in charge of its authorized agents, to stop for a considerable and unreasonable time—about twenty minutes—across one of the public streets or crossings or traveled places of the town of Seneca, in the county and state aforesaid, to the great inconvenience and annoyance and violation of the rights of the public, and in violation of ordinances of said town; thus completely blockading the said street or crossing, which leads from the business portion of said town to the passenger landing of the Blue Ridge Railroad, across the track of said defendant, during which time the passenger train on the Blue Ridge Railroad had arrived, and was due to depart.

“(3) That on said day plaintiff was accompanying and assisting his son off to his command, who had purchased a ticket and was to take the Blue Ridge Railroad train at this point. That, waiting for a considerable time, and no opening being made in said freight train through which persons might pass, and the said passenger train being due to depart, the way being thus blocked for a great distance either way, persons were therefore compelled to cross said freight train in going to and from said passenger train, by going over the bumpers and a number of persons did so. The plaintiff's son crossed said train as aforesaid, and plaintiff immediately followed him—attempts to cross said freight train, which was at that time standing motionless across said street or crossing. That while the plaintiff was in the act of crossing between two of said freight cars, without any notice or warning, without the sound of a whistle or the ringing of a bell on said locomotive, the defendant company, through its agents and servants then and there in charge of said train, negligently, recklessly, and unlawfully caused said train of cars to move rapidly and suddenly, and thereby caught plaintiff's foot between two of said cars, and so mangled and crushed it as to necessitate its being amputated, all of which was grossly negligent, reckless, and unlawful on the part of the said defendant corporation.”

Paragraph 4 alleges that he was damaged in the sum of \$1,999.

The first exception assigns error as follows: “(1) The presiding judge erred in overruling the defendant's demurrer to the complaint for this reason: The complaint shows that the plaintiff climbed up between two box cars of a train, with an engine attached to it, without waiting for it to get out of the way, without applying for it to be removed, without attempting to go around it, and without notice to any one of his intention so to do. These facts show gross contributory negligence on the part of the plaintiff. The circuit judge should have so held, and dismissed the complaint on the ground that it did not state facts sufficient to constitute a cause of action.” When the facts stated in the exception are considered in connection with the other facts alleged in the complaint, it cannot be said that the only inference to be

Burns v. Southern Ry. Co

drawn from them is that the injury was caused by the gross contributory negligence on the part of the plaintiff. The demurrer was therefore properly overruled.

The second assignment of error is as follows: “(2) The presiding judge erred in refusing the defendant’s second request, which was as follows: ‘The ordinance in question [ordinance of the town council of Seneca, S. C.] applies only to places where the public streets of Seneca cross the railroad. It does not apply to the station yard of the defendant at a point between the ticket office and the Blue Ridge landing place, where the public may have been accustomed and allowed to pass, not upon any street of Seneca, or upon any extension of any street.’ Said request continued a proper construction of said ordinance applicable to the case.” His honor said: “I cannot charge you that just as requested here, but I charge you this: That the ordinance of Seneca (section 20) is as follows: ‘That any person or persons obstructing the public crossings with cars, engines or trains longer than ten minutes at a time, shall be deemed guilty of a misdemeanor, and fined or imprisoned at the discretion of the council.’ That ordinance has reference to the public crossings of streets by railroads in the town of Seneca. Now, it is not for me to tell you whether this injury occurred within the yard, or whether there is a yard there. It would be charging upon the facts. I can only tell you that, under the ordinance of the town of Seneca, it is unlawful for a public crossing to be obstructed for longer than ten minutes at a time. It is for you to say whether this was a public crossing, and whether or not this train obstructed that crossing for a period longer than ten minutes.” The reasons assigned by his honor for not charging the request in its exact language are satisfactory to this court.

The third, fourth, fifth, and sixth exceptions are as follows:

“(3) The presiding judge erred in modifying the defendant’s third request to charge. The request was as follows: ‘If the jury believe from the evidence that the plaintiff was guilty of gross negligence in the circumstances attending the alleged injury, and that such gross negligence contributed in any way to the accident, in the sense of having any share or agency in bringing it about, the plaintiff is not entitled to any damages.’ The modification was as follows: ‘That if the plaintiff was guilty of gross negligence which contributed to the injury, in the sense of being the proximate cause of the injury, he cannot recover.’ The error being: (a) This court has held (*Wragge v. Ry. Co.*, 47 S. C. 105, 25 S. E. 76, 33 L. R. A. 191, 58 Am. St. Rep. 870) that the defendant’s neglect to give the statutory signals need not be the proximate cause of the disaster, but have construed the word ‘contributed,’ in connection with the defendant’s negligence, to mean having any share or agency in bringing about the result. The same word is used in the same section in connection with the plain-

Burns v. Southern Ry. Co

tiff's gross negligence, and should receive the same construction. (b) Even if the plaintiff's gross negligence must have been a proximate cause of the disaster, it was error to hold that it must have been the proximate cause.

"(4) The presiding judge erred in modifying the defendant's fifth request to charge. The request was as follows: 'In an action under the statute [sections 1685, 1692, Rev. St. 1893], it is not required of the defendant to show that the gross negligence of the plaintiff was a proximate cause of the disaster. It is sufficient, under the statute, to relieve the defendant from liability, if the plaintiff's gross negligence is shown to have had any share or agency in bringing about the disaster.' The modification was as follows: 'If the plaintiff himself was guilty of gross negligence which was the proximate cause of bringing about the injury, he cannot recover.' The errors being the same as pointed out in exception 3.

"(5) The presiding judge erred in charging the jury as follows: 'If you believe that he himself [the plaintiff] was guilty of gross negligence, and that such gross negligence was the proximate cause of this injury, then you cannot give him a cent.' The errors being the same as pointed out in exception 3.

"(6) The presiding judge erred in charging the jury as follows: 'If you find that the defendant railroad company was negligent—was guilty of negligence—and that the plaintiff was guilty of gross negligence himself, and that such gross negligence was the proximate cause of the injury, then you must find for the defendant.' The errors being the same as pointed out in exception 3."

It is true, the requests conformed to the principle announced in *Wragge v. Ry. Co.*, 47 S. C. 105, 25 S. E. 76, 33 L. R. A. 191, 58 Am. St. Rep. 870; but a different rule is laid down in the case of *Bowen v. Ry. Co.*, 58 S. C. 222, 36 S. E. 590, which is subsequent to the case of *Wragge v. Ry. Co.*, and in which the member of the court who wrote the opinion in *Wragge v. Ry. Co.* concurred. The appellant's attorney was, however, granted permission to review the case of *Bowen v. Ry. Co.*, in which the court says: "When the law speaks of an act of negligence as contributing to an injury, it means as a direct and proximate cause thereof. Contributory negligence is thus defined in 7 Enc. (2d Ed.) 371: 'Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury, as a proximate cause thereof, without which the injury would not have occurred.' " This court, after mature deliberation, has determined to adhere to the rule stated in *Bowen v. Ry. Co.*, for otherwise there would be no legal test for the guidance of the jury in determining whether the act of the party contributed to the injury.

The seventh exception is as follows: "(7) The presiding

Notes

judge erred in refusing the defendant's seventh request, which was as follows: 'This being an action under the statute (by my order and plaintiff's election), I charge you not to consider the question of alleged violation of the ordinance of Seneca relating to blockading public crossings.' Plaintiff, having elected to proceed under the statute upon a specific act of negligence, should have been confined thereto." His honor said: "I have to refuse that request, for the reason that it was made an issue in the case." After the plaintiff made his election to proceed under the statute, it was the duty of the defendant to make a motion to strike out of the complaint any allegations which it deemed were inappropriate to such an action, and, having allowed them to remain in the complaint, it could not object to their consideration.

The eighth exception is as follows: "(8) The presiding judge erred in charging the jury as follows: 'The charge here is that the defendant negligently and unlawfully allowed one of its trains * * * to block one of the streets of the town of Seneca.' After the plaintiff had elected to proceed under the statute, the alleged unlawful blocking of the street had nothing to do with the case." This exception is disposed of by what was said in considering the seventh exception.

It is the judgment of this court that the judgment of the circuit court be affirmed.

NOTES.

CONTRIBUTORY NEGLIGENCE—PASSING UNDER OR BETWEEN OBSTRUCTING CARS.

Scope of Note.

This note will be found to contain little except illustrations. And from these it will be seen that the courts, in passing upon the question whether or not it is contributory negligence to pass under or between obstructing cars, is generally controlled, not by any general rule, but by the evidence showing the circumstances under which the attempt in question was made.

DISTRICT OF COLUMBIA.

Train Started without Warning.

Plaintiff found a street crossing closed by a train, and after waiting some minutes for it to move, and being impatient to reach his business, attempted to climb over the platform and between the cars. Just at that moment the train started without warning, and his foot was crushed. It was held that his own conduct prevented a recovery. *Spencer v. Baltimore & Ohio R. Co.*, 4 Mackey (D. C.) 138, 54 Am. Rep. 269. In this case, it is said in the opinion: "On this question the following rules will be found established by the authorities. When there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, no action whatever can be sustained. In the use of the words 'proximate cause' is meant negligence occurring at the time the injury happened. In such case no action can be sustained by either, for the reason 'that as there can be no apportionment of damages, there can be no recovery.' So where the negligence of the plaintiff is proximate, and that of the defendant remote, or consisting in some other matter than what occurred at the time of the injury, in such case no action can be sustained for the reason that the immediate cause was the plaintiff himself. Under this rule falls that class of cases where the injury arose from the want of ordinary or proper care on the part of the plaintiff at the time of its commission. These prin-

Notes

ciples are sustained by *Hill v. Warren*, 2 Stark. 377 ; 7 Metc. 274 ; 12 Metc. 415 ; 5 Hill 282 ; 6 Hill 592 ; *Williams v. Holland*, 6 C. & P. 23. On the other hand when the negligence of the defendant is proximate, and that of the plaintiff remote, the action can then be well sustained, although the plaintiff is not entirely without fault. This seems to be now well settled in England and in this country. Therefore if there be negligence on the part of the plaintiff, yet if, at the time when the injury was committed, it might have been avoided by the defendant in the exercise of reasonable care and prudence, an action will lie for the injury.

"Applying this rule to the facts of this case, we find a person engaged in the very act of crossing this train—climbing over between the buffers—at the moment when this defendant carelessly started the train without notice."

ALABAMA.

Subsequent Attempt to Pass through Diminished Space.

Where it appears that plaintiff's intestate crossed the spur track of defendant's road at the street crossing in a town where cars were left to be unloaded, leaving a space of twenty feet for the passage of the public, and on his return half an hour later, the cars having been pushed close together by an engine which could have been seen, was killed in attempting to pass between the cars, he was held guilty of contributory negligence. *Pannell v. Nashville, F. & S. R. Co.*, 55 Am. & Eng. R. Cas. 92, 97 Ala. 298, 12 So. 236.

GEORGIA.

Climbing over Platform.

In *Andrews v. Central R. & B. Co.*, 45 Am. & Eng. R. Cas. 171, 86 Ga. 192, 12 S. E. 213, 10 L. R. A. 58, it was held that, though a standing train be an unauthorized obstruction of a public crossing, a person attempting to pass between the cars by climbing over the platform and bumpers, if injured thereby in consequence of a sudden movement of the train, cannot recover unless the engineer, conductor, or some other person having control of the train's movements knew of his attempt to cross or had notice of his exposure to danger.

Passing under Train Stopping for Wood and Water—Starting without Warning.

Plaintiff was injured by the starting of cars as he was passing under them after dark, whilst they were temporarily stopped for taking in wood and water, the place not being a public crossing. It was held that the gross negligence and want of ordinary care on the part of plaintiff prevented a recovery, even if the engineer did not give the usual signal for starting the train. *Central R. & B. Co. v. Dixon*, 42 Ga. 327.

IDAHO.

Passing under Cars—Starting without Warning.

Where the plaintiff, in passing along a street which was blocked by a railroad train with an engine thereto attached, belonging to and then being operated by the defendant, passed under one of the cars of said train five times within an hour and a half, and was caught and his leg crushed, by the moving of the train in an attempt to pass under the sixth time, it was held that he was guilty of such contributory negligence as bars a recovery, and this, even though the servants of the company failed to ring the bell or sound the whistle before starting. *Rumpel v. Oregon Short Line & U. N. Ry. Co. (Idaho)*, 35 Pac. 700.

INDIANA.

Climbing over Drawbars with Knowledge That Train Might Start at Any Moment.

In *Lake Shore & M. S. Ry. Co. v. Pinchin*, 112 Ind. 592, 13 N. E. 677, 35 Am. & Eng. R. Cas. 384, it was held that where a person knows that a train is on its way to its destination, and has stopped temporarily at a station, but is likely to move at any instant, the attempt to pass

Notes

between the cars of the train is such contributory negligence, as a matter of law, as will defeat a recovery for an injury so incurred. In this case it is said in the opinion: "It must be affirmed, as matter of law, on the facts exhibited in the answers of the jury, that the appellee was guilty of negligence in attempting to pass between the cars, and in the manner in which he took to carry out the attempt. He knew the train was not to remain in the town, but was there on its trip westward, and he knew that it had broken in two; so that, even if he was not negligent in making the attempt to cross, he was negligent in the manner in which he conducted himself in making his way between the cars. If it were conceded that he was without fault in endeavoring to pass through the train, still it must be held that he was negligent in not exercising a higher degree of care in effecting what no reasonable man could avoid knowing was a dangerous passage between the cars. He was burdened with things that interfered with his safely clambering through the train; he made no haste, but laid the things he had in his hands on the end of one of the cars, and, before leaving his dangerous position, picked them up and put one of them in his pocket. This was not such care as was required, even had he been crossing with permission of the railroad company, and without fault. It by no means follows that because a man may do an act that he may do it carelessly.

"But we need not place our decision upon the ground that the manner in which the appellee attempted to cross between the cars made him guilty of contributory negligence, for he was guilty of negligence in making the attempt. There was therefore negligence in entering upon the act, as well as in the manner of performing it. A person who has knowledge that a train of cars is stopping temporarily at a way station, on its way to its destination, has no right to assume the risk of passing between the cars. It is a danger so immediate and so great that he must not incur it. *Owen v. Railroad Co.*, 35 N. Y. 518; *Railroad Co. v. Copeland*, 61 Ala. 376; *Stillson v. Railroad Co.*, 67 Mo. 671; *Lewis v. Railroad Co.*, 38 Md. 588; *Holden v. Railroad Co.*, 50 U. C. C. P. 39. It will not avail the plaintiff that he was not fully aware of his danger; for a plaintiff is bound to know the extent of the danger in cases like this, where the circumstances are known to him, or the hazard is apparent to a reasonably prudent man. *Railroad Co. v. Henderson*, 43 Pa. St. 449; *Railroad Co. v. Kendrick*, 40 Miss. 374. A man must use his senses, and is not excused, where he fails to discover the danger, if he has made no attempt to employ the faculties nature has given him. 2 Wood R. Law, 1319, note 2; *Railway Co. v. Goddard*, 25 Ind. 200. One who attempts to cross between the cars of a train which he knows, or might know by using his natural faculties, is likely to move at any moment, is guilty of negligence. But here the case is stronger, because the fact is that the appellee might have known, by observation or 'by feeling,' that the train was actually in motion when he attempted 'to get down.'"

IOWA.

Passing under Train—Misled by Failure to Signal.

Plaintiff, in assisting a passenger to a train on defendant's road in the nighttime, attempted to pass under one of a train of freight cars standing across the road, to which an engine was attached, and while under the car was injured by the starting of the train. It was held that he was guilty of contributory negligence, even though he knew it was the custom to signal before starting; and that, if they made a signal, he could get through before the cars were backed, as he had done on other occasions. *Smith v. Chicago, R. I. & P. R. Co.*, 55 Iowa 33, 7 N. W. 398.

MAINE.

Attempting to Cross after Section of Severed Train Has Passed.

In *York v. Maine C. R. Co.*, 84 Me. 117, 24 Atl. 790, it was held that whether a traveler upon the highway, who sees the first section of the severed train pass over the crossing, is negligent in attempting to cross the track, without looking or listening for the rear section of the train, is a question for the jury.

Notes

Passing through Nine-Inch Opening between Cars—Contributory Negligence of Children.

In an action for injuries received by a boy nine years of age while passing between two cars nine inches apart on a street crossing, it was held that the jury, in passing on the question of contributory negligence on his part, should consider whether, by reason of youth and inexperience, he was aware of the danger of so passing. *Schmitz v. St. Louis, I. M. & S. Ry. Co.*, 119 Mo. 256, 24 S. W. 472.

Opening Some Distance from Crossing—No Duty to Signal.

In *Stillson v. Railroad Co.*, 67 Mo. 671, it is held that where a street crossing is obstructed by a train of cars, and there is an opening in the train at a place some distance from the crossing, a person who attempts to pass through said opening does so at his peril, and that those in charge of the train are not required to ring the bell or sound the whistle, as this is only required in approaching a crossing.

Boy Climbing between Cars Obstructing Street—Contributory Negligence of Children.

In *Thompson v. Missouri, K. & T. Ry. Co. (Mo.)*, 67 S. W. 693, 2 R. R. R. 832, 25 Am. & Eng. R. Cas., N. S., 832, it was held that a boy attempting to climb between cars of a freight train which is blocking a public street is not negligent, though he has sufficient mental capacity to appreciate the danger, and though such action on the part of an adult would be negligence, unless he has the same prudence, thoughtfulness, and discretion to avoid the danger which is possessed by an ordinary adult, or unless in the jury's opinion he failed to exercise the degree of care which under like circumstances would be expected of one of his years and capacity.

Passing through Two-Foot Opening between Cars—Moving Cars without Warning.

The deceased, who was in charge of a team, left it at some distance from a street crossing and went over the latter in search of a bolt that had dropped from his wagon, and while beyond the crossing defendant's train backed from the north upon and covered the crossing, leaving an opening about two feet in width, through which deceased on his return attempted to pass, but was caught and killed by a backward movement of the train. There was evidence that no bell was rung and no whistle sounded before the movement of the train which caused the accident. It was held that the deceased might rightly assume that some such signal would be given before the movement was made; and that it could not be said, as a matter of law, that deceased was guilty of contributory negligence in passing through the opening. *Wilkins v. St. Louis, I. M. & S. R. Co.*, 101 Mo. 93, 13 S. W. 893, 45 Am. & Eng. R. Cas. 185.

Crossing between Cars with Knowledge That One of Them Is Being Moved.

In *Wilkins v. St. Louis, I. M. & S. R. Co.*, 101 Mo. 93, 13 S. W. 893, it was held that when a person is attempting to pass at a public crossing between two cars, knowledge on his part that one of the cars is being moved by an engine does not render him guilty of negligence, unless he also knew that the effect of the motion was to shove the cars together.

OHIO.

Person Climbing between Cars Obstructing Crossing in Violation of Ordinance Not a Trespasser.

In the case of *Railroad Co. v. Mackey* (Ohio Sup.). 29 L. R. A. 757, it is said in the opinion: "Defendant's counsel asked the court to charge the jury that, 'if you find in this case from the evidence that defendant's train of cars occupied Main street crossing * * * for a period exceeding five minutes, and more than the statutory period, and you further find that plaintiff, while said train so occupied said crossing, climbed up between two of defendant's cars in said train, he, by so doing, became and was a trespasser, and while so trespassing the defendant owed him no duty in moving the train from such

Notes

crossing, unless you find from the evidence that the defendant and its servants operating the train knew of his presence,' which was refused. This request implies that, under the circumstances stated, the plaintiff would, as matter of law, be a trespasser if he climbed up between two of the cars while attempting to cross over. We think this is a question of mixed fact and law. The evidence tended to show that at the time the attempt to cross over was made the crossing had been obstructed for more than five minutes, to the hindrance of travel thereon, which act of continued obstruction, if proven, was a violation of law, and made the company itself a trespasser. Its cars were where they had no right to be, while, if the boy was rightfully upon the crossing, as the evidence tended to show he was, where he had a right to be, his attempt to pass the obstruction by climbing upon the cars would not make him a trespasser. It was, we think, for the jury to say whether he was a trespasser or not. If a railroad company obstructs a highway for an unreasonable length of time, or for a longer time than the law permits, unless it is without fault, the railroad company thereupon becomes a trespasser, and if a person makes a reasonable use of its cars without injury to them at a crossing, for the sole purpose of crossing the railroad track, the railroad company is estopped from saying that he is a trespasser. Having brought about the necessity, it cannot take advantage of its own wrong. But, although a person may not be a trespasser, his conduct may amount to gross or willful negligence."

PENNSYLVANIA.

Child Passing under Coupling Pole—Recovery Depending upon Whether Train Was Stationary or Moving.

Plaintiff, a child of six or seven years of age, was walking on a street in a densely-populated portion of a great city. When he came to a railroad crossing, a train of freight cars of defendant covered the street crossing and barred his progress. One of the cars, loaded with long lumber projecting over the bumper, was connected with the box car behind it by a coupling pole, six inches in diameter, and from twelve to fourteen feet in length. Plaintiff passed under the train to join a party of boys playing on the opposite side of the train, and as he caught hold of the coupling pole, which was directly over the street crossing, the box car struck him, threw him on the track, and, as he attempted to escape the impending danger, his left hand, and three fingers of his right hand, were caught and completely severed by the wheel. There was considerable conflict in the evidence as to whether or not the train, at the time plaintiff attempted to pass under the coupling, was in motion, or was standing on the street crossing. It was held that this was properly submitted to the jury, who were instructed that if the train was in motion when plaintiff attempted to pass through it, their verdict must be for defendant. *Philadelphia, W. & B. R. Co. v. Layer*, 112 Pa. St. 414, 3 Atl. 874. In this case, it is said in the opinion: "Whether or not an attempt on the part of an adult person to cross over or under a train, obstructing the crossing of a public street, in case of injury is negligence per se, or merely evidence of negligence, we are not called upon to decide. We are now considering the duties and responsibilities of the railroad company with reference to a case where contributory negligence cannot be asserted. The plaintiff was, at the time of the injury, a child of tender years, without the experience and discretion which would enable him to understand the dangerous character of the act which resulted in his injury. A child's capacity is the measure of his responsibility. If he has not the ability to foresee and avoid danger, negligence will not be imputed to him. *Philadelphia Pass. Ry. Co. v. Hassard*, 75 Pa. St. 367; *Pennsylvania R. Co. v. Kelly*, 31 Pa. St. 372. He was not a mere trespasser. He had a right to pass along the highway. He was in the exercise of that right. Being a mere child, he was not negligent. Hence the whole question turns upon the negligence of the company. If there was evidence on that point, the cause was properly submitted."

Notes

Child Passing under Train Left on Crossing through Negligence.

In *Rauch v. Lloyd*, 31 Pa. St. 358, where it appeared that a child of tender years attempted to pass under a train, negligently left standing on the crossing of a public street, by which he was injured, it was held that the owners of the cars were liable.

Boy Climbing between Cars—Contributory Negligence—Question for Jury.

In *Todd v. Philadelphia & R. Ry. Co. (Pa.)*, 2 R. R. R. 37, 25 Am. & Eng. R. Cas., N. S., 37, 51 Atl. 332, it was held that whether a boy ten years old, injured while attempting to get over a train standing across a street, and which started up while he was on it, without warning, ought to have avoided the accident by going along the sidewalk of the cross street, is a question for the jury.

SOUTH CAROLINA.

Climbing between Cars—Whether Gross or Willful Negligence.

In *Littlejohn v. Richmond & D. R. Co.*, 45 S. Car. 181, 22 S. E. 789, 9 Am. & Eng. R. Cas., N. S., 873, it was held that a pedestrian injured by the starting of defendant's trains while attempting to climb over between two of its cars while it was at a stand-still across a city street, those in charge having given no starting signals, is entitled to maintain an action against the railroad company for damages. And that whether such an attempt is gross or willful negligence on the part of the person making it is a question for the jury to decide after considering all the attending circumstances.

TENNESSEE.

Driving around Obstructing Train at Dangerous Place.

Plaintiff's intestate was driving on the highway, and upon approaching a track found it obstructed by a train of cars, and attempted to drive around at a dangerous place, and his cart was overturned and he was killed. It was held that the negligence of the company in obstructing the crossing could not be considered the proximate cause of his death. *Jackson v. Nashville, C. & St. L. R. Co.*, 19 Am. & Eng. R. Cas. 433, 13 Lea (Tenn.) 491, 49 Am. Rep. 663.

TEXAS.

Crossing between Cars in Sight of Engineer.

Defendant's train obstructed a highway crossing, and during the fifteen minutes plaintiff waited, in full view of the engineer, the train remained stationary; and, there being no other crossing within half a mile, plaintiff attempted to cross between two cars, and was injured by the train starting. It was held that under such state of facts the court erred in holding as a matter of law that plaintiff was guilty of contributory negligence. *Irvin v. Gulf, C. & S. F. Ry. Co. (Tex. Civ. App.)*, 42 S. W. 661.

Crossing between Cars to Go to Fire.

Defendant's train was standing across the main highway in a village when an alarm of fire was sounded. The bells on defendant's engines were rung, and the whistles blown, to give the alarm. Many persons were crossing between the cars to reach the fire. While plaintiff was crossing between the cars they were suddenly moved, and he was injured. Defendant's servants at the time knew that people were crossing between the cars. It was held that plaintiff, in attempting to cross between the cars to go to a fire, was not guilty of contributory negligence. *San Antonio & A. P. Ry. Co. v. Green*, 20 Tex. Civ. App. 5, 49 S. W. 670.

VIRGINIA.

Crossing through Eighteen-Inch Space between Cars—Implied Invitation to Cross.

The defendant company, in order to keep open a path leading from a village to its railway station across a switch, habitually parted the cars standing on this switch. The plaintiff's intestate, while on his way to the station, attempted to cross this track when the space between the

Wikle v. Louisville & N. R. Co

parted cars was only eighteen inches, and was caught and killed by the sudden backing of the train. When he reached the track he could not see the engine and had no notice that the cars were about to start. It was held that the company was liable; its acts in keeping the crossing open constituting an invitation to the public to use it in coming to the station, and the deceased was not guilty of contributory negligence. *Nichols v. Washington, Ohio & Western R. Co.*, 83 Va. 99, 5 S. E. 171, 32 Am. & Eng. R. Cas. 27.

WISCONSIN.**Questions for the Jury—Child Climbing between Cars Obstructing Crossing for Unreasonable Time.**

In an action to recover for the death of a boy, eight and one-half years old, who was killed by being thrown under a freight train while trying to climb through the opening between two cars of the train which was standing over a crossing in a village, there was evidence that the train had blocked such crossing, at which there were three tracks, for fifty minutes; there was also evidence tending strongly to show that such crossing, while not a legal crossing, was a licensed way, and that the whole distance between the crossing and the depot, a space of one hundred and fifty feet, was almost constantly used by grown persons and children in passing and repassing, with the knowledge of the railway employees, and without their objection, and also that children played in the space between the tracks. There was proof that adults and children frequently crawled under or climbed over trains at that place under like circumstances and that upon the day of the accident the conductor saw children playing between the tracks and attempting to ride on the cars of his train as it came in. The evidence as to the giving of the signals before the starting of the train was conflicting. No trainman saw the children or knew of the accident at the time. It was held that the questions of the negligence of the trainmen, and of the contributory negligence of the deceased were for the jury. *Carmer v. Chicago, St. P., M. & O. Ry. Co.*, 95 Wis. 513, 70 N. W. 560, 8 Am. & Eng. R. Cas., N. S., 331. But in this case it is said in the opinion: "Had the plaintiffs' intestate been an adult attempting to climb between the cars under the circumstances stated, it seems that he would have been guilty of contributory negligence, as a matter of law. *Flynn v. Railway Co.*, 83 Wis. 238, 53 N. W. 494."

COMPLIANCE WITH DIRECTIONS OR INVITATIONS OF RAILROAD EMPLOYEES.

See monograph appended to *Edwards v. Chicago & A. Ry. Co.* (Mo. App.), 2 R. R. R. 333, 25 Am. & Eng. R. Cas., N. S., 333.

A. R. Y.

WIKLE v. LOUISVILLE & N. R. Co.*(Supreme Court of Georgia, Aug. 9, 1902.)*

[42 S. E. Rep. 525.]

Agent—Authority—Evidence.

Where agency is shown by proof of the relative situation of the parties, the agency is established no further than is necessary for the discharge of the duties ordinarily belonging to it. 2 Greenl. Ev. §§ 64, 64a.

Same—Same—Same—Malicious Prosecution.*

Accordingly, where a railroad company is sued for malicious prose-

*See *Penny v. New York, etc., R. Co.* (N. Y.), 12 Am. & Eng. R. Cas., N. S., 180, and note, 183 et seq.; *Texas & P. Ry. Co. v. Cope* (Tex.), 3 R. R. R. 906, 26 Am. & Eng. R. Cas., N. S., 906; *Alabama & V. Ry. Co. v. Kuhn* (Miss.), 19 Am. & Eng. R. Cas., N. S., 466; *Clairborne v. Chesapeake & O. Ry. Co.* (W. Va.), 14 Am. & Eng. R. Cas., N. S., 217.

McGrath v. Delaware, L. & W. R. Co

cution, and it appears that one who had charge of the defendant's business at a certain station, and sold its tickets there, missed certain money of the company from the cash drawer, suspected a man who had been loitering about, and, going into another county, procured the arrest of the plaintiff because of a resemblance to such loiterer, and had a warrant issued against him for larceny, there is not sufficient evidence to authorize a jury to find that the institution of the prosecution was within the scope of the agent's authority, and there is, therefore, no error in granting a nonsuit.

(Syllabus by the Court.)

Error from superior court, De Kalb county; John S. Candler, Judge.

Action by Harry Wikle against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Burton Smith, for plaintiff in error.

Jos. B. & Bryan Cumming and M. A. Candler, for defendant in error.

PER CURIAM. Judgment affirmed.

LEWIS, J., absent on account of sickness.

McGRATH v. DELAWARE, L. & W. R. Co.

(*Supreme Court of New Jersey, Nov. 10, 1902.*)

[53 Atl. Rep. 207.]

Injury to Employee—Assumption of Risk—Attempting to Stop Car Running Downgrade.

A servant, whose duty was to prevent coal cars running on a downgrade and in charge of a brakeman from overrunning a coal chute by placing on the track a wedge-shaped piece of wood, and who was injured while attempting to stop a car which was beyond the control of the brakeman, cannot complain against his master that the inability of the brakeman to control the car was owing to a defective brake, since the stopping of a car about to overrun the chute for any reason was his duty, and the risks incident thereto were assumed by him.

Same—Contributory Negligence.

The immediate cause of the injury was the breaking of the wedge, or "sprag," owing to its rottenness. The servant had selected the sprag from several furnished by his master, and the testimony showed that its condition could have been ascertained by a casual examination: *held*, that the servant was guilty of contributory negligence in failing to observe the condition of the sprag.

Error to court of common pleas, Hudson county.

Action by Daniel McGrath against the Delaware, Lackawanna & Western Railroad Company. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Argued June term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and GARRETSON, JJ.

Bedle, Edwards & Lawrence, for plaintiff in error.

Warren Dixon, for defendant in error.

GUMMERE, C. J. This writ of error brings up for review a judgment recovered by the plaintiff below, McGrath, against the railroad company, for personal injuries received by him while in their employ. His duty, at the time of the accident, and for a considerable time previous thereto, had been to assist in unloading coal cars at the company's docks on the Hudson river. The cars were run along the docks on a down-grade, one at a time, with a brakeman in control, and brought to a stop directly over a chute, so that they could be unloaded into it. When, as sometimes happened, a car could not be stopped, by the use of the brake, directly over the chute, it was the duty of the plaintiff, and of other servants of the company in a like employment, to use what was called a "sprag" to bring it to a standstill. This sprag was a wedge-shaped piece of oak wood, and it was placed on the track in front of the wheel. On the day of the accident the plaintiff saw a car coming down the dock in the direction of the chute, where it was intended to be stopped. As the car came along, it was apparent to him that the brakeman in charge of it was not able to control it, and that it would overrun the chute. In order to prevent this from occurring, he took up a sprag, which he had previously selected from among those furnished by the company to their employees, and placed it upon the track in front of the wheel of the car. The sprag, being rotten, broke, and the wheel ran over his hand, crushing it. Liability is sought to be imposed upon the company,—First, because they furnished the plaintiff with a defective sprag, the condition of which could have readily been ascertained by them upon a proper inspection, or by applying proper tests; and, second, because the inability of the brakeman to control the car was due to the fact that the brake upon it was out of order, and that this would have appeared upon inspection. It is not perceived how the second ground of complaint will support the plaintiff's action. It was the fact that the car was beyond the control of the brakeman that called for action on his part. One of the duties which his employment required him to perform was to use the sprag, under the conditions which existed, without regard to what produced them, to check a car which the brakeman could not stop, as well when the situation had been created by the negligence of his employers as when it arose from circumstances with which they were entirely unconnected. The risks incident to the performance of that duty were assumed by him by his contract of employment. Moreover, if there was danger in attempting to stop a runaway car, that danger was perfectly obvious to the plaintiff, and he knowingly took the hazard of the attempt. Nor do we think that the first ground upon which the plaintiff's case was rested will support the action. It is based upon the duty which a master owes to his servant of using reasonable care to furnish him with proper appliances with which to do his work, and of making inspection and tests

Dillon v. Iowa Cent. Ry. Co

thereof at reasonable intervals for the purpose of ascertaining whether they are in good order. It appears from the plaintiff's own testimony that the defective sprag was a new one; and by the testimony of one of his witnesses that its rotten condition could have been readily detected "by the use of a hammer, by sounding, or by casual examination of it." Now, although the master is bound to use reasonable care in the selection of the appliances to be used by the servants, and to make proper inspection thereof, yet this does not absolve the latter from all responsibility with relation to their condition. The duty of self-protection requires him to make such inspection of the appliances furnished to him for his work as will disclose to him any obvious defect therein, and to exercise a proper watchfulness to see that during use they do not become so defective as to be more dangerous than they otherwise would be. *Coyle v. Iron Co.*, 63 N. J. Law, 609, 44 Atl. 665, 47 L. R. A. 147. Failure to do this is negligence on his part, which will prevent him from recovering for an injury received by him through a defective appliance, the condition of which was, or should have been, known to the master. The facts disclosed in the plaintiff's case show that, if he had made such an examination of the rotten sprag, as his duty required him to do, he would have become cognizant of its condition. His neglect to do so was partially the cause of his injury. The trial court should have directed a nonsuit at the close of the plaintiff's case upon the request of the defendants, and its failure to do so was error.

The judgment under review should be reversed.

DILLON v. IOWA CENT. RY. CO.

(*Supreme Court of Iowa, Dec. 20, 1902.*)

[92 N. W. Rep. 855.]

Injury to Employee—Negligence—Sufficiency of Evidence.

A freight train operated by two engines, one at each end, stopped near a station, and the conductor, in the presence of the engineer of the front engine, gave directions to a brakeman as to some switching by the rear engine to set in some cars on a switch track. While this was being done, the engineer of the front engine went between some cars standing on a track on the other side of the main track, which were moved suddenly by the switching crew, without knowledge that the engineer was between the cars, and he was killed. There was evidence that deceased went between the cars for the purpose of urinating, and that it was customary for employees to go between standing cars for that purpose: *held* that, conceding that the cars were moved with unnecessary violence, the switching crew was not guilty of negligence.

Same—Contributory Negligence—Going between Standing Cars.

Deceased engineer was guilty of contributory negligence precluding recovery by his administrator from a railroad company.

Appeal from district court, Franklin county; J. R. Whittaker, Judge.

Dillon v. Iowa Cent. Ry. Co

Action to recover damages for death of plaintiff's decedent, alleged to have resulted from injuries received through defendant's negligence, while deceased was in the employ of defendant as a locomotive engineer. At the conclusion of plaintiff's evidence the court directed a verdict for defendant, but on motion of plaintiff granted a new trial. From this order defendant appeals. Reversed.

Geo. W. Seevers and J. H. Scales, for appellant.

Quick & Carter and F. M. Williams, for appellee.

McCLAIN, J. The evidence for plaintiff tended to establish the following state of facts: Deceased was engineer in charge of a locomotive bringing a freight train from the north into Eldora. Another locomotive, in charge of one Cummings as engineer, was attached to the rear end of the same train. For the purpose of switching, the train was stopped before it reached the station; the front engine, in charge of deceased, being about 200 feet north of the station when it was stopped. In the presence of deceased, and near enough to him so that he might have heard what was said, the conductor of the train told a brakeman to take certain cars from the rear of the train and place them at the "chute." It was evidently the understanding that this was to be done by the use of Cummings' engine at the rear, and by the use of this engine certain cars were detached from the rear of the train, and drawn north, and then shoved in upon a side track on the east side of the main track. There were two side tracks, leaving the main track at about the same place to the north of the yard, the one further east going to the stock yards and alongside of a chute where cattle were unloaded; the other, called the "house track," intermediate between the stock yards track and the main line; and on the house track were several cars coupled together opposite the place where the engine of deceased was stopped, while further south, separated from these connected cars by an interval of about 18 feet, was another car, loaded with household goods, which had probably been placed in position for unloading; this last car being north, however, of the station. For some unexplained reason the cars which had been separated from the freight train on the main track and taken north by the use of Cummings' engine for the purpose of switching were run in upon the house track with such force that the cars standing on the house track were suddenly knocked or driven about 30 feet south upon the house track, with great force and violence. It appears that the deceased was between two of the cars which were coupled together standing on the house track at the time they were suddenly moved, and about 10 or 12 feet from his engine, and that by the motion of these cars he was thrown down, and received the injuries from which he soon after died. No one saw deceased leave his engine and cross to the cars on the house track or go between them. The fire-

Dillon v. Iowa Cent. Ry. Co

man of the engine, but a few minutes before the accident, saw deceased at the engine, and plaintiff offered to prove by him that deceased made a remark indicating the necessity of urinating, which testimony, however, was not admitted. Evidence was admitted showing a custom on the part of railroad employees to go between cars standing on the track about where these cars were situated, and at similar places, for the purpose of urinating; but there was no evidence that any such custom or practice was known to the officers of the defendant road, or approved by them. It may be said, also, in this connection, that there was some evidence tending to show that when deceased was taken from under the freight car where he was injured the front of his trousers was unbuttoned. It was shown that there was a water-closet for the use of employees and others situated about 20 feet west of the north end of the station,—that is, across the main track from the station,—and that this water-closet was sometimes open and sometimes locked, but when locked access to it could be secured by applying at the office in the station for the key. The station agent testifies that about five minutes before the accident he passed down along the east side of the cars standing on the house track, and met deceased coming north on the same side of the cars, having come across the house track at the opening between the cars which were coupled together and the car containing the household goods; but the witness did not see deceased go between the standing cars, nor cross over to the west side of the house track, where he was when injured. Testimony bearing on the violence with which the cars were thrown along south on the house track was given by a person who was, under the direction of the station agent, opening the car of household goods for the purpose of looking at the goods contained therein, it appearing from such testimony that this car was violently struck by the other cars pushed against it from the north, and moved some distance. The motion to direct a verdict for defendant, which was sustained, was based on the want of evidence to show that defendant was guilty of any negligence proximate to the injury to deceased, and also the want of evidence to show that deceased was free from contributory negligence, as well as on affirmative evidence that deceased was guilty of contributory negligence, as appears from the testimony of witnesses summarized as above. Plaintiff's motion for a new trial was predicated on the exclusion of the evidence offered tending to show what the deceased said to the witness just before the accident as to the necessity of urinating, the admission of the testimony of certain witnesses, not above referred to, that employees who went between standing cars for the purpose of urinating assumed the risk in doing so, and alleged error of the trial court in sustaining defendant's motion to direct a verdict on the different grounds set forth therein. Errors are now assigned on the action of the trial court in

Dillon v. Iowa Cent. Ry. Co

sustaining this motion for a new trial on the various grounds alleged therefor.

We shall not consider the alleged errors of the trial court in the exclusion of the testimony of the fireman as to what deceased said just before the accident nor as to the admission of testimony of witnesses as to assumption of risk; for, in view of the testimony which was received bearing on the question of defendant's negligence, and the acts of deceased tending to show contributory negligence, we think the result was not, and could not have been, affected either by the exclusion of evidence tending to show the purpose for which it is claimed deceased left his engine and went between the cars standing on the house track nor by the admission of the mere legal conclusions of the witnesses as to whether they assumed the risk when they went between cars standing on the track for the purpose of urinating. As it seems to us, if the evidence shows beyond dispute, either on the one hand that there was no negligence of the defendant proximately connected with the injury to deceased, or, on the other, that the evidence showed contributory negligence of deceased, or want of due care on his part, then the motion to direct a verdict was properly sustained, and the motion for a new trial should have been overruled. The acts of the employees of the defendant in throwing the cars violently along the house track are not to be abstractedly considered as constituting negligence in themselves. So long as the railroad company, through its employees, was operating its cars without danger to persons toward whom it owed some duty, it is no affair of any one else whether they were operated violently and unskillfully or not. It is only when the acts complained of appear to have been negligent with reference to the rights or safety of persons who complain thereof that any question of negligence arises. It would hardly be contended that if a tramp were stealing a ride in a box car, where he was without the knowledge of employees, or who had no reason to know of his presence there, that he could recover damages because he was injured by reason of the negligent, unskillful, or even reckless handling of the cars by such employees. We are to determine whether there was negligence of defendant's employees by considering what relation there was between their acts and the safety of or peril to one injured thereby; and, without regard to the question of contributory negligence, it is clear that any negligent handling of defendant's cars by its employees was not the proximate cause of an injury resulting therefrom, unless the safety of the party in whose behalf complaint is made was a matter with reference to which the defendant and its employees were charged with some duty. Cases cited for appellee to the effect that it is negligence, rendering the railway company liable, to operate its cars, even in switching in its own yards, so as to injure persons who are walking beside the switch track or on such track, are

Dillon v. Iowa Cent. Ry. Co

not in point, for in all of them the conclusion reached is based on the assumption that the employees were bound to know that persons might be alongside or in front of such cars as moved, and that the fact of moving them, or the method of doing so, might place such persons in peril,—a peril which the employees were bound to look out for, and use care to prevent. But we cannot think that the employees of a railroad company, operating a train on a switch track in its yards, and moving the cars of the train, or other cars against which they are pushed or driven, are under any obligation to assume that persons may be between cars which are coupled together. If they have no reason to anticipate that any one will be between such cars, and have no knowledge that any one is there, the act of moving such cars, even violently, or in an unusual manner, will not constitute negligence proximate to the injury of a person thus situated. It is not necessary to cite and discuss the cases which appellant refers to, for we find on examination that none of them are analogous, in the important matter which has just been pointed out, to the case before us.

A consideration of the question as to whether the evidence fails to show due care for his own safety on the part of deceased, or affirmatively shows contributory negligence on his part, leads to the same result. It must be, as matter of law, contributory negligence, for any person, without reason or excuse for doing so, to go between cars standing on a side track, which, in the operation of the business of the railroad company, may be moved. We do not think it is material whether such person has reason to suppose that the cars will be moved or not. He is bound to know that, in the very nature of things, they are on the track for the purpose of being moved, and is negligent in being between them when they are moved. It is, of course, necessary and proper to go between cars which are coupled together, standing on the track, whether coupled to an engine or not, for some purposes. A brakeman must do so for the purpose of uncoupling; an employee engaged in the inspection or repair of cars may properly do so in the prosecution of the business for which he is employed. There may be other circumstances rendering such an act proper, and not negligent; but there is no evidence in this case to indicate that deceased went between the cars for any proper purpose, or any purpose justifying him in incurring the risk involved in doing so, unless it was proper to do such act for the purpose of screening himself from public view while engaged in urinating. Undoubtedly, a railroad company is bound to furnish its employees reasonable opportunities for responding to the calls of nature. See, by way of illustration, *Pennsylvania Co. v. McCaffray*, 139 Ind. 430, 38 N. E. 67, 29 L. R. A. 104; *Railroad Co. v. Martin* (Ind. App.) 39 N. E. 759. As to this matter the evidence is uncontradicted that a water-closet was provided for the use

Dolphin v. New York, etc., R. Co

of employees, access to which could be secured in a reasonable manner. There is nothing to show that deceased did not have reasonable time and opportunity for using this water-closet. It was less than 250 feet from where his engine stood, and in plain sight, and there is not the slightest showing that there was any emergency, in connection with the immediate moving of his engine, which could have deterred him from taking advantage of the accommodations thus provided. Indeed, if the testimony of the station agent as to where he saw the deceased just before the accident is to be believed, then deceased actually went further to reach the place where he received his injury than he would have been required to go in order to reach the water-closet. Giving all the testimony introduced or offered for the plaintiff all the weight to which it can possibly be entitled, we think it shows without question contributory negligence on the part of deceased.

Our conclusion is that there was no evidence of negligence on the part of defendant's employees, and that there was direct and uncontradicted evidence of contributory negligence on the part of deceased, and that, therefore, the motion to direct a verdict for defendant was properly sustained, and the motion for new trial should have been overruled. The action of the lower court must therefore be reversed.

WEAVER, J., takes no part.

DOLPHIN v. NEW YORK, N. H. & H. R. Co.

(Supreme Judicial Court of Massachusetts, Suffolk, Jan. 9, 1903.)

[65 N. E. Rep. 820.]

Injury to Brakeman—Contributory Negligence.

A brakeman in a freight yard, returning from a car which he had accompanied when kicked onto one of the twelve tracks onto which they might be kicked, is guilty of contributory negligence, having crossed part of the tracks, and stood with his back in the direction from which a car might be kicked, while measuring to see if a car on one of the tracks was left so near the switch as not to allow room if a car came on another track.

Exceptions from superior court, Suffolk county; Edgar J. Sherman, Judge.

Action by Charles D. Dolphin against the New York, New Haven & Hartford Railroad Company. Verdict was directed for defendant, and plaintiff brings exceptions. Exceptions overruled.

S. A. Fuller, for plaintiff.

Chas. F. Choate, Jr., for defendant.

LATHROP, J. The accident for which the plaintiff seeks to recover damages occurred on March 12, 1897, at about 10 o'clock in the evening, in the defendant's freight yard in Taunton. The plaintiff had been in the employ of the Boston & Maine Railroad for a year as a freight brakeman, and had

been in the employ of the defendant for about two weeks before the accident, working at night in the same freight yard. This yard was situated just south of Danforth street. On the westerly side there were two main lines running substantially north and south, and twelve side tracks radiating from them towards the east. There was a locomotive shifting engine there, and on the night of the accident it was employed in kicking freight cars onto the different tracks. When a car was kicked off, it was the duty of a brakeman to get on the car, and ride it down to the place where it was to be left, and then return to the engine for another car. Shortly before the injury to the plaintiff, he had ridden a car down the yard, and started to walk back. Part of the way he went straight back, and then started to walk in an easterly direction, across the tracks, for the purpose of reaching a path outside the tracks, where it was easier walking. As he started across, he noticed that the locomotive engine was on the Danforth street crossing, but he did not stop to ascertain whether it was moving or standing still. On the way across he noticed a car which he thought had been left too near a switch, and he stopped to measure the distance, to see whether, if a car came on another track, there was room for it to go by. To ascertain this, he stood with his back towards Danforth street, and stretched out his arm. He had just put himself in this position, when he was struck by one of two freight cars which were being backed into the freight yard by the shifting engine at the usual rate of speed in the yard, namely, five or six miles an hour. A freight yard is a dangerous place, where the men employed have, in a great measure, to look out for themselves. The plaintiff was an experienced brakeman, and, as he testified, he knew that he had to rely upon his eyes and his senses to ascertain when the cars were coming. He might have returned to Danforth street by walking along the track over which he had come. Instead of this, he chose to walk across the tracks, where he was exposed to danger at any moment. He saw the locomotive engine at Danforth street when he started to cross the tracks, but did not look for it again. When he reached the place where he was soon afterwards struck, he turned his back to Danforth street, the point from which danger was most likely to come, and while so standing was injured. Under these circumstances we are of opinion that there was no evidence that the plaintiff was in the exercise of due care, and that the judge rightly ordered a verdict for the defendant. *Lynch v. Railroad Co.*, 159 Mass. 536, 34 N. E. 1072; *Galvin v. Railroad Co.*, 162 Mass. 533, 39 N. E. 186; *Tumalty v. Railroad Co.*, 170 Mass. 164, 49 N. E. 85, 11 Am. & Eng. R. Cas., N. S., 468; *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758. This view of the case renders it unnecessary to decide whether there was any negligence on the part of the defendant, or whether the provision of Pub. St. c. 112, § 170 (Rev. Laws, c. 111, § 200), applies.

Exceptions overruled.

SCHULTZ v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Wisconsin, Nov. 28, 1902.)

[92 N. W. Rep. 377.]

Master and Servant—Injuries—Negligence.

Plaintiff was assisting in unloading a car loaded with lumber. The car was tilted, so that one side was lower than the other. The lumber consisted of a tier of planks along each side of the car, between which tiers lumber of various sizes had been thrown in. While the car was being unloaded, one of the men knocked out the stakes on the lower side, lumber was pushed out over the tier on that side, and a few moments later the pile on that side fell on plaintiff: *held*, that a nonsuit was proper, since, if the pile fell from the mere action of physical forces, the conditions were obvious, and if from the removal of the stakes, or from pushing lumber over the unsupported pile, the negligence of fellow servants was responsible.

Appeal from superior court, Milwaukee county; J. C. Ludwig, Judge.

Action by John Schultz against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Action to recover for personal injuries by reason of the fall of certain lumber from a car which plaintiff, a common laborer, was assisting to unload, on May 13, 1899. The car was an ordinary flat car, having upon its floor a number of nails or spikes, described as "sidewalk spikes," driven in so that the heads were still from an inch to an inch and a half above the floor of the car, some of them being lower by reason of being bent over. There was no evidence of the ownership of the car, or by whom loaded. On this car was a quantity of lumber, of which a tier or course of planks between two and three feet high was laid evenly and level along each side of the car, and restrained by upright stakes fitting into sockets along the outer edges. The middle of the car between these two courses or tiers was filled with indiscriminate lumber thrown in helter-skelter. This condition was obvious from either end of the car. The car was stationed upon a curve, with the ends approximately north and south, and the east side lower than the west. The gang of six men of which plaintiff was one proceeded to unload the car, and, after removing a small quantity of lumber, one of them, in plaintiff's sight, knocked out of place the upright stakes which served to retain the lumber. Plaintiff approached the east side of the car to put in place some skids on which to slide the lumber off, and as he did so the pile of planks on that side tipped over and fell onto him. That pile is described as consisting, first, of a 3x4 set edgeways, and then 11 2-inch planks. These planks, as they were piled and lay on the car, were level. None of the witnesses did—or, indeed, could—testify to any immediate cause for the planks falling over; simply, having been in place at one moment, at another they fell,

Schultz v. Chicago, etc., Ry. Co

some five or six minutes after the stakes had been taken out, and after several pieces of lumber had been unloaded over that side. The negligence alleged in the complaint was, first, the presence of the spikes in the floor of the car, and that through negligence of the defendant the lumber was stacked, piled, and loaded so unskillfully and unsafely that by reason thereof and of the said defect in said car the lumber rolled down upon the plaintiff. At the close of plaintiff's evidence the court granted a motion for nonsuit on the ground that the cause of the fall of the lumber was mere matter of conjecture, and that there was no evidence to establish that it was caused by the alleged negligence of the defendant. From judgment thereon plaintiff appeals.

Max W. Nohl (Ernest Bruncken, of counsel), for appellant.
C. H. Van Alstine, for respondent.

DODGE, J. (after stating the facts). Plaintiff contends that the fall of the lumber must be ascribed to the presence of the spikes in the bottom of the car. Also to the manner in which the lumber was laden upon the car, namely, the promiscuous dumping of indiscriminate lumber loosely between the two tiers lying along the sides; and invokes the rule of *res ipsa loquitur*, declared in this court in *Cummings v. Furnace Co.*, 60 Wis. 603, 18 N. W. 742, 20 N. W. 665, *Stacy v. Railway Co.*, 85 Wis. 225, 54 N. W. 779, and *Carroll v. Railway Co.*, 99 Wis. 399, 75 N. W. 176, 67 Am. St. Rep. 872. The principle of those cases is that, where the accident could not well happen unless either the apparatus be defective or be negligently managed, then the accident itself is evidence of one or the other of these causes; and, if defendant be responsible for both condition and management of the apparatus, the accident alone tends to establish defendant's liability, and justifies a verdict. The antithesis to this rule was laid down in *Musbach v. Chair Co.*, 108 Wis. 57, 84 N. W. 36, where the accident might have been due either to a defect in the apparatus, for which defendant would be liable, or to negligence of co-servant, for which he would not. It was there said (page 67, 108 Wis., and page 39, 84 N. W.): "With these two possible causes to account for the explosion, the burden of proof, of course, rested on the plaintiff to prove the one for which the defendant would be liable." In the case before us we have nothing proved but the fact that the lumber fell. It appears that there were spikes, which might or might not tilt the tier of lumber on the east side of the car so as to render it insecure. There is no proof that they did so. Indeed, so far as the evidence goes, it tends the other way, for the only witness on the subject declares that the planks composing this tier were level. Besides this possible cause, there appears, however, the fact that the tier of lumber about 2½ feet high on the lower edge of a tipping car was subject to outward

Texas & P. Ry. Co. v. Reagan

pressure from the lumber thrown behind and against it; that the loaders of the car had taken precautions against this outward tendency by confining the lumber by upright stakes along the car edge, and that such safeguarding stakes had just been removed in plaintiff's presence, and by his fellow servant; also that certain lumber had already been passed over this exterior tier, with probable tendency to start an outward movement. Here are at least three possible causes for the fall of this lumber other than the mere presence of spikes in the car floor: First, the obvious tendency of physical forces; second, the possibly negligent removal of the stakes, which obstructed such forces; and, third, the possibly negligent act of pushing pieces of lumber over this unsupported wall. For neither of these three could defendant have been liable to plaintiff. Not the first, because all the conditions were open and obvious, and as easily discoverable by plaintiff as by any of defendant's agents; so that, if they constituted a peril to members of the unloading crew, the plaintiff assumed the risk thereof. Not the second or third, because any negligence therein was that of fellow servants. As was pointed out in the Musbach Case, it is not enough that plaintiff show that there are several causes, one as probable as another, to warrant the court in submitting to the jury a choice between them. If there is a reasonable possibility that the accident may have been due to a cause other than the alleged negligence of the defendant, it becomes the duty of the court to take the question from the jury, unless there is some evidence other than the mere happening of the accident to establish the efficacy of such negligence. Of that we can find nothing in the present case, and must conclude that the trial court properly performed its duty in declining to submit to the conjecture of the jury which of the several possible causes was the actual one.

Judgment affirmed.

TEXAS & P. RY. CO. v. REAGAN *et al.*

(*Circuit Court of Appeals, Fifth Circuit, December 2, 1902.*)

[118 Fed. Rep. 815.]

Depositions De Bene Esse—Use at Trial—Absence of Witnesses—Proof.

Rev. St. § 865 [U. S. Comp. St. 1901, p. 663], providing that unless it appears that a witness is dead or gone out of the United States or to a greater distance than 100 miles from where the court is sitting, his deposition shall not be used in the cause, does not prevent the use of the deposition of a witness in a federal court sitting in Texas, which was taken at the witness' place of residence in Minnesota, without proof that the witness was not within 100 miles of the court, since it would be presumed that he continued to reside where he was at the time the deposition was taken.

Master and Servant—Injuries to Servant—Railroad Fireman—Contributory Negligence.

Where, in an action for the death of a railroad fireman occurring in a collision, defendant charged that plaintiff's deceased was guilty

Texas & P. Ry. Co. v. Reagan

of contributory negligence in failing to give the engineer on his engine a proper signal, and that such failure caused the collision, deceased was thereby charged with affirmative negligence, and the burden of proof thereof was on the defendant.

In Error to the Circuit Court of the United States for the Northern District of Texas.

Mrs. M. M. Reagan brought this suit, for herself as widow and her minor children, for damage caused by the killing of her husband, Martin Reagan, a fireman in the employ of the Texas & Pacific Railway Company, who was killed in a wreck on said railway alleged to have been caused by the negligence of one Price, an engineer handling the engine on which Reagan was firing. Two freight trains had orders to meet and pass at Hetz. The west-bound train had arrived at Hetz, and was going in on the side track. The east-bound train came in without being under control, and ran into the rear cars of the west-bound train before it was off the main track. In this collision Reagan, who was fireman on the east-bound train, was killed.

The defendant, by amended answer, pleaded the contributory negligence of Reagan, as follows: "That the deceased, husband of the plaintiff, was guilty of contributory negligence which proximately contributed to the death, and without which it would not have occurred, in this: The train which was meeting the train on which he was firing and the one run into was on his side of the engine, and it was his duty to receive signals from such train or its crew, and give them to the engineer. He gave the engineer on his engine a signal to go on after the two engines had passed each other. Acting and relying on this signal as being correct and proper, the engineer, Price, went on, and the two trains ran together or collided."

On the trial the plaintiffs offered in evidence to support their case the deposition of M. J. Daily, which had been taken at Ft. Worth, Tex., in December, 1901, *de bene esse*. The witness was going beyond the jurisdiction of the court. To the reading of this deposition by the plaintiffs in evidence the defendant objected for the reason that it was taken *de bene esse*, and some time before the trial, and the plaintiffs had not and did not show to the court that the said witness M. J. Daily was not, at the time his deposition was offered in evidence, within 100 miles of the court where the trial was being had, and no reason was shown why he could not be produced in court to testify orally; which objection the court overruled, and the deposition was by the plaintiffs read in evidence; to all of which the defendant excepted, and tendered a bill of exceptions, which was signed and made a part of the record. The plaintiffs' attorney stated that he did not know where the witness Daily was then, and J. W. Ward, superintendent of the Rio Grande Division of the Texas & Pacific Railway, stated: "I do not know whether I can place M. J. Daily or

not. At the time of this accident he lived at I don't know when he went from there to Two Harbors. The court remarked: "If it be shown that a deposition was taken he lived in Minnesota I will not object. The court rules that it is not necessary affirmatively that the witness does not live within 100 miles of the court." The deposition showed that the witness resided at Two Harbors, Minn., and that at the time of the accident he was temporarily in Ft. Worth, Tex., on his way to Cal.; further, that by occupation he was a locomotive engineer who had not in the past confined his work to a single place but had traveled about; also, on the trial, there was no evidence offered by the railway company tending to prove contributory negligence. The bill of exceptions showed that the plaintiff offered any evidence to show that at the time of the accident the defendant was exercising due care.

In his charge to the jury the court, among other things, charged as follows: "The burden of proving that the defendant was guilty of contributory negligence rests upon the plaintiff, and unless the defendant has shown by a preponderance of greater weight of evidence that the deceased was guilty of negligence which contributed to the injury or death then the defendant would fail on its plea of contributory negligence,"—to which charge the defendant excepted. From an affirmance of the judgment below the defendant below sues out this writ of habeas corpus.

T. J. Freeman and B. G. Bidwell, for plaintiff.
S. H. Cowan, for defendants in error.

Before PARDEE and SHELBY, Circuit Judges.
BOARMAN, District Judge.

PARDEE, Circuit Judge (after stating the facts). The first assignment of error is based on the admission of the deposition of Daily taken de bene esse. The objection was that at the time of offering the deposition the witness was not within 100 miles of the court where the trial was held, or, if within the 100 miles, he did not attend. The statute authorizing the taking of depositions de bene esse provides as follows:

"But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the county for a greater distance than one hundred miles from the place where the court is sitting, or that, by sickness, bodily infirmity, or imprisonment, he cannot appear and travel and appear at court, such deposition shall not be received in evidence in the cause. Rev. St. 865 [U. S. Comp. St. 1901, § 1035]."

As far back as *Insurance Co. v. Southgate*, 104 U. S. 243, it was held that where the witness resided more than 100 miles from the court at the time of taking the deposition, the inhibition of the statute did not apply, the witness was considered beyond a compulsory attendance.

Texas & P. Ry. Co. v. Reagan

In *Whitford v. Clark Co.*, 119 U. S. 522, 7 Sup. Ct. 306, 30 L. Ed. 500, the supreme court cite *Insurance Co. v. Southgate*, supra, with approval, and lay down the rule as follows:

"It thus appears to have been established at a very early date that depositions taken *de bene esse* could not be used in any case at the trial if the presence of the witness himself was actually attainable, and the party offering the deposition knew it or ought to have known it. If the witness lives more than one hundred miles from the place of trial, no subpoena need be issued to secure his compulsory attendance. So, too, if he lived more than one hundred miles away when his deposition was taken it will be presumed that he continued to live there at the time of the trial, and no further proof on that subject need be furnished by the party offering the deposition, unless this presumption shall be overcome by proof from the other side."

When Daily's deposition was taken he lived at Two Harbors, Minn., more than 100 miles from the court. There was no presumption nor proof that he had since come within 100 miles of the court.

The second assignment of error complains of the charge of the trial judge to the effect that the burden of proving that the deceased was guilty of contributory negligence was upon the defendant.

If there is error in this charge, then it seems clear that the defendant below should have asked for an instructed verdict, because the issue of contributory negligence was in the case, and there was no evidence in the case to show that the deceased was not guilty of contributory negligence or even in the exercise of due care.

Counsel for the plaintiff in error conceded the general rule in the United States courts that the burden of proof in cases involving contributory negligence to be as given by the judge in this case, but he claims that there are exceptions to the rule just as well established. He cites *Railroad Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136, which furnishes no exception to the rule, but correctly holds that the burden of proving direct negligence on the part of the railroad company's employees was upon the plaintiff. He also cites *Corcoran v. Railroad Co.*, 133 Mass. 507, 12 Am. & Eng. R. Cas. 226; *Riley v. Railroad Co.*, 135 Mass. 292, 15 Am. & Eng. R. Cas. 181; *Railway Co. v. Crowder*, 63 Tex. 502; *Id.*, 76 Tex. 499, 13 S. W. 381; *McCray v. Railway Co.*, 89 Tex. 168, 34 S. W. 95; *Railway Co. v. Murphy*, 46 Tex. 356, 26 Am. Rep. 272; and *Railway Co. v. Hester*, 72 Tex. 40, 11 S. W. 1041.

An examination of these cases will show that, in the particular case then in hand, it was held that an employee seeking to recover damages against the railway company was required to prove that at the time of the injury he was in the exercise of due care; and in relation to this it may be noticed that in

Long's Adm'r v. Illinois Cent. R. Co

Riley v. Railroad Co., supra, it was held that could be excused from proving that the deceased exercise of due care where death was instant rule declared in Railway Co. v. Murphy, supra,

"It is often stated that the plaintiff must s injury was caused by the negligence of the defen any fault or negligence on his part. It would rect, it is thought, to say that the plaintiff must : injury of which he complains was produced by the of the defendant, under such circumstances as di any negligence on his part, contributing to his ir absence of proof, his negligence would not be pr

However the rule may be with regard to prov we are of opinion that in this case the specific negligence which was charged to have prox tributed to the death of the deceased, and with would not have occurred, was active negligenc giving a wrong signal. This issue was prese defendant, and it was not to be expected, nor p ble in the nature of things, that the plaintiff c negative for the deceased whose death was i We think there can be no doubt that, under the c and pleadings in this case, the charge complain all respects correct.

The judgment of the circuit court is affirmed.

LONG'S ADM'R v. ILLINOIS CENT. R. C

(Court of Appeals of Kentucky, June 14, 19

[68 S. W. Rep. 1095.]

Master and Servant—Danger Incurred in Obedience Superior.*

The principle that the servant may lawfully obey the o ployer relying on his superior knowledge and judgment a section hand obeyed the order of the section boss to car to his place of work when he knew that a fast trai though the station where the men boarded the car was station, and the boss knew no more of the whereabouts train than the servant knew; and therefore the maste heard to say that the servant assumed the risk of a c the danger was so obvious that a servant of ordinary uated as he was, would not have obeyed; and that is the jury.

Du Relle and O'Rear, JJ., dissenting.

Appeal from circuit court, Hardin county.

"To be officially reported."

Action by Jesse Long's administrator against Central Railroad Company to recover damages

*See foot-note appended to Cogdell v. Southern Ry. 4 R. R. R. 39, 27 Am. & Eng. R. Cas., N. S., 39.

Long's Adm'r v. Illinois Cent. R. Co

of plaintiff's intestate. Judgment for defendant, and plaintiff appeals. Reversed.

S. M. Payton and O. M. Mather, for appellant.

W. H. Marriott, Pirtle & Trabue, and J. W. Dickinson, for appellee.

HOBSON, J. Appellant filed this suit to recover damages for the loss of life of his intestate by reason of the alleged negligence of appellee, and at the conclusion of the evidence on both sides the court instructed the jury peremptorily to find for the defendant, although he had overruled this motion at the close of the plaintiff's testimony. The intestate was a section hand in the service of appellee, working under a boss whose name was Kron. He had been working for the company about three days at the time of his death, although it would appear from the proof that he had been in the same service under a previous employment. He was killed on September 10, 1900. On that morning about 6 o'clock the section boss, with his crew of seven men, including the intestate, left the section house on the hand car and went to Riney station. They waited there for some time for the passenger train known as No. 104, a fast train from the south, but it was late. An accommodation passenger train, known as No. 32, was due shortly also from the south. Riney is not a telegraph station. The section boss finally concluded that he could safely go to Otter creek, which was about two miles north of Riney, and was under the impression that the local passenger No. 32 would probably arrive before the fast passenger train No. 104. He accordingly ordered his men to get on the hand car and go to Otter creek. This they proceeded to do, and at each curve they stopped and looked and listened for the train behind them, but saw or heard nothing. After they had made three stops in this way, and when they had emerged from the last curve, and were running down the grade to the Otter creek switch, and not very far from it, one of the men on the car suddenly called out, "There she comes." The train was then emerging from a cut about 800 feet from them, and running, according to the proof for the plaintiff, 60 or 70 miles an hour. The hands on the car, except Long, immediately jumped off without standing on the order of their going. About the time they reached the ground, or before they got up from the fall, the train struck the car. Whether Long did not know of the approach of the train, or realize how close it was to him, is not made clear by the proof. He remained on the car, and was thrown up into the air by the engine as high as the top of the smokestack, and his brains were knocked out. The proof for the plaintiff tended to show that he was so situated that he could not get off as quickly as the others, while that for the defendant showed that the section boss called to him to leave the car. But this was evidently just before the train struck it. He

Long's Adm'r v. Illinois Cent. R. Co

was 54 years of age, and was perhaps not as quick in his movements as the younger men. The proof for the plaintiff showed that there were two whistling boards south of the hand car, one for a road crossing, and one for the station, and that the train did not whistle for either of these. The proof for the defendant showed that the train did whistle, and that it was running between 50 and 60 miles an hour. The schedule time of the train was 35 miles. On that morning there were two sections of No. 104. The train which struck the hand car was the first section, or an extra consisting of four or five sleepers, carrying excursionists to Ohio, but running on the time of the regular train, and as its first section. It had run from Paducah, 175 miles, without stopping, and was about 25 minutes late. Shortly after it came the second section of No. 104, or the regular fast train, and also the accommodation passenger train, known as No. 32, and they were all three at Otter creek together. It is urged for appellee that the intestate knew the train was late and overdue, and took the risk. It is urged for appellant that he acted under the orders of his foreman, and had a right to presume that his superior would not order him to go ahead with the hand car if there was danger. The principle relied on is that the servant may lawfully obey the orders of his employer, relying on his superior knowledge and judgment. But it is insisted that this principle does not apply, as Riney was not a telegraph station, and each of the men on the hand car knew as much about the danger as the boss. The circuit court seems to have taken this view.

Kron had a watch, and so far as appears was the only man in the crew who had a watch that was running; but they all knew the time of the train, and that it was overdue. None of them knew that there was an extra on the road that morning, but as this was running on the time of the regular train, and was simply the front section of it, it did not materially effect the result. The train men had no intimation of the presence of the hand car on the track. No flag was put out by Kron, and no torpedoes or anything to give notice of danger ahead. In the American and English Encyclopedia of Law (volume 20 [2d Ed.] p. 120) the rule is thus stated: "Since the master is under a special duty to inspect and investigate risks to which the servant is exposed, and since the servant may rely upon the performance of this duty, the fact that the servant proceeds under the orders of the master in performing an act whereby he is exposed to unusual danger renders the master liable for a resulting injury to the servant, unless the risk of the act was fully realized by the servant, and was so apparent that no man of ordinary prudence, situated as he was, would have undertaken it." A number of cases are collected sustaining the text. See, also, to same effect, 1 Thomp. Neg. §§ 192, 442. In section 445 it is said: "Where the negligence of one person has prepared a risk for another, and that other, proceeding in the discharge of his

Long's Adm'r v. Illinois Cent. R. Co

duty or in the course of his business, accepts the risk, and is hurt in consequence of so doing, the question of whether he is guilty of contributory negligence is almost always a question of fact for the jury." A servant is not called upon to set up his unaided judgment against that of his superiors. He may rely upon their orders. *Ward v. Railroad Co. (Ky.)* 65 S. W. 2. As has been well said, the servant's dependent and inferior position is to be taken into consideration; and if the master gives him positive orders to go on with the work, and the servant is injured, he may recover, unless the work was so obviously dangerous that a servant of ordinary prudence, situated as he was, would not have obeyed.

In this case Long was a mere laborer. The section foreman under whose direction he worked represented the master, and it was Long's duty to obey his orders in the usual course of business. When he received an order it was not his duty to sit in judgment upon its propriety, or to enter into a discussion with him as to the facts upon which it was based. He had a right to presume that improper orders would not be given, and to assume that the section foreman would not direct him to take risks that were improper. If he was injured while obeying the orders of his superior and by reason of his negligence, he may recover, unless the risk was such that a person of ordinary prudence, situated as Long was, would not have taken it. In determining whether Long should have obeyed the orders of his superior, it must be borne in mind that the crew were out on the road, and that if Long had not obeyed he could not have remained with the crew. So far as appears he knew nothing about the running of the trains, and was not required by his employment to know about them. It was the section boss' duty to control the movements of the crew, and to do this with proper regard to their safety. Long had a right to rely on his superior knowledge and judgment as to the safety of proceeding with the hand car under the circumstances, unless the facts actually known to Long were such that a servant of ordinary prudence, situated as he was, would not have taken the risk, and this was a question for the jury. In an exhaustive note on this subject to the case of *Dallemand v. Saalfeldt*, 48 L. R. A. 755 (s. c. [Ill. Sup.] 51 N. E. 645, 67 Am. St. Rep. 214), the editor, after pointing out the conflict of authority on the question, says: "Some judges, following out the analogy of the doctrine stated in the last section, have held that the rule by which contributory negligence is inferred, as matter of law, from the undertaking or continuance of work which entails an abnormal risk of which the servant was aware, involves the corollary that the addition of the element of a direct order will not prevent the defense from taking effect if the servant understood the perils to which he would be exposed in obeying that order. * * * But by almost all courts, including those who apply the rule just referred to (see *Pennsylvania*,

Long's Adm'r v. Illinois Cent. R. Co

Illinois, and North Carolina cases cited *infra*), it is held that the fact of the servant's having been directly ordered to do the act which caused the injury introduces into the situation a differentiating circumstance, which will render his contributory negligence a question for the jury in nearly every conceivable state of the evidence. It does not follow that because the servant could justify a disobedience of the order he is guilty of negligence in obeying it. * * * Hence we find it laid down in a leading case that where, in obedience to an order, the servant performs a duty which, though dangerous, is not so dangerous as to threaten immediate injury, or where it is reasonably probable that the work may be safely done by using extraordinary caution or skill, he may recover if injured. * * * In other cases the same principle is expressed by a restrictive form of statement, the servant being held entitled to obey a specific command of his superior without necessarily incurring the consequences of contributory negligence, unless the execution of that command involves a hazard which no ordinarily prudent person would have subjected himself to." In support of these principles, the following instances are given in which the servant was allowed to recover: Where a section hand obeys orders to take a hand car off the track, when a train is close at hand; or where a section man undertook to get two stones off the track when a train was approaching; or where a brakeman jumped from a moving train; or where a laborer was injured by the fall of a large wheel which he was helping to move down an incline; or by the caving of a bank; or by the explosion of a blast over which he was ordered to work. These principles control this case. If a gravel train had stopped at Riney that morning, and waited for the passenger until it was past due, and the conductor had then concluded to go on to Otter creek ahead of the passenger train and had ordered the hands aboard, it would hardly be maintained that if the train had been run into by the passenger before it reached Otter creek, and one of the laborers killed, the company would not be responsible. Yet this is, in substance, the case we have; for the section boss has as full control of the hand car as the conductor has of the gravel train. The hands on the gravel train would not be required to inquire what orders the conductor had, or what emergency induced him to go forward, or what reason he had for supposing it to be safe. All this applies equally to the laborer working under the section boss. Long was simply riding on the hand car in obedience to the orders of his boss, who was taking him to the place of work, and for some reason was anxious to get there as quickly as he could.

Judgment reversed, and cause remanded, with directions to grant appellant a new trial.

DU RELLE and O'REAR, JJ., dissent.

MERCANTILE TRUST CO. v. PITTSBURGH & W. RY. CO. (LAKE, Intervener).

(Circuit Court of Appeals, Third Circuit, April 25, 1902.)

[115 Fed. Rep. 475.]

Equity—Petition against Receiver for Tort—Pleading.

Proceedings on a petition of intervention filed in a suit in equity against a receiver therein, asserting a claim for damages for the death of an employee, alleged to have resulted from negligence in the operation and management of a railroad by the receiver, are equitable in character, and the petitioner is entitled to have the receiver plead in conformity to the rules and practice in equity.

Master and Servant—Duty to Warn Servant of Special Risks.*

The duty of informing a servant of special or extraordinary risks connected with his service is a primary duty of the master, when they are known to him and the delegation of such duty to any other servant, whether higher or lower in the scale of employment than the one exposed to the peril, cannot relieve him of the responsibility imposed on him by the law.

Same—Storm Causing Damage to Railroad Track—Failure to Warn Trainmen.

A brakeman on the second section of a fast freight train on a railroad operated by a receiver was killed in a wreck at night, caused by a landslide. There had been heavy rains during the day along that portion of the road, and a storm in the evening, of unusual, if not unprecedented, violence, causing a number of landslides and wash-outs, which were known to the train dispatcher; and he notified the conductor and engineer of the first section of the train, on leaving the last station, to look out for slides at various places specified, but which did not include the place where the wreck subsequently occurred. Those in charge of the second section, which left 20 minutes later, received no notice or warning at all: *held*, that the failure to give such notice of the general dangerous condition of the track was culpable negligence, which was a proximate cause of the accident, and rendered the receiver liable for the death.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Charles Koonce, Jr., and James H. Wilson, for appellant.
John McCleave, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. On the 18th day of March, 1899, Mattie Lake, by leave of the court, filed her intervening petition in the case of the Mercantile Trust Company v. The Pittsburgh & Western Railway Company then pending in the circuit court of the United States for the Western district of Pennsylvania, in equity. In her petition, she claims in behalf of herself and infant son, damages from the receiver of said railway company for the death of her husband, which she alleges was occasioned by the negligence of said receiver in operating said railway.

The decedent, John R. Lake, was, on the 22d day of March, 1898, and for some time prior thereto had been, in the em-

*As to the duty to warn and instruct employees, see *Haus v. Lake Erie & W. R. Co. (C. C. A.)*, 22 Am. & Eng. R. Cas., N. S., 864, and foot-note.

Mercantile Trust Co. v. Pittsburgh, etc., Ry. Co

ploy of the respondent, as a freight brakeman. On the day mentioned, Lake and his fellow members of the crew of trainmen, at De Forrest Junction (a station on respondent's road about 12 or 14 miles north of Youngstown, Ohio), took charge of a through fast freight train running between Chicago and the East, for the purpose of running it to Bennett (a station on respondent's road near the city of Pittsburgh, Pa.). Between these points, near Carbon station, on the road which respondent was operating as receiver, the main track ran along the southern base of a range of hills which are parallel with said track, and at the point referred to, said track cuts the base thereof so as to form an embankment on the north side of said track about 12 feet high. From said railroad, the hills retreat northward at a steep degree of inclination. On the hillside facing the track are gullies and ravines, which drain about 75 acres. Through the center of it runs a slight embankment, built to support a tramway to the top of the hill, where was an abandoned limestone quarry. This embankment, on one side thereof, deflected the direction of the waters draining the hillside, and on the night of the accident, helped to cause such a concentration of water as made a washout and carried clay and gravel over the tracks of respondent's railroad. The accident, in which decedent lost his life, was caused by this obstruction. One of the allegations of intervener's petition is, that respondent was guilty of negligence, in not appreciating the danger of a washout at the place in question, and in not guarding against it, it being charged that the ditch to carry the water off which came down the hillside, was insufficient, and the culvert through which it was discharged, was much too small.

On the 22d of March, it had rained a great portion of the day, and in the evening there occurred a very heavy rain storm, washing away bridges and causing landslides to occur on respondent's tracks, which interrupted traffic over his road from a station about 8 miles south of Youngstown to Pittsburgh, which included the place of the accident. Between these places are Hazelton and New Castle Junction, about 15 or 16 miles apart, and between them, some 5 or 6 miles east of Hazelton, is Carbon station, near which the accident took place. The chief dispatcher on the day in question was at New Castle Junction. Fast freight train No. 94, coming from the west, was run in two sections, the first section arriving at Hazelton in time to leave there at 8:02, the second section 20 minutes later. The rain of all day and heavy storm of the evening had by that time worked great havoc along the line of the road east and west of New Castle Junction. All admit that it was a heavy rain in the evening, and respondent's witnesses declare that it was a storm of unusual violence. The master reports that there was evidence to show that the amount of rain falling throughout that section of the country, including the place of the accident, was very great, if not unprecedented.

Mercantile Trust Co. v. Pittsburgh, etc., Ry. Co

The chief dispatcher at New Castle Junction had learned by 7:30 o'clock that at many places between Lowellville and Allegheny City, including points between Hazelton and New Castle Junction, the tracks had been obstructed by washouts, and that a bridge over Herron's creek was washed out by the flow, thus cutting the main line of the road, and making a detour by a branch road necessary for all trains. The master also reports that there was evidence by the witnesses called in behalf of the petitioner, that there had been obstructions, caused by rain storms, on the track at the place of the accident, at times prior to the date thereof, but that this was denied by the witnesses called in behalf of the respondent. With this knowledge of the serious character of the storm possessed by the dispatcher at New Castle Junction, no notice was given to section 2, although a notice was communicated to the conductor and engineer of the first section, to proceed with caution and look out for washouts and landslides at certain named points. Section No. 1, leaving at 8:02, passed the point of danger safely, but section No. 2, leaving Hazelton 20 minutes later, proceeded at its usual speed, until it reached the obstruction at a point a little distance west of Carbon station. The engine and several cars were thrown from the track, and the petitioner's husband so injured that he died before he was taken from the wreck.

On this general statement of facts, the petitioner complains of negligence on the part of the respondent on three distinct grounds, which are briefly stated as follows:

(1) Ordering the train on which decedent was, to leave Hazelton for New Castle Junction—a distance of 16 miles—without in any manner notifying him, or those in charge of the train, of the dangerous conditions prevailing along the road at that time.

(2) Inadequate provisions for the carrying away of surface water accumulating at the place of the accident.

(3) Failure and omission to furnish sufficient employees to inspect and watch the condition of the track and roadbed at the place of the accident, under the circumstances in this case.

No answer or other pleading was filed to the intervener's petition, and no appearance having been entered by respondent, the intervener, on the 17th of November, 1899,—nearly nine months after the filing of her petition, asked that her petition be taken pro confesso. The court overruled this motion, and ordered respondent to file his answer to the intervener's petition "instanter." At the same time, the intervener moved the court to order the issues of the case to be tried by a jury. This the court declined to do, and ordered that the case be referred to a special master. On the 30th of January, 1900, the parties appeared before a special master, in pursuance of said order, and respondent, by his counsel, offered to file a plea of "not guilty," to which objection was

Mercantile Trust Co. v. Pittsburgh, etc., Ry. Co

made for the reason that it was not a pleading in accordance with the practice of the federal courts, in a case of this character, which was equitable in its form and character, and should be governed by the rules and practice in equity.

The special master did not pass upon this objection or admit the pleading, at that or any other time during the hearing before him. It was filed, however, on the 7th of April, 1900. At the commencement and close of respondent's testimony, an objection was made by the intervener to the introduction of any evidence on the part of the respondent, for the reason that no issue was made to which evidence could be adduced by him. This objection was overruled *de bene esse*, but neither the master nor the court below, at any time thereafter, passed upon these questions, although they were raised by the intervener in her exceptions to the master's report. Notwithstanding this imperfect state of the pleadings, the master proceeded to hear the case, and on the 7th of April, made his report, in which, after sundry findings of fact and conclusions of law, he recommended that the intervener's petition be dismissed. To this report, exceptions were filed by the intervener, and argued by counsel to the court below. On the 24th of November, 1900, a decree was entered by the court below, in favor of the respondent and dismissing the petition of the intervener.

Upon this statement of the proceedings had subsequent to the filing of her petition, the intervener, in addition to the grounds of recovery urged in her petition, makes the point "that a plea of 'not guilty' is not a sufficient answer in an equity case, to raise issues entitling the respondent to adduce evidence contradictory to that of complainant, except as to the amount of damages, where damages are claimed."

It is clear that the proceeding instituted by the intervener's petition was one in equity. It was addressed to the equity side of the court, in an equity suit there pending. The receiver of the railroad company, as the officer and hand of the court, had control and management of the said railroad, and possession of all its funds and assets. The intervener sought by her petition for an order upon the receiver, that he should recognize and pay out of these funds a claim for unliquidated damages, accruing on an alleged liability incurred by the said receiver in the operation and management of the road. Under the circumstances, we think the case was one of equitable cognizance, and should have been proceeded with in accordance with equity rules and practice, and that the petitioner was entitled that the respondent should either demur to the complaint of her petition, or should file an answer thereto, admitting or traversing every material allegation of the petition, and stating with sufficient particularity every substantive defense. The plea of "not guilty," while appropriate to a trial at law, we think was inadmissible in the proceedings below. The plea was a nullity. No proper issue was raised

Mercantile Trust Co. v. Pittsburgh, etc., Ry. Co

thereby. We cannot say that she was not injured by the want of an answer—specific answer—to the averments of her complaint. She was denied that which was the right of every complainant in a court of equity.

But though of opinion that the proceedings below in this respect were grossly irregular, we place our determination of the case upon its merits, and therefore turn to what seems to us the most serious charge of negligence made by the intervenor. This is, that under the conditions which obtained along the respondent's tracks, on the night of the accident, it was his duty to give intervenor's decedent, or those in charge of his train, notice thereof, and that his failure so to do was the proximate cause of the accident. It was undoubtedly the duty of the receiver to notify his employees of any unusual danger to which they might be exposed in the performance of the service in which they were engaged, of which he was informed and they were not, or of which the master was better informed than the servant could be. To give such notice to the employee, is the exercise of that proper and reasonable care for the safety of the servant, which the law imposes as a duty upon the master.

Recurring to the facts disclosed by a careful reading of the record, and as found by the master: It appears that it had been raining all through the day of March 22d, and that at its close a storm of unprecedented violence set in throughout the region in which that part of the railroad of respondent, with which we are here concerned, was operated. The chief dispatcher at New Castle Junction, 16 miles east of Hazelton, had full information as to the character of the storm and the havoc it was creating on certain portions of the road, at 7:45 on the evening of the accident. At that time, he sent a dispatch to Hazelton, which in substance annulled train No. 5, being the Chicago Express, going west, which would have occupied the road between Hazelton and New Castle Junction about that time. This order was communicated to those in control of the first section of No. 94 fast freight. A notice was also given to the conductor and engineer of said first section, to run cautiously and look out for washouts at certain specified places between Hazelton and New Castle Junction. It is true that this notice did not include the point near Carbon station, at which the accident afterward happened. Section No. 1, as we have seen, left Hazelton at 8:02 in the evening, passed the point of the accident, some five or six miles west of Hazelton, in safety, and arrived at New Castle Junction at 8:45. Section No. 2 of the same train, and upon which was decedent, left Hazelton at 8:22, having received the notice that the Chicago Express had been annulled and that it had a clear track before it to New Castle Junction. As this was a fast freight, this notification gave it the right of way, and must necessarily have had the effect of measurably relieving the

Mercantile Trust Co. v. Pittsburgh, etc., Ry. Co

mind of the engineer from anxiety as to the speed of his train. There was no notice, however, given to the conductor or engineer, or any other person on the train, such as was given to those on the first section, warning them of possible dangers along the road resulting from the storm then raging. As to this important fact, the finding of the master is as follows:

“It further appears that on the evening of the accident the conductor and engineer of the first section, as was the custom in such cases, had received notice to look out for slides on account of the amount of rain that had fallen at various places specified in the notice, to wit, at Himrod, at Struthers and at Sand Cut, but said notice did not specifically warn these employees on the first section to look out for obstructions at the place where the accident subsequently occurred. The conductor and engineer of the second section received no such notice, nor any notice at all.”

It is urged by respondent, and his argument is accepted by the master, that as the notice given to the first section was to look out for washouts or dangers at certain specified points, and as these did not include the place of the accident, therefore, such a notice to the second section would have been unavailing to prevent the accident that afterwards occurred. It would seem obvious, however, that any notice of special dangers, such as that given to the first section, would have served as a caution to those in control of the train, and so impressed upon them the necessity of careful running of the train, as would have prevented the accident that actually occurred. The argument of respondent and the view taken by the master overlook the fact, that the charge of negligence here is, not that the precise notice given to section No. 1 was not given to section No. 2, but, that no notice of any kind calculated to warn or caution those in control of section No. 2 of special dangers resulting from the storm, was given to them. Under the circumstances, the neglect to give such warning was a culpable breach of the duty owed by the respondent to his servants engaged in running section No. 2. As we have already said, the storm was of unusual and extraordinary, if not unprecedented, violence, and that it had already wrought havoc and obstruction along the line of the road to be traversed by the decedent, was known by those to whom the duty of watching and observing such conditions, and of caring for the safety of those exposed to their special dangers, was delegated. No valid excuse is interposed by respondent for the nonperformance of this duty. No custom dispensing with such a notice, or practice of omitting it, as to which its employees were informed, was attempted to be proved. On the contrary, the testimony of the respondent's dispatcher was to the effect that it was always expected that warning should be given in case of storm, even of those much less violent than that of the night in question. Besides, that there was necessity on this occasion for such a notice, even in

Mercantile Trust Co. v. Pittsburgh, etc., Ry. Co

the opinion of those in charge of the railroad, is evidenced by the fact that special warning was given to section No. 1, and that the chief dispatcher testified that he thought and believed that he had sent a notice to those in control of section No. 2.

It is intimated that as the engineer and conductor, and those on board the trains, were exposed to the storm, they knew of its violence and were thereby warned of its dangers. But this is not true, in the sense in which it must be true to relieve the respondent from liability; that is, in the sense that the peril was an obvious one, and those exposed to it were bound to observe it and guard themselves against it. The violence of the storm immediately around themselves, did not necessarily give those on the train the information as to the results of that storm along the line of the railroad, which was possessed by the dispatcher who was in telegraphic communication with the whole line. It was the fact that the storm had produced and was producing landslides and wash-outs at various points, that constituted the ground for apprehension, and created the necessity for extraordinary care and caution. That the storm was of this character, could not be known by those in control of section 2, unless the information was conveyed to them by those who had received the telegraphic reports concerning the same. This, then, was not the case of a servant assuming the risk of a known and obvious peril.

We are compelled to the conclusion, therefore, that the neglect to give those in control of section No. 2 any notice whatever, which would serve to caution them against the results of this extraordinary storm, was a proximate cause of the accident, by which decedent came to his death, and was culpable negligence for which the respondent is liable. Such conclusion is strengthened by the fact which appears in the record, that after the first section had left Hazelton, but before the second section had left, the dispatcher was in possession of additional information as to the severity of the storm and the havoc caused by it. This fact serves to increase the burden of responsibility resting upon the respondent, with respect to notifying those on section No. 2 of the general dangerous condition of the road.

The duty of informing a servant of special or extraordinary risks connected with his service, is a primary duty of the master, and the delegation thereof to any inferior servant, cannot relieve him of the responsibility imposed upon him by law. Whether the servant, to whom such duty is delegated, be higher or lower in the scale of employment, makes no difference. By whomsoever performed, the duty is that of the master, and he is always responsible to the servant for its due performance.

This view of the case makes it unnecessary that we should consider the other charges of negligence contained in the petition, although one of them, touching the inadequate pro-

Winkler v. Philadelphia & R. Ry. Co

vision for carrying away the water accumulating from the hillside at the place of the accident, impresses us with its importance.

The decree of the court below is therefore reversed, with directions to the said court to enter a decree in favor of the petitioner, and to assess her damages by reason of the premises by such mode as it shall determine.

WINKLER v. PHILADELPHIA & R. RY. CO.

(*Superior Court of Delaware, Newcastle, Sept. Term, 1901.*)

[53 Atl. Rep. 90.]

Federal Statute—Employers' Liability Act—Automatic Couplers—Failure to Furnish—Interstate Commerce—Burden of Proof.

The safety appliance act of congress of March 2, 1893, as amended April 1, 1896, provides that it shall be unlawful for any carrier to haul on its lines any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without men going between the cars; and section 8 provides that any employee injured by any car in use contrary to the act shall not be deemed to have assumed the risk: *held*, that in an action for injuries received while coupling a tender to a car, the claim being that the tender was not properly equipped under the act, the burden is on plaintiff to show that the cars in question were being used in moving interstate commerce, and were not properly equipped.

Interstate Commerce.

If the car being moved had come from a point out of the state, it would be moving interstate commerce.

Same—Automatic Couplers.

Though the car to which the tender was being coupled was not used in interstate traffic, the case was within the statute if the removal of such car was a necessary step in moving an interstate car.

Same—Same—Employers' Liability Act—Cars—Definition.

The safety appliance act of congress of March 2, 1893, as amended April 1, 1896, provides (section 2) that it shall be unlawful for any carrier to haul on its lines any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without men going between the cars; and section 8 provides that any employee injured by any car in use contrary to the act shall not be deemed to have assumed the risk: *held*, that a locomotive tender is a car within the act.

Same—Same—Same.

In an action for an injury received while coupling a car to a tender the negligence relied on was the necessity of making the coupling with a "bull-nose" coupler on the tender: *held*, that if the tender at the time of accident was equipped with automatic couplers, but that it was so connected with the "bull-nose" coupler that the coupling with other cars was not made automatically by impact, but it was necessary for men to go between the ends of the cars to couple and uncouple, then the coupling did not comply with the act of congress of March 2, 1893, as amended April 1, 1896, requiring safety couplings, and was unlawful.

Same—Same—Contributory Negligence.

If, however, in using such unlawful coupler, the plaintiff contributed to the accident by his own carelessness, he could not recover, notwithstanding the fact that the coupling was unlawful.

Damages.

On a verdict for a servant in an action against the master for in-

Winkler v. Philadelphia & R. Ry. Co

juries the jury should award such sum as will reasonably compensate him for his injuries, including therein his loss of time and wages, his pain and suffering in the past and such as may come in the future, resulting from the accident, and also for such pecuniary loss as, from the evidence, the jury may believe will arise from his diminished ability to earn a living in the future.

Action by George C. Winkler against the Philadelphia & Reading Railway Company. Verdict for plaintiff.

Argued before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Victor B. Woolley and Wm. S. Hilles, for plaintiff.

Levi C. Bird and Andrew E. Sanborn, for defendant.

LORE, C. J. (charging jury). George E. Winkler, the plaintiff in this action, claims that on the 19th day of February, 1901, he was in the employ of the Philadelphia & Reading Railway Company, the defendant, as head brakeman of the shifting crew, which was using shifting engine No. 1,242 and its tender in moving and delivering interstate commerce cars at the siding on the south side of this city, the defendant then and there being a common carrier of passengers and freight; that while coupling the tender to the next car, using a "bull-nose" coupler, without fault on his part, his right hand was caught between the couplers, resulting in the loss of three fingers, and otherwise crushing and injuring his hand; that the "bull-nose" coupling on the tender was dangerous and unlawful; that he was inexperienced in the business of a brakeman, and was not warned or instructed by the defendant as to the risk thereof; that his injuries were caused by the defendant's negligence. The defendant, on the other hand, claims that the engine and tender were not engaged in moving interstate commerce at the time of the accident, but merely in moving local traffic; that the "bull-nose" used on the tender at that time was necessary in order to safely move cars around sharp curves in the Diamond State Steel Yard, where the automatic couplers would not work, and was a reasonably safe and proper appliance for such purpose; that, moreover, the tender and cars were equipped with automatic couplers, as required by law; that the plaintiff sought work as a competent brakeman, and also actually received instructions as to the risk of his employment, which risks and dangers were also open and known to the plaintiff; that his injuries were the result of his own carelessness. It is conceded that the relation of master and servant existed between the plaintiff and the defendant at the time of the accident. We are asked to instruct you as to certain duties and obligations growing out of that relation. It is the duty of the master to provide for his employees a reasonably safe place in which to work, and reasonably safe tools and appliances with which to work, and also to keep them in a reasonably safe condition. The place, tools, and machinery need not be of the best, nor of the latest pattern, nor of the most improved kind, but must

be reasonably safe and adapted to the purpose for which they are to be used. If the master fails to provide such safety, and injury results from such failure alone, he is liable. It is the duty of the master to make, promulgate, and enforce such rules for the government of his business as are necessary, complicated as to make his supervision in person impracticable, and the duty of the servant to obey such rules properly. Where the master knows that the servant is inexperienced, he may not presume that the servant knows the risks of his employment. It is the duty of the master to warn the servant against the dangers of the master, and which it is unreasonable for the servant to appreciate. Where, however, a servant of maturity and of average capacity solicits employment, the master has a right, in the absence of the contrary, to assume that the servant understands the particular work applied for. It is on the servant's knowledge of the disqualification of the servant, and counter dangers known to the master, and known to the servant, that the duty of instructing the servant arises. *Railroad Co. v. Winkler*, 436, 104 Fed. 124. The servant assumes the risk and hazards which are ordinarily incident to the work he undertakes and is presumed to have knowledge of them. Where the employment is of a dangerous nature, the servant assumes the risk he may incur from machinery and devices and methods of work which are open and apparent and equally well known to the servant as to the master. *Creswell v. Railroad Co.*, 43 Atl. 629; *Maul v. Railroad Co.*, 1 Per. 990; *Huber v. Jackson & Sharp Co.*, 111 Fed. 100. These are some of the general rules governing the liability of master and servant.

The assumption of risk, however, on the part of railroad companies which are common carriers in interstate commerce has been modified by the "Safety Appliance Act," passed by Congress and amended April 1, 1896, which was in force at the time of the accident. This act provides

"Sec. 2. That on and after the first day of January, 1896, it shall be unlawful for any common carrier to be hauled or used on its lines any car or locomotive not equipped with couplers connected by impact, and which can be uncoupled by hand of men going between the ends of the car or locomotive."

"Sec. 8. That any employee of any such carrier who may be injured by any locomotive, car or engine, in violation of the provisions of this act shall be deemed to have assumed the risk thereby incurred, and shall not be entitled to recover damages for such injury continuing in the employment of such carrier."

Winkler v. Philadelphia & R. Ry. Co

ful use of such locomotive, car, or train has been brought to his knowledge."

In this case it is claimed by the plaintiff that at the time of the accident he was engaged in moving interstate commerce for the defendant company, with a tender or car not equipped with couplers coupling automatically by impact, which could be uncoupled without the necessity of men going between the ends of the cars, but were being coupled by a swinging "bull-nose" and link, contrary to the act of congress, and that his injuries resulted therefrom. To sustain this contention, it is necessary for the plaintiff to show by a preponderance of the evidence: (1) That at the time of the accident he was engaged in moving cars then used in interstate traffic; (2) that at the time of the accident the cars then in use were not equipped with automatic couplers, as required by the act of congress. The burden of proof is upon the plaintiff to show these facts.

First. If the tender and car were then in use in moving local traffic, only, from point to point within the limits of this state, they could not be engaged in interstate commerce. If, however, the car being moved had come from a point out of the state, with freight to be here delivered, it would be moving interstate commerce. This would be so even though the car to which the tender was being coupled was not the car used in interstate traffic, if the removal of such car was a necessary step in getting at and moving said interstate car.

Second. Should you be satisfied that the tender was so engaged in moving interstate commerce, you must be further satisfied from the evidence that it was not equipped with automatic couplers. We may say to you that the tender of a locomotive engine engaged in interstate commerce is a car within the scope of the act of congress, which uses the general terms "locomotive," "car" or "train." A tender is defined to be a car by Webster. The tender is not a locomotive engine, or component part thereof, but is the small car carrying water and fuel for the engine, and to which the first passenger or freight car of the train is usually coupled. This interpretation comes not only within the language of the act of congress, but is especially within its scope, which is to promote the safety of employees and travelers upon railroads. Should you find that the tender at the time of accident was equipped with automatic couplers, but that it was so connected with the "bull-nose" coupler that the coupling with other cars was not made automatically by impact, but so equipped that it made it necessary for men to go between the ends of the cars to couple and uncouple, then such coupling did not comply with the act of congress, and was unlawful. If, at the time of the accident, the defendant was using such a coupler, which was prohibited by the act of congress, it was guilty of negligence per se; and, if the injuries complained of resulted from such unlawful use alone, then the defendant

Louisville, etc., Ry. Co. v. Chandler's Adm'r

would be liable. The law manifestly contemplates that the car shall be so equipped that the coupling shall actually be made automatically, and, if not so equipped, the plaintiff did not assume the risk arising therefrom, even though he continued in the employment of the company after such unlawful use of the cars had come to his knowledge. If, however, in using such unlawful coupler, the plaintiff contributed to the accident by his own carelessness, he cannot recover, notwithstanding the fact that the coupling was unlawful. In such case he must take the consequence of his own contributory negligence. Should you find that at the time of the accident the defendant company was not engaged in moving interstate commerce, but only local commerce, we say to you that the act of congress does not apply. In like manner it does not apply if the cars in use were actually equipped with automatic couplers, as contemplated by the act, and in compliance with its terms. Should you find from the evidence the state of facts to be such that the act of congress does not apply to the case under the foregoing instructions, you should not consider the provisions of this act in making up your verdict, but be governed by the general rules relative to master and servant.

This action is based upon the negligence of the defendant company. Such negligence is never presumed, but must be proved, to entitle the plaintiff to a verdict. The burden of proving such negligence is upon the plaintiff. It is the duty of the servant, as well as of the master, to exercise care and prudence in all cases commensurate with the risk or danger of the employment. Therefore, if the plaintiff contributed to the accident by his own negligence, he cannot recover. Where contributory negligence is relied upon as a defense, however, the burden of proving such negligence is upon the defendant. If you find for the plaintiff, your verdict should be for such sum as, in your judgment, from the testimony, will reasonably compensate him for his injuries; including therein his loss of time and wages, his pain and suffering in the past and such as may come in the future, resulting from the accident, and also for such pecuniary loss as, from the evidence, the jury may believe will arise from his diminished ability to earn a living in the future.

Verdict for plaintiff.

LOUISVILLE, H. & ST. L. RY. CO. v. CHANDLER'S ADM'R.

(*Court of Appeals of Kentucky, Dec. 2, 1902.*)

[70 S. W. Rep. 666.]

Injury to Brakeman—Overloading Cars.*

A railroad company is liable for death of a brakeman caused by the overloading of cars beyond their estimated capacity, where the

*As to the degree of care required in furnishing safe place to work, see generally, foot-note appended to *Southern Indiana Ry. Co. v. Moore* (Ind. App.), 3 R. R. R. 251, 26 Am. & Eng. R. Cas., N. S., 251.

Louisville, etc., Ry. Co. v. Chandler's Adm'r

overloading was, or by the use of ordinary care could have been, known to the conductor, or other agent of the company whose duty it was to see to the proper loading, and was not known to deceased. Same—Same—Damages—Instruction.

Remark of plaintiff's attorney to the jury, in an action against a railroad company for death of a brakeman, from overloading cars, "You will render such a verdict here as will teach this railroad company it must obey the law, and give us such sum of money as will show the railroad company that it cannot violate the law," is not ground for reversal.

Verdict.

The jury not being directed to find any special facts, though the real issue was whether C.'s death was due to the overloading of a train, a verdict, "We * * * believe * * * that C.'s death was due to the overloaded train, and find for plaintiff damages to the amount of \$7,000," amounts to a general verdict, the rest being surplusage.

Appeal from circuit court, Breckinridge county.

"Not to be officially reported."

Action by Thos. B. Chandler's administrator against the Louisville, Henderson & St. Louis Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Helm, Bruce & Helm and Chapeze & Wathen, for appellant.

B. H. Young and M. W. Ripy, for appellee.

GUFFY, C. J. This is an appeal from the Breckinridge circuit court, from a judgment rendered in favor of appellee in the suit in said court against the appellant. It is claimed by the plaintiff that the decedent, Thos. B. Chandler, was, while in the employment of the appellant as a brakeman on a freight train run eastwardly on what is known as the Fordsville Branch of the Louisville, Henderson & St. Louis Railway Company, killed by the negligence of the appellant. The negligence, as alleged, consisted in the overloading of the cars, and by having defective trucks. The question of defective trucks was, however, excluded from the consideration of the jury by the court, for the reason that there was no testimony tending to show that the trucks were deficient. The overloading of the cars, and whether such overloading caused the wreck which resulted in the death of Chandler, were the only questions left for the consideration of the jury. The first trial resulted in a verdict and judgment in favor of the appellee for \$14,000, but that judgment was set aside by the court for several reasons, not necessary to be here considered. A new trial resulted in a verdict and judgment for plaintiff for \$7,000, and, appellant's motion for a new trial having been overruled, it prosecutes this appeal.

The grounds relied on for a new trial are: (1) That the court erred to the prejudice of the defendant in instructing the jury in instructions Nos. 1 to 8, both inclusive, given by the court to the jury, to which the defendant objected and excepted at the time. (2) The court erred to the prejudice of the defendant in refusing to give the jury instruction "b"

Louisville, etc., Ry. Co. v. Chandler's Adm'r

asked by the defendant, to which the defendant excepted at the time. (3) The court erred in allowing incompetent testimony prejudicial to the defendant, to which defendant objected and excepted at the time. (4) The court erred to the prejudice of the defendant in not allowing competent testimony, to which defendant objected and excepted at the time. (5) The verdict of the jury is not sustained by sufficient evidence, and is contrary to the law. (6) The court erred to the prejudice of the defendant in overruling its motion to peremptorily instruct the jury to find a verdict for it at the conclusion of plaintiff's evidence, to which defendant objected and excepted at the time, and still excepts. (7) The court erred to the prejudice of the defendant in overruling its motion to peremptorily instruct the jury to find a verdict for it at the conclusion of all the testimony, to which defendant objected and excepted at the time. (8) The verdict of the jury is excessive, appearing to have been given under the influence of passion and prejudice. (9) Misconduct of one of the attorneys for the prevailing party, in this: that he argued to the jury: "You should render such a verdict here as will teach this railroad company it must obey the law." And again the said attorney further argued: "Give us such a sum of money as will show the railroad company that it cannot violate the law." To all of which defendant objected and excepted at the time, which objections and exceptions the court overruled, and it still excepts. Said language was prejudicial to the substantial rights of defendant.

After a careful consideration of the law and facts in this case, we are of opinion that the court did not err in the giving and refusing of instructions. The instructions of the court are as follows: "(1) If the jury believe from the preponderance of the evidence that the defendant's cars, or any one of them, which composes the train on which plaintiff's intestate was serving at the time he was killed, were overloaded (that is to say, were loaded beyond their estimated capacity to carry such weight), and that this fact was known to the conductor in charge of said train, or other agent of the defendant whose duty it was to see to the proper loading thereof, or could have been known by such conductor or other agent by the use of ordinary care, they should find for the plaintiff. Otherwise they should find for the defendant. (2) There is no evidence before the jury tending to show that there was any defect in any of the defendant's cars, trucks, king bolts, bolsters, or other parts thereof; and the issue submitted to the jury is whether or not any of the cars composing said train were overloaded, and, if so, whether this fact was known to the conductor, or other agent of the defendant whose duty it was to see to the proper loading of the cars, or could have been known by such conductor or other agent by ordinary care, and whether the death of Thos. B. Chandler was caused by much overloading. (3) The plaintiff's intestate on entering the service of the defendant assumed all the ordinary risks inci-

Louisville, etc., Ry. Co. v. Chandler's Adm'r

dent to such hazardous employment and service, and there can be no recovery for his death if it was caused by such ordinary risk. (4) There can be no recovery in this case if the jury believe from the evidence that the deceased, on the day he was killed, and prior to the time he was killed, knew that the cars were overloaded, if they were overloaded, and continued in such service after such knowledge. (5) It was the duty of the conductor of defendant's train, or some other agent of the defendant, to use ordinary care to see that the cars composing said train were properly loaded, and were not overloaded; and the failure on the part of such officer or agent to discharge such duty, if there was such failure, was negligence on the part of defendant. (6) 'Ordinary care,' as used in these instructions, is such care as an ordinarily prudent man is accustomed to use under like or similar circumstances. (7) If the jury find for the plaintiff, they should find such sum as in their opinion, from the evidence, will fairly compensate the estate of plaintiff's intestate for the destruction of his power to earn money during the probable duration of his life, considering his age at the time of his death, and his ability to earn money, as shown by the evidence, not exceeding the sum claimed in the petition. (8) If the jury cannot all agree on the verdict, three-fourths of them may agree, in which case all of the jurors agreeing to the verdict must sign it." Instruction "b," offered by the defendant, was embraced in the instructions already given, and hence it was not error to decline to repeat it. The instructions asked by defendant which embodied any correct principle of law had been substantially given in the instructions before quoted.

We fail to perceive any error of the court in admitting or rejecting evidence. It is manifest that the verdict of the jury is sustained by sufficient evidence; hence it follows that the court did not err in overruling the various motions of appellant to instruct the jury to find for the defendant.

There is no evidence or circumstance in this case tending to show that the verdict was excessive, or that it was given under the influence of passion or prejudice. If plaintiff was entitled to recover at all, the verdict is very reasonable.

The ninth ground for new trial professes to quote the remarks of one of the attorneys for plaintiff, which, in substance, is that "you will render such a verdict here as will teach this railroad company it must obey the law, and give us such a sum of money as will show the railroad company that it cannot violate the law." Whether such remarks were within what might be considered the proper line of argument is a question upon which we need not express an opinion. Suffice it to say that they do not furnish any ground for a reversal of this judgment. It would be quite difficult for this court to announce a definite rule as to the line of argument that attorneys might pursue in certain cases. In this case it is certain that the attorney did not undertake to state any fact bearing upon the case on trial, nor did he attempt to

Duree v. Chicago, etc., Ry. Co

state any proposition of law that should govern the case. It was simply an appeal to the jury to render such a verdict as would teach the appellant to obey the law. Surely every one ought to obey the law.

The appellant has argued at great length, and with signal ability, that the court below should have given a peremptory instruction to find for the defendant. We are clearly of opinion that the evidence in this case fully justified the jury in believing that the accident which cost this man his life was caused by overloading of the cars, and that those whose duty it was to see that the cars were not overloaded knew that they were being so overloaded, or could, with ordinary care, have known the fact. There is not a scintilla of evidence in this case to show that the deceased was in any manner guilty of contributory negligence. The province of the jury was to hear the testimony and determine as to the truth of the matter. If the jury had believed the evidence of the defendant, they would likely have found for the defendant. They evidently believed the testimony of the plaintiff, namely, that the overloading of the cars caused them to run off the track; and, of course, there is no question but what that caused the death of Chandler. Their verdict is abundantly supported by the testimony. The instructions are quite as favorable to the appellant as it was entitled to; hence the peremptory construction was properly refused.

The brief of appellant discusses the verdict of the jury, and suggests that it did not authorize the judgment. The verdict of the jury is as follows: "We, the jury, believe from the evidence that Thos. B. Chandler's death was due to the overloaded train, and find for the plaintiff damages to the amount of seven thousand dollars." There was no direction to the jury to find any special facts; hence anything they said, further than to find for plaintiff or defendant, was merely surplusage, and could not at all affect their verdict; but, as already indicated, the real issue was whether Chandler's death was due to the overloaded train, which seems to be what the jury found without going into details, or saying that the train was overloaded, and therefore the trucks left the track, and the cars were turned over, and Chandler, therefore, killed.

There appears to us no error in this record to the prejudice of appellant's substantial rights. The judgment is therefore affirmed, with damages.

DUREE v. CHICAGO, M. & ST. P. RY. CO.

(*Supreme Court of Iowa, Dec. 20, 1902.*)

[92 N. W. Rep. 890.]

Injury to Section Hand—Negligence—Sufficiency of Evidence.

While a section hand on a railroad was standing beside the track as a freight train passed, something struck his eye, causing a sting-

Duree v. Chicago, etc., Ry. Co

ing sensation. The engine had passed, and was about 100 feet from him, and the wind blew from the train towards him. Shortly thereafter three particles of coal, each about the size of a pin head were removed, and the sight of that eye was lost: *held* not to warrant an inference of negligence, either in the improper management of the engine, or the lack of proper equipment.

Application of Statute.

Code, § 2056, which casts the burden of proof on a railway company in action for damages sustained by any person, on account of "loss or injury to his property" occasioned by fire set or caused by operation of such railway, has no application to actions for injury to the person.

Assumption of Risk.

A section hand on a railroad assumes the risk of injury from such sparks and cinders as may be thrown off by the engines in the ordinary operation of the road, while he is necessarily standing beside the track as trains pass.

Evidence—Harmless Error.

A ruling sustaining an objection to a question which is afterward answered by the witness, if erroneous, is without prejudice.

Same.

Where, in an action against a railway company for damages resulting from being struck in the eye by a cinder from a passing engine, the specialist who removed the cinder has testified that he could not tell whether it was hot when it struck, refusal to allow him to say whether he could have told, had the cinder been larger, was not error.

Witnesses—Mileage.

Where there is no proof as to the distance traveled by witnesses in attendance at a trial, who were not summoned or sworn, no mileage for such witnesses can be taxed.

Appeal from district court, Keokuk county; John T. Scott, Judge.

Action for damages. The plaintiff appealed from judgment for the defendant. Subsequently the defendant appealed from a ruling on a motion to retax costs. Affirmed.

Brown & Brown, for appellant.

C. H. Mackey and J. C. Cook, for appellee.

LADD, C. J. The plaintiff, while working as a section hand on defendant's line of road, Saturday, October 28, 1899, stepped aside to allow a freight train to pass. It was moving up grade, to the southwest. He stood to the southeast, about 12 feet from the track, looking in the same direction, and the wind was blowing from the northwest. When the engine had passed about 100 feet, something struck him in the eye, causing a burning sensation and pain. One Frederickson shortly after removed two substances. "The first seemed to be a wooden, fibrous matter, and the other a small coal cinder, * * * about the size of an ordinary pin head." Later in the day the eye was examined by a physician, who took out a similar particle. On Monday following, a specialist removed a particle of coal, or like substance, "as large as the head of an ordinary brass pin," which was deeply imbedded in the cornea. The outcome of it was the loss of sight in that eye. Upon proof of these facts, the jury, by direction of the court, returned a verdict for the defendant. Exception is taken to

Duree v. Chicago, etc., Ry. Co

this ruling, but we think it correct. Though much to be regretted, human ingenuity has not yet been able to produce a device or apparatus wholly adequate to prevent the emission of sparks and cinders from a locomotive engine when moving a train of cars at the customary rate of speed. The necessity of a draft of air to keep up the fire is such as to render it impracticable to reduce the openings in the spark arrester to a size so small as to prevent the escape of particles. This is generally understood, and possibly courts should take judicial notice of the fact, as a matter of common knowledge. *Menomonic River Sash & Door Co. v. Milwaukee, & N. R. Co.* (Wis.) 65 N. W. 176. At any rate, the emission of particles of coal or sparks, not unusual in size or quantity, will not, alone, warrant the inference of negligence, either in the improper management of the engine or its lack of equipment with appliances of approved efficiency. *Savannah, F. & W. R. Co. v. Tedman* (Fla.) 22 South. 658; *Gandy v. Railroad Co.*, 30 Iowa, 420, 6 Am. Rep. 682; *McCummons v. Railway Co.*, 33 Iowa, 187; *Garrett v. Railway Co.*, 36 Iowa, 121. If it could be said that the injury to plaintiff's eye "was occasioned by fire set out or caused by operation of such railway,"—which hardly seems possible,—such injury is not within the purview of the section of the statute casting the burden of proof in such cases on the defendant. Section 2056, Code. The damages there contemplated are those "sustained by any person on account of loss or injury to his property." The words quoted were inserted in that portion of section 1289 of the Code of 1873 relating to damages occasioned by fire set out or caused by the operation of a railway, and, as thus changed, enacted as section 2056 of the Code. The modification was evidently made to meet the decision in *Liming v. Railroad Co.*, 81 Iowa, 246, 47 N. W. 66, awarding damages occasioned by injuries to the person. No evidence of any defect in the construction or operation of the engine was introduced, or that smoke or cinders and sparks of unusual size or quantity were being thrown out. The specks taken from the eye did not appear to be larger than a pin head, and it cannot be inferred that, because of emitting them, the defendant was negligent. See, *Wiedmar v. Railroad Co.*, 114 N. Y. 462, 21 N. E. 1041; *Searles v. Railway Co.*, 101 N. Y. 661, 5 N. E. 66. The hazards incident to the ordinary perils of his employment were assumed by the plaintiff. He must necessarily step aside from his work on the track in order that trains may pass. Sparks and cinders were likely to be thrown out of the engine at any time when in operation. This he was bound to know, and, if injured thereby without negligence on the part of defendant, he cannot recover.

2. Appellant, when on the witness stand, was asked whether he noticed that there was a great amount of smoke coming from the engine. An objection was sustained. As he stated

Duree v. Chicago, etc., Ry. Co

afterwards that he did not know, the ruling was without prejudice. Again, objection was sustained to the question "whether it apparently came from the engine, or in the direction from the engine." To what "it" referred, is not disclosed in the record. Assuming that smoke, wind, or the cinder was the antecedent, the ruling, in view of what has already been said, could not have affected the conclusion. The court refused to allow the specialist to say whether he could have told, had the cinder been larger, if it was hot when it struck the eye. Such evidence would have been entirely irrelevant. Expert opinion is necessarily confined to the facts as developed on the trial. As the physician said that he could not tell in this particular case, there was no error in not allowing him to answer subsequently whether he could tell with the facts not as they in fact were.

3. Six persons attended court at defendant's request for the purpose of giving their testimony when called. Fees for attendance and mileage in their behalf were taxed as part of the costs by the clerk. Upon discovery that they had not been subpoenaed, the plaintiff, as they had not been used, moved a retaxation, eliminating any allowance to them. In resistance, the defendant made a conclusive showing that, had not the case been taken from the jury, these persons would have been used as witnesses, and given testimony material to the issues, and that they were in attendance for this purpose only. No showing was made of the distance traveled by each. The court held that fees for attendance had been properly taxed, but that mileage should not have been allowed. From this ruling the defendant appealed. It was clearly correct. As they had not been summoned in the usual way, and the record failed to show that they had been called as witnesses, the burden was upon the defendant to vindicate the propriety of taxing the costs. This is entirely omitted in the matter of mileage. But the showing was sufficient as to attendance. The service of a subpoena is in the interest of the party desiring the attendance of the witness, and not of his opponent. If he will attend voluntarily, such service would be superfluous and of benefit to neither party. The omission to swell the costs with the additional expense in officer's fees and mileage for issuing and serving subpoenas furnishes no ground of complaint by the other side. It is the rather a favor, in the way of eliminating unnecessary expenses. *Christensen v. Union Trunk Line* (Wash.) 32 Pac. 1018; *Farmer v. Store*, 11 Pick. 241; *U. S. v. Sanborn*, 28 Fed. 299; *Crawford v. Abraham*, 2 Or. 166. The plaintiff relies on *Fisher v. Railroad Co.*, 104 Iowa, 588, 73 N. W. 1070. But in that case no showing whatever was made. So far as appeared, the persons whose fees were involved may have no knowledge or connection with the case whatever. See *Briggs v. Rumely*, 96 Iowa, 202, 64 N. W. 784.

Affirmed.

RIDDLE v. FORTY-SECOND ST., M. & ST. N. AVE. RY. CO.

(Court of Appeals of New York, Jan. 27, 1903.)

[66 N. E. Rep. 22.]

Injury to Employee—Contributory Negligence.

The evidence showed that plaintiff's intestate was excavating under defendant's street railway, over which the cars were continually passing; that while working in the trench he was struck by a car; that he saw it approach, and leaned back to be out of the way; and that there was plenty of room in the trench for him to remain at a safe distance from the car as it passed, but that he raised up so as to bring his face near the car, and was struck by the step: *held*, that he was guilty of contributory negligence, preventing recovery.

Appeal from supreme court, appellate division, First department.

Action by Janet Riddle, administrator of David B. Alexander, against the Forty-Second Street, Manhattanville & St. Nicholas Avenue Railway Company. From a judgment of the appellate division (76 N. Y. Supp. 1029) affirming a judgment for plaintiff, defendant appeals. Reversed.

Charles F. Brown, Addison C. Ormsbee and Henry A. Robinson, for appellant.

Thomas Darlington, for respondent.

HAIGHT, J. This action was brought to recover damages for the alleged negligent killing of David Brown Alexander, commonly known as David Brown. The plaintiff was his maternal aunt, with whom he lived, and whom he supported. It does not appear that he left other relatives. The decedent was a carpenter in the employ of Naughton & Co., contractors, who were engaged in altering switches for the defendant company. At the time of the accident they were engaged in changing a switch on the Boulevard near Seventy-First street, in the city of New York, at which point the tracks curve around and run down Tenth avenue. An excavation had been made under the tracks 12 or 15 feet square, with a trench on the outer side of the curve several feet in length, and between 3 and 4 feet in depth, so as to make a change of the gas pipes underneath the tracks. The decedent and one Lloyd were engaged in bracing up the tracks of the railway company, and in watching the bracings as the cars passed over the tracks; the decedent acting as foreman, and Lloyd as his helper. The cars upon the defendant's road were operated by electricity taken from a power rail which had been removed for the space of about 25 feet on either side of the excavation, and the defendant's cars ran over the tracks at that point by means of the momentum obtained before reaching the point where the power rail had been removed. The cars passed about a minute and a half apart. At the time of the accident the decedent and Lloyd were in the trench, stooping down, when one of the defendant's cars approached from the north, passing over the excavation. As it

Riddle v. Forty-Second St., etc., Ry. Co

approached, the decedent leaned back in the trench so as to be out of the way of the car, and it appears to have partially passed, at which time he straightened up, bringing his face nearer to the car. In rounding the curve the rear step of the car extended farther from the track, by some eight or ten inches, than when running on a straight track; and in passing it struck the decedent upon the bridge of the nose, knocking him backwards on to the side of the trench. After the accident the decedent arose. There was a mark upon his nose, where a small piece of the skin was torn off. Some one of the men present supplied him with a piece of court-plaster, which he pasted over the place of the injury; and then he returned to his work in the trench, where he remained, according to the testimony of Lloyd, the plaintiff's witness, for the space of about 20 minutes, and by other witnesses from an hour to an hour and a half, and then he left, going to the tool-house, a short distance away, complaining of a pain in his head. This was about 11 o'clock in the forenoon. He remained at the toolhouse the rest of the day. When the rest of his fellow workmen quit work in the evening he went to a saloon near by, where he remained until about 9 o'clock in the evening. During the day he appears to have been in a partial stupor, sleeping some of the time. At other times he was troubled with nausea and vomited, and was unable to walk without assistance, and in attempting to do so on two or three occasions fell down. He was taken home from the saloon in a cab, assisted into his house and to bed, and appears to have gone to sleep. The next morning he was found unconscious by his aunt, and subsequently he was removed to the J. Hood Wright Hospital, where he died during the day. Upon the post mortem examination a slight abrasion was found upon the back of the head, and a clot of blood of the size of a small hen's egg in the temporal lobe of the brain, on the right side. The cause of his death was cerebral hemorrhage, causing apoplexy. The walls of the blood vessels had the appearance of being degenerated and in an unhealthy condition.

The condition of the plaintiff was to the effect that he was a strong, healthy, temperate man; and on the part of the defendant that he was very intemperate; had drank liquor several times that morning before the accident, and that he had complained of pain in his head for a number of days; that he was drunk during the day and evening, and vomited several times. At the conclusion of the plaintiff's evidence the defendant moved for a nonsuit upon the ground that no negligence had been shown on the part of the defendant, and that it affirmatively appeared that the decedent was guilty of contributory negligence, and this motion was renewed upon the close of the evidence. It was denied on each occasion, and an exception taken. The verdict was in favor of the plaintiff, and the judgment entered thereon has been affirmed by

Alabama Great Southern R. Co. v. Brooks

the appellate division, but the affirmance does not appear to have been unanimous.

We think that the motion for a nonsuit or for the direction of a verdict should have been granted. The only negligence charged against the defendant was in not warning the decedent of the approach of its car. Upon this question the evidence may be conflicting. Some of the persons present testified that the gong was sounded, but Lloyd, who was in the trench with the decedent, did not hear it. It, however, is undisputed that the contractors employed a man to stand by the trench and give warning to the men in the trench of the approach of a car, and that this was done on this occasion. But assuming that no warning was given, the fact remains that the decedent saw the car as it approached; that he leaned back in the trench so as to be out of its way; that there was plenty of room in the trench for him to remain at a safe distance from the car while it passed, and, had he done so, no injury would have resulted, but by raising up and bringing his face nearer to the car while it was passing he came in collision with the step. This was his own act, and we think it was contributory negligence on his part. He appears to have been an intelligent man, and, as we have seen, was the foreman in charge of the work. He knew that the trench was at the point where there was a curve in the tracks around which the cars ran into Tenth avenue, and that in rounding the curve the rear of a car would be thrown a greater distance from the track than the side of the car when running upon a straight line. He was familiar with the situation. He understood the dangers, and, in engaging to do the work, undertook the risks.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

* PARKER, C. J., and GRAY, BARTLETT, MARTIN, VANN, and WERNER, JJ., concur.

Judgment reversed, etc.

ALABAMA GREAT SOUTHERN R. CO. v. BROOKS.

(*Supreme Court of Alabama, Dec. 17, 1902.*)

[33 So. Rep. 181.]

Death of Employee—Negligence—Pleading.

A count averring that plaintiff's intestate, while engaged in the discharge of his duties as a brakeman, was caught between two cars and crushed and killed, and alleging that his death was proximately caused by the negligence of the locomotive engineer in operating the engine, sufficiently alleges defendant's negligence.

Same—Obvious Danger—Pleading.

In an action against a railroad company for the death of a brakeman, a plea alleging facts showing that the danger incurred by decedent was obvious, is not defective for failing to expressly aver that it was obvious.

Same—Same—Same.

A plea in an action against a railroad company for the death of a brakeman by being caught between two cars, alleging that decedent

Alabama Great Southern R. Co. v. Brooks

unnecessarily went between two cars, when he "knew, or by reasonable diligence could have known, that cars were approaching, and would probably collide with the ones between which he went," and that he thereby assumed the risk of being injured, fails to show that the danger was obvious.

Same—Contributory Negligence—Pleading.

The plea is not one of contributory negligence.

Assumption of Risk.

An employee does not assume a risk created by the employer's negligence.

Cross-Examination.

Where, in an action against a railroad company for the death of a brakeman by being caught between two cars, a witness for defendant testified that he heard the conductor instruct the brakeman to couple the air brakes "after he left there," it was not error to permit him to be asked on cross-examination if he had not stated to the conductor at a specified time and place, in the presence of designated persons, that the deceased was coupling the air brakes as ordered by the conductor.

Same.

Where the conductor testified in his direct examination that he had not ordered the brakeman to go between the cars at the time he was hurt, it was not error to require him to answer the question whether he remained silent when the brakeman told him after the accident that he (the brakeman) tried to couple the air brakes as the conductor had ordered him to do.

Evidence.

The testimony of third parties as to the silence of the conductor on the occasion of the brakeman's statement to the conductor was admissible.

Same.

Proof, in an action against a railroad company for the death of a brakeman while in the performance of his duties, that it was the conductor's duty, as soon as an accident happens, to telegraph the number and initials of the cars where the accident occurred, was immaterial.

Questions for Jury.

Where, in an action against a railroad company for the death of a brakeman, the evidence was in conflict on all the material questions of the case, the issues were properly submitted to the jury.

Appeal from city court of Birmingham; Charles A. Senn, Judge.

Action by Nannie S. Brooks, as administratrix of the estate of B. F. Brooks, deceased, against the Alabama Great Southern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action by Nannie S. Brooks as administratrix of B. F. Brooks, an employee of appellant, to recover damages for the death of said B. F. Brooks. The first count, after making the necessary preliminary averments, alleged that Brooks, while engaged in the discharge of his duties as a brakeman at Epes, was caught between two cars on defendant's road and crushed and killed, and then avers that his death "was proximately caused by the negligence of Jesse Clements, who was also in the employment of said defendant, and who, under his employment, had charge or control of a locomotive engine on said railroad; that the negligence

Alabama Great Southern R. Co. v. Brooks

of said Clements consisted in this: that he negligently ran a car which was attached to said engine down to and against another car near or by which her said intestate was standing in the discharge of his duties, and thereby struck her said intestate, crushing and injuring him as aforesaid." The second count varies from the first only in this, that it avers that Clements "negligently operated or ran the locomotive engine which he had under his control while it was attached to one or more cars or train of cars so that said car or train of cars struck her intestate, inflicting the injuries as aforesaid." The third count adopts the averments of the first count down to the description of the negligence, and then charges that Clements' negligence consisted in this: that he negligently ran an engine, with a car or cars attached thereto in the town of Epes in violation of an ordinance of that town, which is set out, prohibiting the running of trains at a greater rate of speed than six miles an hour, and that the death of Brooks was proximately caused thereby. The sixth count adopts the averments of the first count down to and including the averment that Brooks was crushed and killed, and then avers that his death was proximately caused by the negligence of one Samuel Park, "who was also in the service or employment of defendant, and under his employment had charge or control of the car or train of cars on defendant's said railroad; that said Park's negligence consisted in this: that he so negligently operated or caused to be operated said car or train of cars that they ran down upon and against her said intestate, where he was standing in the discharge of his duties, inflicting the injuries as aforesaid." To the first, second and sixth counts, separately and severally, defendant demurred, "First. Because said count is indefinite and uncertain in that it fails to allege or show of what the negligence of said Jesse Clements consisted. Second. For that said count is indefinite and uncertain in that it does not show this defendant in what respect the said Clements was negligent in running said car; whether it was running too rapidly, or in what respect he was negligent in regard thereto." These demurrers having been overruled, defendant interposed the plea of the general issue and several pleas of contributory negligence. The evidence showed that on February 15th, 1900, appellant ran from Tuscaloosa towards Meridian a local freight train consisting of many cars. This train was manned by Park, conductor; Clements, engineer; Webb, flagman, and Brooks, plaintiff's intestate, brakeman. The train reached Epes about 4 o'clock p. m. the same day. Epes is an incorporated town, and had an ordinance then in force prohibiting the running of trains at a greater rate of speed than six miles an hour. At Epes considerable switching was done and four or more freight cars were cut out of the train and placed upon what is known as the "passing track." After these cars were placed upon the passing track Brooks was ordered by the conductor, Park, to

Alabama Great Southern R. Co. v. Brooks

couple the air between them, and the engine and other cars pulled out of the passing track on to the main track and went a considerable distance before re-entering the passing track. The estimates of the witnesses differed as to the length of time that elapsed between the placing of the cars on the passing track and the collision. There were other conflicts in the evidence, as shown by the opinion. The opinion sufficiently shows the objections and exceptions to evidence, as well as charges refused to defendant. There was verdict for the plaintiff for \$7,000. Defendant filed a motion for a new trial upon the ground that the verdict was contrary to and unsupported by the evidence. This motion was overruled, and defendant appeals.

Smith & Weatherly and John London, for appellant.

Lane & White, S. O. Harkness, and Walter K. Smith, for respondent.

HARALSON, J. The court gave the affirmative charge for defendant as to each of the counts except the first, second, third and sixth.

1. That the demurrers to these counts were properly overruled we need not discuss after our repeated decisions sustaining counts of a similar character. *Mill Co. v. Parker* (Ala.) 32 South. 700; *Mining Co. v. Tolbert* (Ala.) 31 South. 519; *Railroad Co. v. Jones*, 130 Ala. 456, 30 South. 586; *Improvement Co. v. Campbell*, 121 Ala. 50, 25 South. 793, 77 Am. St. Rep. 17; *Railway Co. v. Arnold*, 114 Ala. 183, 21 South. 954; and the other cases referred to in these decisions.

2. The fifth plea sets up, that plaintiff's intestate "voluntarily and unnecessarily went in between two cars on the track of defendant, when he knew, or by reasonable diligence could have known, that a car or cars were approaching the ones between which he went, and that they [would] probably collide, and that thereby he assumed the risk of being injured when the cars came together."

The demurrers to the plea were, (1) that it assumes that there was obvious danger for plaintiff's intestate to go between the cars; (2) that the plea does not show or aver that going in between the cars, was obviously dangerous; (3) because the averment that plaintiff's intestate assumed an obvious danger is merely the conclusion of the pleader, and (4) that the said plea does not aver or show that plaintiff's intestate knew that the approaching cars were coming with force and would probably strike the cars between which plaintiff's intestate was, and that in striking said cars [they] would probably injure plaintiff's intestate.

The plea is not bad because, in terms, it did not state that the danger incurred by plaintiff's intestate was obvious, if the facts stated show that it was obvious. Facts set up to show danger, may be and are stronger to show it, than the mere statement of the conclusion of the pleader without facts, that

Alabama Great Southern R. Co. v. Brooks

ts and is obvious. Railroad Co. v. Roach, 110 Ala. 267, 132.

all know that a car may be propelled by an engine, to a coupling with another one standing on the track of it, at such a rate of speed as to show at a glance to a sensible person, that it would be dangerous to go in between the approaching car and the one standing, to couple when they come together. There is not only danger in coupling, but it may be instantly apprehended. But it is a matter of common knowledge, that in such case, the moving car may be propelled so slowly and cautiously, as not to suggest the idea of danger attending its coupling with a standing car. They often come together without jar, or without a bump between them. The plea here, assumes that there was danger in making the coupling by intestate. The plea that deceased "knew or by reasonable diligence should have known that a car or cars were approaching the engine between which he went and that they would probably couple," falls short of an averment of any fact to show danger in making the coupling and that it was obvious, and on this point was subject to the demurrer to it. Bailey, Mast. & Co. v. Railroad Co. v. Banks, 104 Ala. 508, 16 South. 547; Railroad Co. v. Railway, 107 Ala. 626, 18 South. 173; Railway Co. v. Old, 114 Ala. 189, 21 South. 954; Railroad Co. v. Roach,

Furthermore, the plea is not one of contributory negligence. It sets up merely that defendant assumed a risk in going to his employment and fails to answer the charge of negligence made in the complaint; for the law is, that an employee, by entering upon the performance of his duties, what-soever may be the danger incident thereto, does not assume a risk created by the employer's negligence.

Webb, the flagman, on his cross examination by plaintiff's attorney, asked, "Did you not state in the presence of Mr. Park and Mr. Hark, and in the presence of the deceased and Mr. Hark and Dr. Reed and Dr. Shaw, at the drug store, while Mr. Webb was there, after he was injured that night,—did you state to the conductor in substance this,—'No, he was coupling the cars; I had already coupled them, but he was coupling the air as you had directed or ordered him to do'?"

This was objected to "on the ground that the declaration of an agent subsequent to the happening of the accident is incompetent, which objection the court overruled, stating that the witness was not competent as to that, but that it tended to impeach the statement of the witness, and that it was introduced solely for the purpose of impeaching the witness."

The witness had just stated, in his direct examination, that the conductor, who was Mr. Park, had instructed deceased to set the air brakes, after they left there; "that he heard the conductor tell deceased that, right there somewhere near the engine, 3, 4 or 5 minutes before the accident." The question propounded was competent for the purposes to which it was limited by the court.

Illinois Cent. R. Co. v. Dotson

4. The plaintiff asked the conductor, on his cross-examination, "Didn't he [the deceased] say to you [on the occasion and at the place referred to in the foregoing exception], that he was not trying to make the coupling, but was trying to attach the air, which you had ordered him to do, at the time he was hurt, and were not you silent when that was said?" The witness had stated in his direct examination, that he had not ordered him to go in between the cars at the time he was hurt, and that when he went in between them, he went voluntarily. The question was not subject to objection. It was competent to discredit the witness by showing contradictory statements, and his silence, when the deceased said to him what the question assumed he did say, tended to show he admitted what deceased charged him with. The same thing applies to similar questions propounded to Dr. Shaw and to W. B. Harkness, as to the silence of Park on that occasion when told by deceased that he had ordered him to go in between the cars.

Objection to the question to the conductor, Park, the basis of assignment of error 14, was properly sustained. The question sought to show by the witness, that it was one of his duties, as soon as an accident happens to telegraph at once the number and initials of the cars, where the accident occurred. Showing this to be one of his duties without more did not prove or tend to prove, if that were important, that he performed that duty.

5. The only refused charges assigned as error are the ones numbered 1, 2, 3, 4 and 7, the first being the general charge for defendant, and the others, like charges, on the first, second, third and sixth counts of the complaint.

The evidence was in conflict on all the material questions in the case, such as whether the deceased went between the cars voluntarily, or by the instructions of the conductor, Park, the rate of speed at which the cars were being shoved back by the engine which collided with those the deceased went between, and whether the engineer, Clements, was guilty of negligence or not, and these questions were properly left for the determination of the jury. Neither of said charges could properly have been given.

The motion for a new trial fails to impress us that the court erred in overruling it. Affirmed.

ILLINOIS CENT. R. CO. v. DOTSON.

(*Court of Appeals of Kentucky, Jan. 29, 1903.*)

[71 S. W. Rep. 636.]

Servant—Injuries—Employment—Evidence.

Where six or seven employees of a railroad bridge gang borrowed the hand car from the foreman, and went on a pleasure trip to a neighboring town, during which time they were not on the company's pay roll, the mere fact that the foreman, as they were starting, re-

Illinois Cent. R. Co. v. Dotson

is mail and a few nails, did not render them in company, so that one of them could recover against employer, for an injury received while on the

suit court, McCracken county.

ilfully reported."

Dotson against the Illinois Central Railroad from a judgment in favor of plaintiff, defended.

by and Pirtle & Trabue, for appellant, for appellee.

This action was instituted by appellee, in suit court, to recover from appellant damages by him from being thrown from a hand car in appellant's service. Appellee in October, 1899, was known as "Bridge Gang No. 9," of which he was foreman. At said time these employees were stationed at a point on appellant's line called "Hunsacker," where they were engaged in building a bridge belonging to appellant. It appears, about 7 o'clock, the weather being too stormy for the appellee, in company with five or six other employees of appellant, who belonged to said bridge gang car which belonged to appellant, and used in connection with their work of repairing the line, and went off from Hunsacker to a place called "Dyersburg," about four miles distant. At that distance of the town of Dyersburg, the train crossed the track, and appellee was thrown violently upon one of the rails of the track, which in a manner as to cause him considerable injury, and appellee, nor any of the men with him, became seriously or permanently injured; but after a few days he left appellant's services, and he, as said before, instituted this action for recovering damages for his injury. He alleges that he was injured while in the employ of appellant, and that the injury was caused by defects in the track owned by appellant for the use of its employees in the bridge gang No. 9, which defects were unknown to appellant, or could have been discovered by the exercise of ordinary watchfulness and attention. The petition further sets forth, seemingly in support of its allegations, the fact that appellee was entitled to be kept by appellant for the benefit of its employees, and that to which appellant, upon application, granted him admission. All the material facts in issue are put in issue by the answer, and it is alleged that appellee was injured while in the employ of appellant; it being affirmatively alleged that his injury occurred while he and some of his companions of

Illinois Cent. R. Co. v. Dotson

bridge gang No. 9 were on a pleasure jaunt to Dyersburg, they having borrowed appellant's hand car for making the said trip. A trial of the cause by jury resulted in a verdict for appellee, who was the plaintiff below, in the sum of \$500, upon which verdict judgment was duly entered. A motion for a new trial having been made by appellant and overruled by the court, the case is here for review.

At the close of appellee's testimony, appellant moved the court to instruct the jury peremptorily to find for appellant (defendant), which motion was overruled. At the close of all of the testimony in the case, appellant renewed its motion for peremptory instruction, which was also overruled. Having reached the conclusion that the court erred in overruling these motions of appellant for peremptory instruction, it will not be necessary to notice the other instructions given by the court, or any of the other instructions asked for by appellant.

Appellee states that, upon the morning he was hurt, Noah Morris came to him, and others of the bridge gang who were in one of the boarding cars used by appellant's employees, and proposed that they should take the hand car and go down to Dyersburg. Appellee tried to state that Noah Morris said, in this conversation, that the boss, A. Bernard, had ordered this to be done, but the court very properly excluded this testimony as hearsay; so the sum total of appellee's testimony upon this question was that Noah Morris and appellee, and four or five others of the bridge gang, took the hand car and started to Dyersburg. He does state that after they had started the foreman, A. Bernard, told Morris, while down at Dyersburg, to get his mail, and also bring back 15 cents' worth of nails. To the same effect is the testimony of Jacob Edwards, one of the bridge gang, who went with appellee on the hand car to Dyersburg. Appellee was unable to show that the foreman made any orders for him or his companions to take the hand car and go to Dyersburg, and the most that he could show was that, after the trip was made up and the men started, the foreman called to Noah Morris and told him to bring back the mail and 15 cents' worth of nails. The fact that appellee was hurt while engaged in the business of appellant lies at the very base of his right of recovery for the injury in question, and it was necessary, in order to recover damages, that he should show this to be true. We do not think that the mere request or order of the foreman, after the party had been arranged for and started, to get his mail and 15 cents' worth of nails, turned what would otherwise have been a mere pleasure jaunt into business of the company. Appellee and his companions were not primarily going on the business of appellant. There was nothing in Dyersburg for them to do for appellant, and the evidence shows that when they got to Dyersburg, except getting the mail and nails in question, appellee and his companions merely wandered around the town for an hour or so, and then returned to camp

Pittsburg, etc., Ry. Co. v. Gipe

nsaker. It seems to us a proposition utterly incredible
ix or seven men, who were on appellant's pay roll at
\$1.40 to \$2 per day, each, should have been sent with a
car, four miles, for the mail and 15 cents' worth of nails,
two men would have been amply sufficient, according to
vidence, to have made the trip with the hand car. The
dant's evidence upon this point put the matter beyond

Noah Morris, who was also introduced by appellee,

he received no orders from the foreman to go to
and that he and his companions went down on
r simply because they desired to go for their own
id that for this purpose he had borrowed the hand
e foreman. The foreman, A. Bernard, testified
me hesitation he consented to lend the hand car
o Noah Morris and his companions to make the
sburg; that the parties were not on the com-
ess, but were going of their own volition and
easure; and that during the time they were not
any's pay roll. And this is all the evidence there
ord upon this point. It follows then, that there
ence whatever to sustain appellee's allegation that
while in the employ, or while doing service for
t; and, this being true, there was nothing to sub-
iry, and the motion of appellant for peremptory
ould have been sustained. Appellee's claim for
admission to appellant's hospital must follow the
case.

the case is reversed for proceedings consistent
inion.

PITTSBURG, C., C. & ST. L. RY. CO. v. GIPE.

[*Supreme Court of Indiana, Jan. 16, 1903.*]

[65 N. E. Rep. 1034.]

ts—Engineers of Different Trains—Employers' Liability

omotive engineer while leaning out of the cab window
e was killed by coming in contact with another
b it was charged was negligently placed in a
ition, too near the track on which deceased was passing,
er in charge, such engineers were fellow servants
aning of the employers' liability act (Burns' Rev. St.
abd. 4), which makes corporations liable for injuries to
es "where such injury was caused by the negligence of
o-employee or fellow servant engaged in the same com-
" * * the said person, co-employee or fellow servant at
g in the place and performing the duty of the corpora-

Pleading.

of negligence was not based on the situation of the

ther trainmen of different trains are fellow servants,
appended to *Beaumont v. Northern Pac. Ry. Co.* (C. C.
k Eng. R. Cas., N. S., 470.

Pittsburg, etc., Ry. Co. v. Gipe

tracks as being too near each other, but on the fact that engine was placed in a dangerous place on the track.

Death by Wrongful Act—Authority of Administratrix to Release Claim against Relief Association.

A railroad employee was a member of a relief association organized and supported by the company and employees. The by-laws provided for the payment of benefits in case of injury or death, and that the acceptance of such benefits should release the company from all liability, and that no payments should be made while any suit for damages was pending, or if damages were recovered. The employee was killed through the negligence of the company, leaving a widow, to whom his benefit certificate was payable, and children. The widow was appointed administratrix, and the amount due under such certificate paid to her on her executing a receipt acknowledging the sum paid as received in full satisfaction of such certificate and of all claims or demands against the relief fund and railroad company on account of such death. She signed the receipt individually and as "admrx.": *held* that, as such administratrix, she had authority to so settle the claim, and the settlement was binding on the children.

Administratrix—Signature—Presumption.

Though her signature to the receipt did not state of what estate she was administratrix, it must be inferred from the context that she signed as administratrix of her deceased husband.

Release of Claim against Relief Fund by Administratrix.

Though the amount paid under the certificate was only the amount which by its terms was payable to the widow, by receiving it as administratrix also she was bound thereby to account for it in her capacity as administratrix, and it therefore furnished consideration for the release in that capacity.

Authority of Administrators.

The authority given to administrators by Burns' Rev. St. 1901, §§ 2454, 2456, to compromise debts due to the estate only when ordered by the probate court, relates only to debts and demands in favor of the estate, and does not relate to the right of action given for wrongfully causing the death of the decedent.

Appeal from circuit court, Hamilton county; John F. Neal, Judge.

Action by Flora J. Gipe, as administratrix of the estate of Sylvester Gipe, deceased, against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Transferred from appellate court under section 1337u, Rev. St. 1901. Reversed.

Deceased, a locomotive engineer, while operating his engine in defendant's yard, in leaning out of his cab window to look, was killed by coming into contact with the tender of another engine which it was alleged had by the engineer in charge been negligently moved to and stopped at a point dangerously near the track on which deceased was passing.

John L. Rupe, for appellant.

Wymond J. Beckett and Christian, Christian & Cloe, for appellee.

GILLET, J. Flora J. Gipe, as administratrix of the estate of Sylvester H. Gipe, deceased, instituted this action against appellant and the Pennsylvania Company to recover damages for the alleged negligent killing of her decedent. Appellee voluntarily dismissed the action as against the

Pennsylvania Company. Appellant demurred to the amended complaint for want of facts, its demurrer was overruled, and it excepted to such ruling, and assigns error thereon. On issues duly joined, there was a trial that resulted in a verdict and judgment for appellee. Appellant unsuccessfully moved for a new trial, and the further questions in this case are presented by an assignment of error based on the latter ruling.

It is sought by the amended complaint to make a case within the first portion of the fourth subdivision of the employers' liability act (section 7083, Burns' Rev. St. 1901). But two objections are urged to such pleading: (1) Because deceased and the alleged negligent fellow servant were, at the time of the death of the former, engaged in the performance of duties as locomotive engineers, it is claimed that they were vice principals, and that the statute does not impose a liability in such cases; and (2) that the condition of certain tracks, in the switch yard where decedent met his death, in respect to their crossing at an angle so acute as not to leave sufficient room for clearance for some distance on either side of the crossing, is shown to have been one of the assumed risks of the employment. We know of no reason why the statute should not be construed as creating a liability as between vice principals. But we deny that it appears that these employees were vice principals. Appellant's counsel, in their brief, speak of them as fellow servants, and the only basis for the claim that they were vice principals appears to be the statement in some of our decisions that in cases falling within the first part of the fourth subdivision of said statute the negligent employee is to be regarded as a vice principal. See *Thacker v. Railroad Co.* (at last term) 64 N. E. 605, and cases there cited. We need not pause to determine whether such statement would justify itself in every state of circumstances that might arise under that portion of the statute; it suffices to state that, while the statutory provision has created a greater responsibility upon the part of the master, it has not operated to create a merely artificial relation that can be made the basis for refinements that would tend to impair the force of the enactment. The second objection to the amended complaint is answered by the statement that the charge of negligence is not based on the situation of the tracks, but that the pleading is based on a charge of negligence upon the part of an engineer in the common service. If there are further objections to the statement of the cause of action, they stand as waived in this court by a failure to discuss them.

We pass now to a question that was presented under the issues based on the second paragraph of answer. The pleading mentioned stated, in substance, the following facts: That appellant was a party to an agreement among certain railroad companies whereby a so-called voluntary relief department was organized for the payment of fixed benefits to employees of said companies and their beneficiaries; that said depart-

Pittsburg, etc., Ry. Co. v. Gipe

ment was maintained by the contributions of employees becoming members thereof, supplemented by the contributions of such companies, by virtue of a provision in said contract to meet all deficiencies in the fund; that decedent became, and was at the time of his death, a member of said department, under a contract; based on an application containing the following provisions: "And I agree that the acceptance of benefits from said relief fund, for injury or death, shall operate as a release of all claims for damages against said company, arising from such injury or death, which could be made by or through me, and that I or my legal representatives will execute such further instrument as may be necessary to formally evidence such acquittance." The answer further shows that the regulations of said department, that are made a part of the contract by the terms of the application, provide that, if suit be brought for such injury or death, payment shall not be made of such benefit until the suit is discontinued, and that, if such suit result in a judgment against the company, or be compromised by it, payment of such judgment or of the amount of the compromise shall preclude any claim upon the relief fund for such injury or death. It is also alleged in said answer that the beneficiary named by decedent in his application was his wife, Flora J. Gipe, and that, with knowledge of the facts aforesaid, she was appointed and qualified as administratrix of decedent's estate, and that, with such knowledge, she afterwards elected for herself, as beneficiary, and as said administratrix, to claim and demand from said relief fund the death benefit so provided, and that thereupon there was paid to her, as such administratrix, the amount of said death benefit, in the sum of \$750, and that, as such administratrix, she signed and executed a full release and discharge of said relief fund and of said Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, which release and discharge was in the following words: "Whereas, Sylvester H. Gipe, deceased, lately in the service of the Pittsburg, Cincinnati, Chicago and St. Louis Railway Company, was a member of the relief fund of the said company, under application No. 5,561, and the death benefit payable from the said relief fund on account of such membership, amounting to seven hundred and fifty dollars (\$750.00), is, upon the condition of the execution of this release, as provided in said application, payable to the undersigned, beneficiary of the deceased, under the terms of his application. Beneficiary: Flora J. Gipe (widow). Now, therefore, I, the undersigned, do hereby acknowledge that the payment of the said sum of seven hundred and fifty dollars (\$750.00) from the relief department and fund of the said company, which sum I acknowledge to have this day received, is in full satisfaction and discharge of all claims or demands on account of or arising from the death of said deceased which I now have, or can hereafter have, whether against the said relief fund, the said the Pittsburg, Cincinnati, Chicago & St.

Pittsburg, etc., Ry. Co. v. Gipe

Louis Railway Company, or any other corporation associated therewith in administration of their relief department. Witness my hand and seal at Indianapolis, Ind., this twenty-eighth day of January, A. D. 1898. [Signed] Flora J. Gipe. [L. S.] [Signed] Flora J. Gipe, Admr. [L. S.]"

A third paragraph of answer was filed, by which appellant answered the facts alleged in said second paragraph of answer in bar only of the claim of the widow. The appellee replied to the special paragraphs of answer in two paragraphs,—general denial, and no consideration. The court instructed the jury, upon the close of the argument, that there could be no award of damages in favor of the widow, so we need not consider that feature of the case further. The court refused, however, to give a peremptory instruction to find for the defendant, and modified an instruction, tendered by appellant, by adding these words: "But if, as to the children of said deceased, such release, executed by said Flora Gipe, was without any consideration moving to or received for them in her trust capacity, the same would only bar the right of recovery for said Flora for her individual benefit, but would not bar a recovery for the benefit of said children."

The appellant's evidence in support of the averments of the second paragraph of its answer consisted largely of the various documents heretofore mentioned, in connection with our statement of the contents of said paragraph. The appellee offered no evidence in support of her reply, and the questions presented with reference to whether the defense on this branch of the case was made out will be discussed as we proceed.

In *Railroad Co. v. Moore*, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638, this court held that an answer substantially like the third paragraph of answer in this case, answering only as to the damages of the widow, was sufficient. It was in that case pointed out that while a beneficiary in such a case is at liberty to seek the statutory remedy, yet if he accepts the sure and immediate benefit of the fund, instead of taking his chances in the courts against the company, the result, at least while the contract stands, is a release of his claim for the tort. To the same effect, *Railroad Co. v. Hosea*, 152 Ind. 412, 53 N. E. 419; and see 51 Cent. Law J. 143. It cannot be denied that a release by a widow, who is the beneficiary, is not a release as to the next of kin, who have a right under the statute to share in the damages notwithstanding the stipulation of the decedent. In this case, however, the question is presented differently, for her the instrument of release was signed by the beneficiary and the administratrix. This leads us to an examination of the power of the latter to compromise.

At common law an executor or administrator had the same power over the personal estate of his decedent that the latter had at the time of his death. *Whale v. Booth*, 4 Term R. 625, note a; *Weyer v. Bank*, 57 Ind. 198; *Latta v. Miller*, 109 Ind. 311, 10 N. E. 100; *Parker v. Steamboat Co.*, 17 R. I. 376, 22

Pittsburg, etc., Ry. Co. v. Gipe

Atl. 284, 23 Atl. 102, 14 L. R. A. 414, 33 Am. St. Rep. 869, and cases cited. His power to compromise has been often affirmed. Williams' Ex'rs (7th Am. Ed.) p. *815; Parker v. Steamboat Co., supra; Chase v. Bradley, 26 Me. 531; Chouteau v. Suydam, 21 N. Y. 179; Rogers v. Hand, 39 N. J. Eq. 270, note. In Underwood v. Sample, 70 Ind. 446, it was held that an executor might, upon a new and valuable consideration, extend the time of payment of a note. In Latta v. Miller, supra, this court held that upon a sufficient consideration an administrator might release one of the makers of a note, the act not amounting to a devastavit. In deciding the case, this court said: "The only restraint upon the common-law rights and powers of an executor, in or over promissory notes and other evidences of debts belonging to the decedent's estate, is imposed, not by statute in this state, but by the decisions of this court." Section 2454, Burns' Rev. St. 1901, provides that "Every executor and administrator shall proceed with diligence to collect the debts and demands due the estate of the deceased," and that, "where the interests of the estate may be promoted thereby, the court, or judge thereof in vacation, may order the executor or administrator to compound debts." Section 2456 of our statutes is as follows: "Where any debtor of a deceased person shall be unable to pay the whole or any part of the demand or claim of such person, or is insolvent or in doubtful circumstances, or where any legal or equitable defense is alleged against such debtor or claim, the executor or administrator, with the approbation of the proper circuit court, or judge thereof in vacation, may compound with such debtor, and give him a discharge, upon receiving the avails agreed upon in such compounding or upon the payment of the same being sufficiently secured." The next section authorizes executors and administrators, with the approbation of the court, to "file" such debts or demands "in said court, for the benefit of the creditors, heirs and legatees of such deceased." If the demand here in question were within the description of the class of demands mentioned in the decedents' act, we might have a different question to deal with. But the provisions of said act do not apply to the compromise of a demand of this nature. The supposed restrictive provisions of said act clearly relate to debts and demands in favor of the estate of the deceased. The right of action that is given for wrongfully causing the death of another is regarded, not as a continuation of the right of the deceased, but as a new cause of action existing in favor of the beneficiaries mentioned in the statute. Burns v. Railroad Co., 113 Ind. 169, 15 N. E. 230; Hilliker v. Railroad Co., 152 Ind. 86, 52 N. E. 607; Railroad Co. v. Hosea, 152 Ind. 412, 53 N. E. 419; Malott v. Shimer, 153 Ind. 35, 54 N. E. 101, 74 Am. St. Rep. 278. As said in Railway Co. v. Goodykoontz, 119 Ind. 111, 113, 21 N. E. 472, 12 Am. St. Rep. 371: "We

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 ver damages were recovera

Pittsburg, etc., Ry. Co. v. Gipe

gave her the legal right to control the prosecution and disposition of the suit, as an administrator has in other cases. Whether the children, who, with herself, were interested in the distribution of whatever damages might have been recovered, can call her to account for any error of judgment she may have committed in making this settlement, is a question to be decided when they make the attempt." This ruling was followed in *Washington v. Railway Co.*, 136 Ill. 49, 26 N. E. 653; *McIntyre v. Sholty*, 139 Ill. 171, 29 N. E. 43; *Express Co. v. O'Donnell*, 88 Ill. App. 459. In the carefully considered case of *Parker v. Steamboat Co.*, 17 R. I. 376, 22 Atl. 284, 23 Atl. 102, 14 L. R. A. 414, 33 Am. St. Rep. 869, a like conclusion was reached. Under the Tennessee statute the widow has the right to sue, but the recovery is for the benefit of the children as well, as held in one of the earlier cases in that state. Under such circumstances her power to compromise, even over the objection of the children, has been a number of times affirmed. *Greenlee v. Railroad Co.*, 5 Lea, 418; *Stephens v. Railway Co.*, 10 Lea, 448; *Holder v. Railroad Co.*, 92 Tenn. 141, 20 S. W. 537, 36 Am. St. Rep. 77. In the case last cited, where the children brought a somewhat anomalous action to recover against the original defendant their share of the money due under a compromise, where the money had been paid to the widow, the court, after referring to the earlier decisions in that state affirming the right of the widow to compromise, said: "Her power to compromise the statutory right of action carried with it, as a necessary consequence, a right on her part to receive for them the whole sum stipulated in the compromise. If the fact that the statute confers upon the widow the first right to sue authorizes her to fix by agreement the aggregate amount to be paid by the wrongdoer to her and the children, it also authorizes her to receive that amount for herself and them. Her bona fide compromise binds the children, and her bona fide receipt of the money paid under the compromise likewise, and for the same reason, binds them." In Mississippi, under a statute substantially like the Tennessee statute, a widow made an agreement to compromise a pending suit to recover for the wrongful killing of her deceased husband. Her right so to do was challenged in *Cotton-Mill Co. v. Mullins*, 67 Miss. 672, 7 South. 542, where the supreme court of that state said: "The widow alone had the right of action, and she had a right to accept and discharge the defendant." In *Cogswell v. Railroad Co.*, 68 N. H. 192, 195, 44 Atl. 293, 295, the court, after pointing out the common-law authority of executors and administrators to compromise, said: "An administrator in very many similar cases is appointed for the express purpose of bringing suit. The plaintiff, having the power to enforce this claim, may properly release it. Indeed, where there is no want of good faith in giving a release, it is difficult to see how any question of authority can arise. The fact that this

Pittsburg, etc., Ry. Co. v. Gipe

is not a common-law action does not affect the right of the administrator to compromise the claim, acting in good faith. In this, as in all other actions prosecuted by him in his capacity as administrator, he is the sole trustee for all persons interested in the suit."

A very full and satisfactory discussion of the subject under consideration is found in *Foot v. Railway Co.*, 81 Minn. 493, 84 N. W. 342, 52 L. R. A. 354, 83 Am. St. Rep. 395, where the question is discussed from the standpoint of the executor or administrator being a statutory trustee. In that case the action was brought for damages under the statute; there was an answer of compromise, and a reply that the compromise pleaded was made without the knowledge or consent of the next of kin, and without the knowledge or consent of the probate court; that such settlement had never been ratified or confirmed by the next of kin or the court, and that the administratrix had never rendered any account of the money so received, but had converted the same to her own use. A demurrer was sustained to this reply, and in passing on the ruling the court said: "It will be noticed that the reply does not attack the settlement pleaded in the answer upon the ground that it was procured through fraud or misrepresentation. The only issue raised by the reply is that the former administratrix, Ellen Flanning, had no authority to make the settlement. The demurrer, therefore, raises the question whether, under Gen. St. 1894, § 5913, the personal representative of the deceased person has power, without the assent of the next of kin and the probate court, to compromise a claim for damages. The right of action given under this statute is exclusively for the benefit of the widow and next of kin, upon the theory that they have a pecuniary interest in the life of the deceased, and the object of the statute is to compensate them for such loss. * * * Neither does it follow that no compromise or settlement could be made by the trustee either before or after commencing the action. If the personal representative is the trustee of the parties to be benefited, for the purpose of commencing the suit, it must follow that he is their trustee for all purposes in connection with the action. Upon him devolves the responsibility of selecting counsel, collecting evidence, and incurring the expenses of a trial. Someone must determine the advisability of accepting a verdict as final, either because adverse or inadequate. Again, for the same reason, if the nature of the evidence attainable and the circumstances of the case should lead the personal representative to the conclusion that the chances of recovery would be slight, and that a compromise would be desirable without commencing the action, he has the same authority to effect a settlement before as after actually serving the summons. The statute contemplates that the entire matter of enforcing the claim and of collecting the money shall be in the personal representative, not only for the pro-

Pittsburg, etc., Ry. Co. v. Gipe

tection of the defendant, but also in order that there may be a responsible party to take charge of the interests of those to be benefited. The law assumes that the court will appoint a trustee who is suitable for the purpose. If experience shows that incompetent persons are often selected, and that they are liable to be imposed upon in the way of being drawn into unwarranted compromises, it is a subject which properly commands the attention of the legislature. As the statute stands, its meaning is clear, and there is no call for a consideration of the common law upon the question." In addition to the above authorities, we cite Tiff. Death Wrongf. Act, § 125; 11 Am. & Eng. Enc. Law (2d Ed.) 926-930.

A painstaking search justifies us in stating that there is no authority that denies to executors or administrators, acting as plaintiffs in suits to recover for wrongful death, the power to make compromises. Where the contract is not infected with fraud or other vice or infirmity, such remedy as the beneficiaries may have to objectionable settlements must be sought on the probate side of the court. In *Yelton v. Railroad Co.*, 134 Ind. 414, 33 N. E. 629, 21 L. R. A. 158, where the question involved was as to the power of the beneficiary to compromise a claim for the death of her husband, there was a dictum to the effect that an executor or administrator could not settle. The language mentioned is now disapproved.

In proceeding to a consideration of the evidence, it is important to note, as before stated, that the issues based on the second paragraph of answer were limited to replies of general denial and no consideration. On this branch of the case counsel for appellee contend that there was no proof that "Flora J. Gipe, Admrx.," whose name was attached to the instrument of release, was Flora J. Gipe, administratrix of the estate of Sylvester H. Gipe, deceased. The argument is made that Flora J. Gipe may have been the administratrix of a number of other estates. While the administratrix was in no wise bound by the agreement made by her decedent in his application before referred to, yet when we find that the instrument of release refers back to the application of the deceased, and that it was provided in said application that the legal representatives of the applicant would execute any such further instrument as might be necessary to evidence the release of the claim for damages on account of the death of the applicant, it can only be inferred that the signature, "Flora J. Gipe, Admrx.," standing as it does in contradistinction to the signature, "Flora J. Gipe," was intended to evidence the assent of appellant to the provisions of said agreement.

With reference to the claim that there was no consideration moving to the administratrix, appellee's counsel contend: (1) That the contract of decedent entitled his wife upon his death to receive \$750 as benefits, and that therefore the relief department only paid what it was legally bound to pay to Flora J. Gipe in her personal capacity: (2) that the evidence does not show that the administratrix used or accounted for

Pittsburg, etc., Ry. Co. v. Gipe

f the money paid. With reference to said first con-
 appellee's counsel, the argument is faulty in that it
 on the assumption that the widow had an absolute
 e relief fund. The widow did not have the right to
 ion of the relief fund while the administratrix of
 prosecuted or was entitled to assert a cause of
 the death of decedent. As pointed out in Railroad
 ore, supra, and Railroad Co. v. Hosea, supra, it
 where both claims could not be enforced. If,
 the benefit of the contract was to be obtained, it
 ary that the right to assert a cause of action under
 e should be released. It will be observed that there
 io attempt to rescind the contract. The release is
 rm, but, in view of the fact that the execution of the
 damages for the death was a condition precedent to
 t from the relief fund, we think, unless as beneficiary
 had some valid collateral agreement, as between
 r children, as to the extent of her right to participate
 ceeds, that the signing of the release as adminis-
 uld operate to charge her in that capacity with the
 the proceeds. As beneficiary, she would not be
 arbitrarily determine what portion, if any, of the
 f the trust she would pay over to that account, and,
 uld be definitely determined under a given state of
 was the extent of her liability as administratrix,
 receipt of the money in both capacities did not
 olve a waste of the trust. We do not think, there-
 as the case is presented the appellant can be said
 een a party to a devastavit. Recurring to the
 und of objection that appellee's counsel urge, it
 id that it is not necessary that the administratrix
 ve actually used or accounted for any part of the
 d, because she must account for her doings on the
 le of the court that appointed her as administratrix.
 ecessary to decide whether the release was con-
 its character, within the case of Stewart v. Rail-
 141 Ind. 55, 40 N. E. 67. If the release was a mere
 would be at least evidence, and, in the absence of
 evidence, should have been given its just effect.
 case where the representative in the action has,
 sideration, released the claims of all beneficiaries,
 e absence of a further assault than was made under
 and evidence in this case, we hold that her action
 all rights that were subsidiary to that of the plain-
 llows that the court below erred in refusing to in-
 jury to find for appellant, and in submitting to the
 uestion as to whether the second paragraph of reply
 nd paragraph of answer was made out upon the evi-
 ther questions are discussed by counsel, but it
 necessary to decide them.
 it reversed, with a direction to the trial court to
 pellant's motion for a new trial.

NORTHERN PAC. RY. CO. *v.* TYNAN.*(Circuit Court of Appeals, Ninth Circuit, October 6, 1902.)*

[119 Fed. Rep. 288.]

Master and Servant—Defective Railroad Cars—Assumed Risk.*

It is the duty of a railroad company, which it owes to its employees as well as to the public, to use reasonable care to see that the cars used on its road are in good order and fit for the purposes for which they are intended; and an employee has the right to rely upon the performance of this duty, and does not assume the risk arising from the company's neglect to perform it.

Same—Contributory Negligence—Coupling Cars.

The burden of proving contributory negligence of an employee, to defeat recovery for his injury, rests on the master; and it must be shown not only that he was negligent, but that his negligence caused or contributed to the injury. The fact that a brakeman, killed while attempting to couple cars on a side track which was on a curve, was working from the inside of the curve, does not warrant an instruction that he was guilty of negligence, as a matter of law,—much less, that he was guilty of contributory negligence,—where there was evidence that, with the cars to be coupled, there was as little danger on the inside as on the outside.

Same—Action for Death of Brakeman—Question for Jury.

Plaintiff's intestate, while employed as a brakeman by defendant railroad company, was killed while attempting to couple two cars on a side track. One of the cars was equipped with an old-style Miller hook coupler. It was little used, and when used was coupled to cars having link and pin couplers; but it was not blocked to hold the hook in position, as customary when such cars are so used, and was old and not in good repair. The other car had also an old-style skeleton link and pin coupler, not generally in use, and the coupling between the two was more than usually dangerous. Deceased was not instructed as to the kind of couplers, and, so far as appeared, did not know the kind in use on such cars: *held*, that defendant was negligent in the use of such appliances, and that, in the absence of conclusive proof of contributory negligence, the court properly refused to direct a verdict for defendant.

Appeal—Review—Refusal of Instructions.

A judgment will not be reversed on appeal because of the refusal of instructions requested, where the record does not contain the entire charge given.

In Error to the Circuit Court of the United States for the District of Oregon.

To clearly understand the contentions of the respective parties, and the opinion of the court, it is essential to outline the substance of the testimony given at the trial. The testimony shows that the deceased went to work for the railway company as brakeman on its Burke-Wallace Branch about three weeks prior to his death; that he was a competent, skillful brakeman; that the train crew consisted of Chattin, as conductor, the deceased, and Chester, as brakeman; that on the morning of March 13, 1899, deceased and Chester were, pur-

*See foot-note appended to *Texas & P. Ry. Co. v. Allen* (C. C. A.), 4 R. R. R. 37, 27 Am. & Eng. R. Cas., N. S., 37.

As to the duty of railroad companies, as employers, to furnish safe foreign cars, see note appended to *Budge v. Morgan's L. & T. R. & S. S. Co.* (La.), 4 R. R. R. 440, 27 Am. & Eng. R. Cas., N. S., 440.

Northern Pac. Ry. Co. v. Tynan

t to Chattin's orders, engaged in the Wallace yards in making up the train that was to leave for Burke; that Chattin told them to get a certain box car off of a yard track called 'Nine-Mile Track,' and put it in the train behind coach 417, which was the passenger coach regularly used on that track; that in front of said box car on the nine-mile track was coach 645; another coach was standing on the adjoining house track; to get said box car in its proper place in the train, deceased and Chester had to first move the coach on the house track, to throw the switch, and get in over the frog to the nine-mile track, and then couple onto and move coach 417; that deceased and Chester were doing the coupling and uncoupling and braking required in the making up of the train; that Chattin did not get over to where they had been working until after the deceased was injured, and just as he died; that deceased and Chester were proceeding in the right way to couple said box car, when, in the act of coupling coach 417 onto coach 645, for the purpose of moving the latter and getting at the box car, deceased was injured; that, immediately before the injury, at the time of the injury, Chester was on top of the box car for the purpose of letting off the brake thereon, and said deceased was not to be let off, nor Chester leave the top of the box car, until deceased had coupled 417 to 645, and also uncoupled the other end of 645 to the box car, and then Chester was to release the brakes on the box car; that the coupler on the end of 417 was a skeleton drawbar, made of malleable iron and riveted together; this skeleton drawbar was an old-style link and pin coupler, the first one that was ever gotten and was unhandy and dangerous, and, in making a coupling between it and any other coupler, a link and two pins would have to be used; that this skeleton drawbar on 417 was different from, and more dangerous and inconvenient to use than, the ordinary style of skeleton drawbars; that 645 was an extra coach, not used regularly; that it was equipped with Miller hooks on both ends; that it was the only car used on the Burke Branch that was equipped with Miller hooks; that the Miller hook was an old-style coupler, designed and intended for passenger coaches, to be used automatically with another Miller hook, and at the time of the injury was not in general use; that more modern automatic couplers had been in general and successful use on passenger coaches and on freight cars for some time before the deceased was injured; that the head of the Miller hook is hook-shaped; that the coupler has a long shank, which has considerable play and lateral motion in a carrying iron; that this play and motion allow the sloping sides of the heads, as two Miller hooks come together, to slip by each other until the hooks pass, when, by the action of a large heavy spring back of the carrying iron, the hooks are forced into grip together, and thus an automatic coupling is effected; that a Miller hook will only couple automatically with another

Northern Pac. Ry. Co. v. Tynan

Miller hook; that, to couple it to anything else, a link and pin must be used; that a coupling between a Miller hook and a skeleton drawbar is the most dangerous and difficult coupling known to trainmen; that a coupling could be much more easily effected between a Miller hook and skeleton drawbar of the ordinary style than between the particular Miller hook and the particular skeleton drawbar that were actually used on coaches 645 and 417; that the employees on the Wallace-Burke Branch had, prior to the employment of deceased, complained to the railway officers of the danger of making couplings between Miller hooks and skeleton drawbars, and had requested the removal of the objectionable equipment; that the lateral motion of the Miller hooks could be prevented by putting blocks and wedges in the carrying iron or stirrup that holds the Miller hook; that when thus blocked the space where the Miller hook would otherwise move from side to side in the carrying iron is filled in with the block that is strapped or bolted there, which prevents the Miller hook from shoving over; that it was customary and usual to block Miller hooks when they were habitually used in making link and pin couplings; that the Miller hook on 645 was not blocked in any way, and was used in nothing but link and pin coupling; that in the ordinary performance of the duty of coupling cars a brakeman could not observe whether or not a Miller hook was blocked; that, owing to the infrequent use of 645, the train crew were seldom called on to make a coupling between a Miller hook and skeleton drawbar, and deceased had not attempted, so far as known, to make such a coupling during his employment by the railway company; that deceased was never warned by defendant, or any of its officers or employees, of the danger of making a coupling between a Miller hook and skeleton drawbar; that the proper and the safest way to make the coupling between the Miller hook on 645 and skeleton drawbar on 417 was to first put the link in the skeleton drawbar (417 being the moving car), and then guide such link by hand into the Miller hook on 645; that deceased had endeavored to make the coupling in that way; that an examination made immediately after the injury disclosed the fact that the ends or heads of the two couplers had slipped by each other so that the Miller hook was slipped in behind the lip of the skeleton drawbar, thereby allowing the platforms of the two coaches to come much closer together than they should come; that attached to the platforms of 417 and 645 were iron buffer plates, with springs attached to the back thereof, the object and purpose of which was to take up the slack and prevent the cars coming together with a jar; that the buffers were not designed or intended to keep the couplers far enough apart to prevent a man who was coupling them together for being squeezed to death; that there were no bumpers or deadwood or anything else on said coaches which would prevent such a result, or which would, in the event of

Northern Pac. Ry. Co. v. Tynan

passing each other, keep the platforms further from the thickness of those bumpers,—about three feet. The coaches were on a curve at the time of the accident; that the deceased was making the coupling from the inside of the curve; that an ordinary link and pin coupling can be made easily and safely on a curve as on a tangent; that the cars are ordinarily and generally coupled from the outside of the curve, because ordinarily the trainmen can couple from the outside, and can from the inside, see and talk to the engine; that the coupling between the cars, which the deceased was making, could be made from the inside as from the outside of the curve; that the deceased was compelled to make the coupling from the inside of the curve, because he could not get the engineer from the outside of the curve, for two reasons, (1) the cars and train which they were making were in the way, and (2) cars on the house track, which was next to the nine-mile track on the outer side of the curve, were so close to the nine-mile track at the place of the accident that the deceased could not get far enough away from the inner side; that it was not practicable to make a coupling between the Miller hook and skeleton drawbar with a link and pin or coupling pin; that the railway company's policy was to make its couplings to be so made was universally known, and no attempt was ever made by the railway company to force it.

Supp. and Jas. F. McElroy, for plaintiff in error. Spencer, Dan J. Malarkey, and Carey & Mays, for defendant in error.

BERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

District Judge, after making the foregoing statement, delivered the opinion of the court.

The case was brought by the administrator of the estate of John Tynan, deceased, under the provisions of the Revised Statutes of 1887 (section 4100), to recover damages from the railway company, which occurred while he was employed as a brakeman by the railway company, and engaged to couple two of its cars. The coupler on one car was a Miller hook, and the coupler on the other car was a skeleton drawbar. It is alleged in the amended complaint that the couplers were old, and not adapted to each other; that they were faulty in construction, and would not couple automatically by impact; that there were no bumpers or deadwoods or other contrivance on the cars to prevent the platforms on each car coming in contact when the couplers passed each other in attempting to couple; that the Miller hook was not blocked, but was so arranged as to prevent or reduce the lateral motion when attempting to couple it with a skeleton drawbar; that the railway company failed to warn the deceased of the

Northern Pac. Ry. Co. v. Tynan

faulty condition and character of the coupler, and of the danger that would accompany the act of making the coupling. The answer denies these allegations of the complaint, and, for affirmative defense, alleges that when the deceased applied to it for employment he was furnished with a book of rules for the guidance of its employees, and that rule 25 provided that, before making a coupling, employees should take time to examine and ascertain the style and condition of the coupling to be made, and notified them that couplings cannot be uniform in style, size, or strength; that the deceased at the time of his employment represented that he had nine years' experience in the railroad service, and promised that he would comply with the rules and regulations of the company, and would discharge the duties of his employment, and assume the risks thereof; that the deceased was guilty of neglect in making the coupling from the inside instead of the outside of the curve; that the deceased was guilty of negligence in making the coupling by placing the link in the skeleton drawbar instead of in the Miller hook; that the cars were used solely upon the Burke Branch, within the state of Idaho, and were not used in interstate commerce. Upon these issues the cause was tried before a jury, resulting in a verdict and judgment in favor of the defendant in error.

The principal error assigned is that the court erred in refusing to give the following instruction:

"I instruct you, gentlemen of the jury, that it will be your duty, under the evidence in this case, and the law governing the same, to return a verdict for the defendant, and I hereby so direct you to do."

A careful reading of the entire testimony contained in the record, a portion of which is embodied in the foregoing statement of facts, has convinced us that the court did not err in refusing to give this instruction.

On March 2, 1893, congress passed "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes." 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]. This act has no special bearing on this case, except in so far as it suggests the reasons that led to its adoption. It is wholly immaterial whether the railway company was or was not engaged in the use of the cars in question in the business of interstate commerce, and we shall not discuss that question. Prior to the passage of this act there had been numerous decisions rendered by the courts of this country wherein it was held that the railroad companies were guilty of negligence in using the Miller coupler in connection with the ordinary link and pin drawbars. *Russell v. Railway Co.*, 32 Minn. 230, 233, 20 N. W. 147; *Hungerford v. Railway Co.*, 41 Minn. 444, 43 N. W. 324; *Railway Co. v. Garrett*, 73 Tex. 262, 13 S. W. 62, 15 Am. St. Rep. 781; *Martin v. Railway*

Northern Pac. Ry. Co. v. Tynan

Co., 94 Cal. 326, 329, 29 Pac. 645; Southern Pac. Co. v. Burke, 9 C. C. A. 229, 60 Fed. 704; Smith v. Railway Co., 73 Hun, 545, 25 N. Y. Supp. 638. These cases are all directly in point in favor of the ruling of the court below. But the present case is much stronger in its facts than in any of the cases cited, in this: that in the present case it is shown that there was no blocking, and that the couplings on each of the cars were old and particularly dangerous, even of their kind. The facts in the case of Railway Co. v. Archibald, 170 U. S. 665, 666, 18 Sup. Ct. 777, 42 L. Ed. 1188, closely resemble the facts in this case. It was there held that it is the duty of a railroad company to use reasonable care to see that the cars employed on its road, both those which it owns and those which it receives from other roads, are in good order and fit for the purposes for which they are intended, and this duty it owes to its employees as well as to the public; that an employee of a railroad company has a right to rely upon this duty being performed, and, while in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from his employer's neglect to perform the duties owing to him with respect to the appliances furnished.

In the light of the testimony and of these decisions (many others might be cited to the same effect), the contention of the plaintiff in error that it had used ordinary and reasonable care in procuring and using proper and safe appliances for the coupling of its cars, and that its employee John Tynan, deceased, had assumed all the risks, and was himself guilty of contributory negligence, does not specially commend itself to the favorable consideration of this court. Kohn v. McNulta, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. Ed. 150, and Southern Pac. Co. v. Seley, 152 U. S. 145, 154, 14 Sup. Ct. 530, 38 L. Ed. 391, upon which the plaintiff in error relies, are readily distinguishable in their facts from the case at bar. The party injured had in the one case seen and coupled the cars there used, and in the other well knew of the dangerous appliances, without complaining of their use. In neither case was it pretended that the appliances were out of repair, or in a defective condition, old, or unfit for use. Every case depends upon its own peculiar facts. The burden of proving contributory negligence on the part of the employee is always cast upon the railroad company, and the general rule is that it must not only appear that the employee was negligent, but it must also be shown that his negligence contributed to the injury. Coasting Co. v. Tolson, 139 U. S. 551, 557, 11 Sup. Ct. 653, 35 L. Ed. 270, and authorities there cited; Railway Co. v. Volk, 151 U. S. 73, 77, 14 Sup. Ct. 239, 38 L. Ed. 78.

Considerable stress is laid by the plaintiff in error upon the fact that the deceased was negligent in attempting to make the coupling from the inside of the curve. It is always easy to say that the injury which occurred might not have hap-

Northern Pac. Ry. Co. v. Tynan

pened if the injured party had been on the other side or had used other methods in trying to make the coupling. But the question to be determined is whether or not he was guilty of negligence in attempting to make the coupling at the place, in the manner and under the circumstances shown by the testimony. There was testimony in this case tending to show that the coupling could have been made, while the cars were on the curve, with as little danger on the inside as on the outside. The reason why it was attempted on the inside is shown by the existence of obstructions which prevented the deceased from signaling the engineer on that side when the coupling was made, which was a part of his duty. In *Bucklew v. Railway Co.*, 64 Iowa, 603, 609, 21 N. W. 103, the court said:

“The engineer occupies one side of the locomotive, and the fireman the other. The usual position of an employee desiring to make a signal for the purpose of controlling the movements of a train, when not on a curve, is on the engineer’s side. In the present case the plaintiff was on the fireman’s side when he gave the signal to stop the train. It is claimed the plaintiff cannot recover because he was not in his proper place. But there was evidence tending to show that, immediately prior to the time the signal was given, the train passed over a curve in the track; and that a signal given while the train was so passing from the engineer’s side could not have been seen by him. Now, conceding that the train had passed a short distance beyond the curve, we cannot say that the plaintiff was negligent in not more promptly passing to the other side of the train before giving the signal.”

But in any event the question of contributory negligence under the testimony, including rule 25 of the railway company, was one of fact, for the jury to determine. The law is well settled that no case should ever be withdrawn from the jury unless the conclusion necessarily follows, as a matter of law, that no recovery could be had upon any view which can properly be taken of the facts which the evidence tends to establish. *Railroad Co. v. McDade*, 135 U. S. 554, 571, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Railway Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679, 36 L. Ed. 485, and authorities there cited; *Railway Co. v. Cox*, 145 U. S. 593, 606, 12 Sup. Ct. 905, 36 L. Ed. 829; *Gardner v. Railroad Co.*, 150 U. S. 349, 361, 14 Sup. Ct. 140, 37 L. Ed. 1107.

The other errors assigned relate to the refusal of the court to give instructions to the jury as requested by the railway company. We shall not review these instructions, because it would be impossible, in the absence of the whole charge, to decide whether or not the court erred in refusing to give any of the requested instructions. The record does not contain the entire charge of the court to the jury. It does show that the railway company took exceptions to two points that were contained in the charge, and that upon both of these points

Brooks v. Louisville & N. R. Co

the exceptions of the railway company were allowed by the court. For aught that appears from the record, the court, of its own motion, may have properly instructed the jury upon all the points sought to be raised by the assignments of error. When the entire charge is not given in the record, it is the duty of the appellate courts to presume that the requested instructions were refused because substantially given in the general charge. *Scaife v. Land Co.*, 33 C. C. A. 47, 90 Fed. 238, 246; *Case v. Hall*, 36 C. C. A. 259, 94 Fed. 300, 302; *Myers v. Sternheim*, 38 C. C. A. 345, 97 Fed. 625; *Railway Co. v. Wineland*, 42 C. C. A. 588, 102 Fed. 673, 676; *Insurance Co. v. Payne*, 45 C. C. A. 193, 105 Fed. 172, 176; *Reagan v. Aiken*, 138 U. S. 109, 113, 11 Sup. Ct. 283, 34 L. Ed. 892; *Andrews v. U. S.*, 162 U. S. 420, 424, 16 Sup. Ct. 798, 40 L. Ed. 1023.

In *Myers v. Sternheim*, *supra*, this court said:

"The only other point relied upon by the plaintiff in error arose out of exceptions to the charge of the court, but a reference to the record shows affirmatively that the plaintiff in error has brought up only a part of the court's charge, and there is nothing to indicate that the omitted portion had no bearing upon the point made. Under such circumstances, we would not be justified in reversing the judgment, even if, in the portion of the charge brought here, error appeared, since, in the portions of the charge omitted, the error, if any, may have been corrected."

The judgment of the circuit court is affirmed, with interest and costs.

BROOKS v. LOUISVILLE & N. R. CO.

(*Court of Appeals of Kentucky, Jan. 15, 1903.*)

[71 S. W. Rep. 507.]

Injury to Employee—Negligence—Presumption.*

Negligence of the master is not presumed, but must be shown; so it is not enough that, while plaintiff was propelling a hand car, the lever broke, but it must be shown there was a defect, and that it was or ought to have been known to defendant.

Contributory Negligence—Pleading.

Failure to reply to an answer pleading contributory negligence entitles defendant to a peremptory instruction.

Appeal from circuit court, Washington county.

"Not to be officially reported."

Action by Daniel Brooks against the Louisville & Nashville Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

J. H. Thurman and J. W. S. Clements, for appellant.

W. C. McChord, Edward W. Hines, and B. D. Warfield, for appellee.

*As to whether a presumption of negligence arises from a mere proof of injury to an employee, see *Wright v. Southern Ry. Co.* (N. Car.), 20 Am. & Eng. R. Cas., N. S., 158, and foot-note.

Brooks v. Louisville & N. R. Co

PAYNTER, J. The appellant was a member of a section gang in charge of one Savage as foreman. At the close of the day, as was customary, the foreman, together with his force, boarded a hand car for the toolhouse, and when they were ready to start the section foreman told them to "bear down," which meant to go in a hurry. While proceeding at the rate of about eight miles per hour, the "short lever" broke, which threw the appellant in front of the hand car, which ran over him, with the result that one of his legs was broken in two places. He was one of the men propelling the car, with his back toward the course that the car was going. In making this statement the evidence offered by the appellee is not considered, because, at the conclusion of plaintiff's testimony a motion was made for peremptory instruction, which was refused by the court. As the appellee's evidence did not strengthen the case attempted to be stated by the appellant, the court, at the conclusion of all of the testimony, gave a peremptory instruction to the jury to find for the appellee, which was accordingly done.

The first question arising is, did the plaintiff offer testimony sufficient to authorize the court to submit the question of negligence to the jury? It is the duty of a master to furnish his servant tools that are reasonably safe for his use. He does not warrant that there is no defect in them, nor does the contract imply such warranty. The master is not liable for defects in the tools which he furnishes the servant for use in his service, unless he, or those intrusted by him with the selection or inspection of such tools, had notice of such defects, or could have discovered them by the use of ordinary care in the selection or inspection of them. This doctrine has been repeatedly enunciated by this court. In order to have made out a case of negligence against the appellee, it was essential that appellant should have shown that there was a defect in the part of the machinery which broke, and which caused it to break, and that the foreman knew it, or, by the exercise of ordinary care, could have discovered it. The case seems to have been tried in the lower court upon the idea that a case had been made out for the jury when the evidence showed that appellant was in the employ of the appellee, and that he was in the discharge of a duty when the lever broke and threw him under the car. It is urged in the brief of counsel for appellant that the law presumes negligence from the state of facts proven in this case. To support his contention he cites a certain line of cases which it is not necessary here to analyze. When a servant is injured he does not show himself entitled to recover by showing that he is injured while in the discharge of a duty, but he is required to produce some evidence tending to show that it was caused by the negligence of the master, or some one representing him. *Hughes v. Railroad Co.*, 91 Ky. 526, 16 S. W. 275; 12 Am. & Eng. R. Cas., N. S., 560; *Wintuska's Adm'r v. Railroad Co.* (Ky.) 20

Roberts v. Port Blakely Mill Co

7. 819. It has been the uniform rule of this court, in so far as it has made an announcement on the question, that in an action of a servant against the master negligence cannot be presumed, but must be proven. While we recognize the correctness of the rule enunciated in *Ward v. Railroad Co. (Ky.)* 18 S. W. 2, 18 Am. & Eng. R. Cas., N. S., 689, still the application of the rule would not, on the state of facts in this case, enable the appellant to recover. That case does not decide that the master warrants that the implement or machinery or with which he may supply the servant for the performance of the labor undertaken shall be absolutely safe, nor does it decide that it is not necessary for the plaintiff to show that there was a defect in the machinery of which the defendant was aware, or might have been aware by the exercise of ordinary care. It simply holds that in a case like that the plaintiff may rely upon the superior judgment of his foreman, and was not required to exercise his own judgment as to the safety of the hand car. We are of the opinion that the appellant failed to make out a case for the jury, because he failed to show that there was a defect in the hand car known to the plaintiff, or one which he could have discovered by the exercise of reasonable care.

There is another reason why the court properly gave a peremptory instruction. The defendant filed an amended answer, in which contributory negligence was pleaded, and the plaintiff failed to reply to it. This entitled the defendant to a peremptory instruction. *White v. Railroad Co. (Ky.)* 18 S. W. 219; *Railroad Co. v. Mayfield (Ky.)* 35 S. W. 924; *Railroad Co. v. Nall (Ky.)* 51 S. W. 168.

For the foregoing reasons the judgment is affirmed.

ROBERTS *et al.* v. PORT BLAKELY MILL CO.

(*Supreme Court of Washington, Sept. 17, 1902.*)

[70 Pac. Rep. 111.]

Y to Employee—Nonsuit.

In an action for death of a conductor of a logging train, resulting from a derailment thereof, the negligence alleged being failure to provide safe and suitable cars, in that the flanges on the car wheels had become worn, and contained flaws discoverable by reasonable inspection, and that one or more of the flanges broke, causing the derailment, is properly denied,—plaintiff's evidence showing the train was loaded as usual and traveling at the usual speed; that the engine was not out of order; that flanges on some of the car wheels were too thin to be safe, and had flaws in them, and broke at the time of the accident; that such condition of the flanges makes a car unsafe and dangerous, especially when rounding a curve, as was the case when the accident occurred; and that a reasonable and ordinary inspection would have discovered the defects; and no other evidence of the accident being shown or intimated by the evidence.

Evidence—Pieces of Broken Car Wheel.

Where a witness testifies that, just after a train was derailed, he saw the car wheels with the flanges broken off, and saw and ex-

Roberts v. Port Blakely Mill Co

amined pieces of broken flanges, and that they had flaws in them and were thin, and that he piled up the pieces, and that six months afterwards he went back to the place of the accident, and near there found a piece of a broken flange, which, though he cannot identify it as one he saw at the time of the accident, appears like some he then saw, the piece is admissible in evidence, both as illustrative of the pieces witness saw at the time of the accident, and also for the jury to determine whether it was one of such pieces.

Res Gestæ.

As part of the *res gestæ* of the wreck of a train from alleged defective flanges of car wheels, declarations of the general superintendent, who had direction and management of the railroad, made while examining the wreck, soon after his arrival at the scene thereof, three hours after it occurred, that if the company used any more wheels of such make he would not work any longer for it, and that he could not be putting new wheels under the cars all the time, is admissible against the company.

Burden of Proof—Instruction.

The bracketed words in an instruction: "The burden is on plaintiffs to establish that the death was caused by defendant's negligence, [and if you find that his death was not due to the negligence of the defendant, then you need consider nothing further, as your verdict in that case must be for defendant.] The negligence of defendant must be established by a preponderance of the evidence,"—are not ground for reversal, as shifting the burden of proof to defendant; the intent of the whole instruction being clearly expressed that the burden is on plaintiffs to prove negligence.

Negligence—Instructions.

A requested instruction defining negligence in general terms need not be given, where the jury are correctly instructed on the specific negligence under consideration.

Same—Same.

The instructions given having repeatedly told the jury that the burden was on plaintiffs to establish negligence, and being such as to impress on the minds of the jury that they must find by a preponderance of the evidence that defendant was negligent, and that this negligence caused the injury, refusal of an instruction that negligence is never presumed is not error.

Evidence.

Though there is some circumstantial evidence in a case, yet, the case not resting on it, an instruction concerning circumstantial evidence may be refused.

Appeal from superior court, Mason county; Mason Irwin, Judge.

Action by Dora Roberts, in her own right, and others, minors, by her as their guardian, against the Port Blakely Mill Company, a corporation. Judgment for plaintiffs. Defendant appeals. Affirmed.

S. P. Richardson and Preston, Carr & Gilman, for appellant.

Troy & Falknor, for respondents.

MOUNT, J. The respondent Dora Roberts is the widow, and Lillie Roberts and Hiram Roberts are the minor children, of Warren Roberts, deceased. In his lifetime Warren Roberts was in the employ of the appellant as a conductor on a logging railroad operated by it in Mason county, in this state. This road was a standard-gauge railroad, equipped with standard

Roberts v. Port Blakely Mill Co

locomotive and with logging trucks, and was operated for the purposes of transporting saw logs from the forest where they were cut to tide water. The road consisted of three sections,—the first section extending from the forest where the logs were cut to a station called "Matlock"; the second, from Matlock to a station called "26"; and the third from 26 to a station called "New Kamilchie," at tide water. On the 15th day of October, 1900, the said Roberts had charge of a train which was running from 26 to New Kamilchie. This train consisted of a locomotive and 17 cars of logging trucks, loaded with saw logs. The train, which was running at the usual rate of speed, in rounding a curve was derailed, and Roberts was thrown from his position on the train to the ground and instantly killed. This suit was brought by his widow and minor children to recover damages for the loss of the husband and father; it being claimed that the train was derailed through the negligence of the defendant in failing to provide safe and suitable cars in this: that the flanges upon the wheels of the cars had become worn, and contained flaws which could have been discovered by reasonable inspection, and that one or more of these flanges broke, causing the train to leave the track, thereby causing the death of Warren Roberts. The cause was tried before the lower court and a jury. A verdict was rendered in favor of the plaintiffs for the sum of \$4,000. From a judgment on the verdict, defendant appeals. Errors of the trial court are alleged substantially as follows: (1) In denying defendant's motion for a nonsuit at the close of plaintiffs' evidence; (2) in denying plaintiffs' motion for a new trial; (3) in admitting in evidence a broken piece of flange picked up at the place of the accident several months thereafter; (4) in admitting in evidence the statement of George Tew, defendant's superintendent, made three or four hours after the accident; (5) in instructions given to the jury; and (6) in refusing to give to the jury certain instructions requested by defendant.

1. We think the motion for a nonsuit was properly denied. The plaintiffs' evidence showed that the train was loaded as usual, and was traveling at the usual rate of speed, and that the track was not out of order. It also shows that flanges on some of the car wheels were too thin to be safe, and had flaws in them, and that they broke at the time of the accident, and left marks and indentations on the rails where the cars left the track; that such condition of the flanges make a car unsafe and dangerous, especially when rounding a curve; that a reasonable and ordinary inspection would have discovered the defect; and that the wreck occurred while rounding a curve. Here was sufficient cause for the accident. Conditions existed which rendered the operation of the train dangerous. The train was being properly operated. When the defective wheels struck the curve, they gave way and left the rail. It was the natural result. No other cause of the accident was shown or

Roberts v. Port Blakely Mill Co

intimated by plaintiffs' evidence, nor in the subsequent evidence of appellant. This court said, in *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518: "Whenever a car or train leaves the track, it proves that either the track or machinery, or some portion thereof, is not in a proper condition, or that the machinery is not properly operated." The evidence here showed that the track was in order; that the train was properly operated; that the machinery was defective, and was liable to, and did, leave the track upon a curve; and that a reasonable inspection would have discovered the defect. There was but one cause shown for the accident, and for that cause the defendant is liable. It is argued by appellant that the entire case is one of surmises and conjectures, that the accident may have been caused by a rock or obstruction on the track or the letting off the brakes before the accident, or that there was some latent defect which no inspection could have discovered, or that a sound and sufficient wheel broke or left the rail; and the rule is invoked that "where the evidence establishes to a certainty that the accident resulted from one or two or more causes, for one or more of which the defendant would be responsible, and for one or more of which he would not be responsible, a verdict for the plaintiffs cannot be sustained." The trouble with this position is that the evidence does not show, nor is there any attempt to show, any other cause than the one above named. We think the rule laid down by the court in *Walker v. McNeill*, supra, is conclusive in this case. In *Walker v. McNeill* the ties of the roadbed were rotten, and when the derailed wheels struck them they broke in two. They were so decayed that they would not hold spikes, and the rails spread. In the case at bar the flanges of the car wheels were worn and dangerous. They contained flaws, and, when rounding a curve, were liable to, and did, leave the track. There is no distinction in principle between the two cases. The same argument used in this case for a reversal would have been applicable in that case. It does not apply to either for the same reason, viz., that there was but one cause shown for the accident, and for that cause defendant was liable.

2. The argument in support of the error assigned in denying the motion for a new trial is based upon the evidence of defendant. Defendant's witnesses testified in substance that the car wheels used were of approved and standard manufacture; that the cars were regularly and frequently inspected, and no defects were found; that all the flanges used were of sufficient strength; that the wheels broken in the wreck were sound and free from flaws; that the deceased conductor had full charge of the road and appliances on his run; that it was a part of his duty to look after the cars and keep them in order. The effect of this evidence was to negative the evidence of the plaintiffs, and, if true, it shows contributory negligence on the part of the deceased. This made a question

Roberts v. Port Blakely Mill Co

act for the jury. After a careful reading of all the evidence, we think there was sufficient contradictory evidence on the points named to go to the jury, and it was for the jury to weigh the same and determine the truth.

The court permitted plaintiffs to introduce in evidence a piece of broken flange picked up at the place of the wreck six months after it occurred. One of the witnesses, who was a brakeman on the train at the time of the wreck, testified substantially that when the wreck occurred he was on the rear end of the train; that he jumped off, and in a few minutes thereafter went forward to the place where the wrecked cars were piled up; that he saw and examined several pieces of broken flange; that these broken pieces had sharp edges in them and were thin; that he saw the wheels with the spokes broken off; that he piled up the pieces; that about six months afterwards he went back to the place of the wreck with one of the plaintiffs' attorneys, and near where the wreck occurred picked up the piece offered in evidence. He was unable to identify this particular piece as one which he had seen there at the time of the wreck, but said: "It was very similar to that in size and heft. * * * There were some longer, and some shorter, and some broken in different ways."

* Q. Were there some that appeared to be like this? A. Yes, sir. We think, under this evidence, that the piece of flange was entitled to go to the jury, as the court in admitting it said, "for what it was worth"; that is, the jury has a right to determine whether it was or was not a piece of flange which was broken from a car wheel at the time of the wreck. *State v. Cushing*, 17 Wash. 544, 558, '50 Pac. 512; *People v. Railroad Co.*, 72 N. Y. 607. Furthermore, we think the piece exhibited was competent as illustrative of the pieces which he had examined at the time of the accident, upon the principle that a drawing or model or photograph is admissible to explain oral evidence, in order that the jury may understand and apply the oral evidence in connection therewith.

Two of plaintiffs' witnesses were permitted over defendant's objection to testify to certain statements made by George Tew, who was general superintendent and had the direction and management of the railroad. Mr. Tew arrived at the scene of the wreck about three hours after it occurred. Soon after his arrival he was examining the same. One of the witnesses testified: "I heard him say— He was looking at the flanges, and he said, if the company used any more iron wheels, he would not work any longer for them." Another testified that Mr. Tew at the same time and place said: "This puts me in a devil of a fix, and I can't be putting new wheels under the cars all the time." We think these declarations were admissible, under the rule stated by Judge Jones in the *Law of Evidence* (section 360), a part of which is as follows: "On the same principle reports to the general manager of a railway company concerning the cir-

Roberts v. Port Blakely Mill Co

cumstances and results of an accident, and also as to who was to blame therefor, made by the superintendent and conductor several days after the event, are incompetent. But, as we have already pointed out, there is a class of cases in which the rule that the declaration must be contemporaneous with the act is construed less strictly, and in which such declarations are admitted, although not technically contemporaneous, if they are spontaneous and tend to explain the transaction, and if so slight an interval of time has elapsed as to render premeditation improbable. Accordingly in numerous cases the declarations of employees and agents, made soon after an accident, have been received as part of the *res gestæ*." *Mechem*, Ag. § 715; *McKelvey*, Ev. p. 280; 1 *Tayl. Ev.* p. 519; *Keyser v. Railway Co.*, 66 Mich. 390, 33 N. W. 867; *Hooker v. Railway Co.*, 76 Wis. 542, 44 N. W. 1085; *O'Connor v. Railway Co.*, 27 Minn. 166, 6 N. W. 481, 38 Am. Rep. 288; *Railway Co. v. Stein*, 133 Ind. 254, 255, 31 N. E. 180, 32 N. E. 831, 19 L. R. A. 733; *Mining Syndicate & Co. v. Rogers*, 11 Colo. 6, 16 Pac. 719, 7 Am. St. Rep. 198; *People v. Vernon*, 35 Cal. 49, 95 Am. Dec. 49; *Hall v. Insurance Co.*, 23 Wash. 610, 63 Pac. 505, 51 L. R. A. 288. The declarations of Mr. Tew were not the narration of a past event, but were the natural declarations growing out of the event, and were so nearly contemporaneous with the accident as to be held to be in the presence of it, and were made under such circumstances as necessarily to exclude the idea of design or deliberation. They were made by one having the control and management of the road. Under these circumstances we think the declarations were admissible.

5. The court instructed the jury as follows: "The burden is upon the plaintiffs to establish that the death of the deceased was caused by the negligence of the defendant; and, if you find that his death was not due to the negligence of the defendant, then you need consider nothing further, as your verdict in that case must be for the defendant. The negligence of the defendant company must be established by a preponderance of the evidence; and by a preponderance of the evidence is not meant the greatest number of witnesses, but it means the evidence which is most convincing to your minds." It is argued that the sentence, "And, if you find that his death was not due to the negligence of the defendant, then you need consider nothing further, as your verdict in that case must be for the defendant," was contradictory of the rest of the instruction, and shifted the burden of proof to the defendant. But the whole instruction must be construed together. So construed, it was not error. It is true that this sentence is not technically correct; but this error is not of moment, especially when the intent of the whole is clearly expressed that the burden is upon the plaintiffs to prove negligence. This court has frequently held that where an isolated portion of an instruction, standing alone, may be

Roberts v. Port Blakely Mill Co

technically erroneous, yet if the whole instruction, taken together, fairly states the law, it will be upheld. *Seattle Electric Light & Motor Co. v. City of Seattle*, 6 Wash. 32 Pac. 1058; *Duggan v. Boom Co.*, 6 Wash. 593, 34 157, 36 Am. St. Rep. 182; *McQuillan v. City of Seattle*, Wash. 600, 43 Pac. 893; *State v. Surry*, 23 Wash. 655, 63 557; *Henry v. Railway Co.*, 24 Wash. 246, 64 Pac. 137; *Per v. Dumon*, 24 Wash. 648, 64 Pac. 804.

It is alleged as error that the court refused to give instruction numbered 2 as requested by defendant. This instruction defined negligence in general terms, as "that said defendant did something or omitted to do something which an ordinarily prudent person under such circumstances would not have done or omitted to do"; but the court specifically instructed the jury as to the duty of the company to provide reasonably safe cars and wheels, and to make reasonable inspection thereof, and also that if the jury found, by a preponderance of the evidence, that the death of deceased was caused by any defects in the cars or wheels, and that such defects could have been discovered by reasonable inspection, and that defendant failed to make such inspection, it was liable. We think this was sufficient, and that it was not necessary to give a general definition of negligence, where the jury are correctly instructed on the specific negligence under consideration.

It is also alleged as error that the court refused to give instruction No. 14 requested by defendant. This instruction had the effect that negligence is never presumed, but must always be proven, and that it was not the duty of the defendant to explain how the accident occurred, or to show that it was not negligent. In the instructions given the court repeatedly told the jury that the burden was upon the plaintiffs to establish negligence, and, while the court did not specifically say that it was not the duty of the defendant to explain how the accident occurred, yet we think, in view of the instructions impressing it upon the minds of the jury that they must find by a preponderance of the evidence that the defendant was negligent and that this negligence caused the injury, it was not error to omit the requested instruction.

It is complained that the court refused to give an instruction requested concerning circumstantial evidence. While there was some circumstantial evidence in the case, the case, as we have seen, did not rest upon this evidence, and for that reason it was not error to refuse it.

The errors assigned as 10, 11, and 12 have reference to instructions to the effect that, if the jury find that the accident occurred by reason of a defective car wheel, still the jury must find that the defect was one which was known, or ought to have been known, to the defendant, and that if the defect was latent, or if the wheel was of standard manufacture and of kind proven safe, even though it contained a flaw which could not have been discovered by proper carefulness, then

Elmore v. Seaboard Air Line Ry. Co

the defendant would not be liable. Upon these questions the court told the jury: "If, therefore, you find from a preponderance of the evidence that the accident which caused the death of the deceased was due to any defect in any wheel or wheels of defendant's cars, by the flanges being worn down too thin, or to any flaw or break in the flanges, and that such defect, if any existed, could have been discovered by reasonably careful inspection of the wheels, and that defendant failed to make such inspection, then your verdict should be for the plaintiffs. * * * The company is not required to guard against defects which cannot be discovered by reasonable care, but they are required to discover defects which can be disclosed by reasonably careful inspection. * * * The master is bound to use appliances which are not defective in construction; but, as between him and his employees, he is not bound to use such as are of the best or most approved description. If they are such as are in general use, that is all that is required. The employer is bound to furnish machinery and appliances that are of ordinary character and of reasonable safety. Whatever is according to the general, usual, and ordinary course adopted by those in the same business is reasonably safe within the meaning of the law." We think these instructions as given covered the instructions requested, and were as favorable to the defendant as it was entitled to. Upon the whole, we think the instructions given fairly stated the law of the case, and that there was no substantial error in the trial.

The judgment will therefore be affirmed.

REAVIS, C. J., and FULLERTON, DUNBAR, HADLEY, WHITE, and ANDERS, JJ., concur.

ELMORE v. SEABOARD AIR LINE RY. CO.

(Supreme Court of North Carolina, Dec. 18, 1902.)

[42 S. E. Rep. 989.]

Coupling Cars—Defective Couplers—Contributory Negligence.

A self-coupler was defective, in that a link was missing. A brakeman opened the lip of the coupler, which restored it to its usefulness, and then, just as the cars were coming together, kicked the bumper of the approaching car, which had a lateral play, and was not in the center, and which he testified he had to kick to make the coupling: *held*, that the injury to his foot, crushed between the couplers, was not caused by a defective coupler, but by his contributory negligence.

Clark and Douglas, JJ., dissenting.

On rehearing. Granted, and new trial allowed.

For former report, see 41 S. E. 786.

Allen & Dortch and Isaac F. Dortch, for plaintiff.

Day & Bell, J. B. Batchelor, T. B. Womack, and Shepherd & Shepherd, for petitioner.

Elmore v. Seaboard Air Line Ry. Co

MONTGOMERY, J. The plaintiff's own testimony upon the question of the defendant's negligence is not consistent, it seems to us, with the allegations of the complaint; and it also seems to us that his honor, in the charge, had some difficulty in understanding what the contention of the plaintiff was as to the proximate cause of the plaintiff's hurt. In the complaint, as it was first drawn and filed, the plaintiff alleged that the defendant was in September, 1900, operating a train of cars on its line of railway between Wilmington and Hamlet with the couplers on the train of cars out of repair and defective "to such an extent that the cars in said train and other cars belonging to the defendant at Clarkton, which were to be made a part of said train, could not be coupled without going between said cars; that on that date there were four cars upon the side track at Clarkton, and as the train approached that place it was uncoupled, leaving the cab on the main track below the beginning of the side track, the balance of the cars being carried along the main track to a place above the other end of the side track." The remaining portion of the complaint was as follows: "(3) That plaintiff was ordered by the conductor in charge of said train, whose orders the plaintiff was bound to obey, to remain near the cars on the main track below said side track, for the purpose of coupling those cars to the cars upon the side track; and the said cars upon the side track were put in motion by defendant, and were negligently permitted to roll very rapidly by means of what is known as 'kicking' cars along said side track and on the main track, and negligently and violently to come in contact with the cars on the main track, where the plaintiff was. (4) That at the said time and place the defendant negligently permitted the coupler attached to the cars on said side track to remain out of repair, so that the lip was closed, which made it necessary for plaintiff to go between said cars in order to couple the same. (5) That on said day, at said town of Clarkton, while the plaintiff was endeavoring to perform the order of said conductor and while he was coupling said cars, he was greatly injured and damaged by reason of the negligence of defendant as herein set forth, and by other acts of negligence. His foot was crushed to such an extent that his big toe and a part of his foot had to be amputated. He suffered great physical and mental pain and anguish, and was compelled to incur great expense, was disabled from work, and has been permanently injured, to his great damage \$10,000." The complaint was afterwards amended, the amendment consisting of the allegation that the conductor well knew that the order to couple the cars could not be performed without going between them on account of the condition of the cars, and the further allegation that the plaintiff was in no fault on his part. It is to be seen from the complaint, then, that the allegation as to defective couplers on the train before it was uncoupled at the siding was a general

Elmore v. Seaboard Air Line Ry. Co

allegation, bearing no more particularly on the cab than on any of the freight cars which composed the train; while it appears from the fourth allegation of the complaint that the coupler attached to the car on the side track, which car was to be shoved back and coupled with the cab, was the particular car equipped with the defective coupler. And yet on the trial that particular car and coupler disappeared practically from the case, and the plaintiff's whole testimony was in respect to an alleged defect in the coupler on the cab.

It is stated in the case on appeal that all of the evidence was sent up, and, after a careful perusal of it, it seems evident from the plaintiff's testimony (and that without being confused by the cross-examination) that he was uncertain where to fix the negligence of the defendant; i. e., whether his hurt was caused from trying to remedy the defective coupler on the cab, or that on the freight car, or both. By the amendment of the complaint he alleged in a general way that the conductor knew that the coupling could not be made without going between the cars on account of the condition of the cars. He did not allege that the conductor knew that there was any defect in the coupler on the cab, or in that on the particular freight car which was to be attached to the cab. On his examination as a witness, however, he said that Capt. Byrd, the conductor, knew that the coupler on the cab was out of fix to the extent that the link or chain was gone—missing. The coupler was a standard automatic coupler, such a one as is required by law to be attached to cars; and the only defect in the one on the cab was the missing link; and, as we have seen, the plaintiff said that the conductor knew that link was missing when he ordered the plaintiff to go to the cab and make the coupling when the cars on the siding should be pushed back against it. The only effect of the missing link was that it rendered it necessary, in order to produce a coupling of the cars, that the lip of the coupler should be opened by the hand; and as the plaintiff testified that he was ordered to make the coupling, and that the conductor knew that the link was missing, let us assume that he was authorized under the order to go to the car and open the lip. He did that, and when it was done the coupler was in as good condition for coupling as if the link had not been missing in the first place. That is to be emphasized, for there is no evidence, not even in the plaintiff's own testimony, to the effect that the coupler had any other defect about it. We know he said that the bumper was turned towards him, and was not in the center, and that he had to kick it to get it into the center to make the coupling with the approaching freight car; but all that is mere opinion evidence. The fact still remained that there was no other defect except the missing link. This court, in *Greenlee v. Railway Co.*, 122 N. C. 977, 30 S. E. 115, 11 Am. & Eng. R. Cas., N. S., 45, decided that it was the duty of railroad companies in this state to equip their cars with self-

Elmore v. Seaboard Air Line Ry. Co

and by act of congress all cars that are operated in commerce are required to be so equipped; and it seems to almost border on the absurd for this court to say we can have no common knowledge of what a self-coupler is, or that we will receive as evidence that a self-coupler was simply because the bumper is not exactly in the center. We know it must be to some extent movable so as to follow the curves of the track, and no greater mobility was required of the plaintiff than that. When the plaintiff, thereupon, opened the lip of the coupler on the cab in the manner described by himself, he had discharged the order which was given him by the conductor. (The conductor testified he gave him no such order, and that the coupler was in bad condition.) But the plaintiff said that, after he had performed his duty,—that is, after he had opened the lip of the coupler,—he looked up the side track, and saw the cars rapidly approaching, and noticed that the coupler on the cab was not in the center, and, to carry out the order of the conductor to make the coupling, he kicked at the bumper on the cab to move it to the center, and his foot was instantly caught between the wheels on the two cars, and badly crushed. We are not inclined to modify in the least the decision made in *Greenlee v. Greenlee & Co.*, 122 N. C. 977, 30 S. E. 115, 11 Am. & Eng. L. R. N. S., 45, in which we decided that the railroad company in this state should equip both their passenger and freight cars with self-couplers, and we are of the opinion that the plaintiff's failure to keep the couplers in proper condition was as culpable as if the cars had never been equipped. But, as we have said, in the case before us the plaintiff was not hurt by the failure of the company to have self-couplers on the car, or for a failure to keep it in repair. The plaintiff, when he opened the lip of the coupler, had released it to its full usefulness, and in his kicking the bumper was negligent. Indeed, when he saw the freight cars rapidly approaching, and, indeed, so near to him as to be right upon him, for he was caught before he could get it down, he violated a rule of the company which he knew of, and which rule put the blame on himself. That he contributed to his own injury is clear to admit of doubt from his own testimony. According to the plaintiff's evidence, the order was given by the conductor, not upon a certain emergency, without the opportunity of reflection, and obedience was a choice of moments.

A petition to rehear is allowed, and there must be a new petition allowed.

CHES, C. J. (concurring). I did not hear this case. The first I knew of it was in conference, when I was present. At that time the court was evenly divided, and the case was stated. As I understand from this statement, the point of dispute was as to whether the case fell under the decisions in *Greenlee* and *Troxler*, as the road had provided itself with

Elmore v. Seaboard Air Line Ry. Co

automatic couplers, when I said I thought it did, and gave my vote in favor of the plaintiff, and the opinion was in that way based on Greenlee and Troxler. And I am still of the opinion I then expressed, that, if the defendant had allowed its coupler to remain broken four or five months without repairing the breach, it was the same in effect as if it had not supplied itself with the automatic coupler. And in concurring in the opinion of the court it must not be understood that I do not sustain Greenlee and Troxler and the other opinions cited for the plaintiff sustaining the doctrine announced in those cases, for I do. But being applied to for a rehearing, I examined the case more thoroughly than I had done, in connection with the model of two cars with automatic couplers, and came to the conclusion that the plaintiff's injury was not caused by the defect in the coupler, but was one of those unfortunate accidents that always have happened, and always will happen, to those engaged in such dangerous work as rail-roading. It would be hard for me to describe this coupler to one who has not seen and examined one. But it consists of what are called "knucks" on each end of the car, which open and shut, something like a man's hand; and, to effect the coupling, one or both of these must be open when the impact of the cars takes place, and the jar caused by this impact causes the hands or knucks to close. And the bolt spoken of is a small key or pin, which falls when the knucks are closed, and prevents them from opening until this pin or key is raised. The wire spoken of as being broken attaches to this pin at one end and a crank at the other end. This pin can only be raised by the hand when this chain is broken. But raising the pin with the chain and crank or with the hand does not open the knucks. This can only be done with the hand, and necessitates the party opening them to go between the cars, whether the pin is raised with the chain and crank or with the hand. In this case it appears from the evidence that the plaintiff had raised the pin with his hand, and was out of danger, and would not have been hurt, but for the fact that he discovered, on the approach of the car which was to cause the impact and which was to be coupled with the caboose, that the drawhead to which the automatic coupler was attached was not in the center of the car, and he kicked it to put it in the center, so as to strike the drawhead of the caboose, and in doing this his foot was caught, and he was injured. The plaintiff testified: "I took my fingers to pull up the draw pin to open the lip of the coupler, and when I had found that the bumper on the drawhead was towards me, and I saw it was not in the center, I looked at the other cars, and saw that the bumper on them was not open, but was closed. If they had been open, I would have opened the lip and stood outside, and it would have made its own coupling. I saw how the situation was, and I had to push my foot down and push this bumper in the center." In order to allow for the curves

Elmore v. Seaboard Air Line Ry. Co

road, it is necessary to allow the drawheads, or
 ers," as they seem to be called by the plaintiff, to have
 lateral play. And when they are uncoupled on a curve
 e sometimes left standing out of the center. This
 be prevented. But it is utterly impossible for a man
 e this pin with his foot by kicking or otherwise. And,
 agree to the doctrine in the Greenlee Case and in the
 r Case, as I understand them, I cannot agree that they
 o the facts in this case. I agree that the defendant
 ily of negligence in allowing this chain to remain out
 ir for so long a time. But this does not entitle the
 ff to recover, unless it caused the injury. Negligence
 does not give a right of action. The negligence com-
 l of must be the cause of the injury. I never supposed
 would be contended that the Cases of Greenlee and
 r would entitle an employee of a railroad company to
 r damages for any injury he might recover from the
 ny while in its employment, whether the defective
 r had anything to do with the injury or not. It seems
 that it might as well be held that, if the plaintiff had
 ring on top of the car asleep, and the jar of the impact
 used him to fall off and break his leg, he might recover
 e the coupler was out of fix, as to hold that the plaintiff
 over for the injury in this case, when the defective
 had nothing at all to do with the injury. I am com-
 to treat this matter coolly, in the discharge of my duty,
 derstand it, without any effort to create sensation or
 and without conflicting with the Cases of Greenlee and
 r. In my opinion, the petition ought to be allowed.
 RK, J. (dissenting). This is a petition to rehear the
 n in this case. 130 N. C. 506, 41 S. E. 786. No fact
 n to have been overlooked, nor any direct authority,
 on examination of the briefs on the former trial it will
 a that the petition simply presents the same points for
 ment. In Dupree v. Insurance Co., 93 N. C. 239,
 C. J., quoting Chief Justice Pearson in Watson v.
 72 N. C. 240, says: "No case ought to be reheard
 petition to rehear, unless it was decided hastily, and
 material point was overlooked, or some direct authority
 t called to the attention of the court." This has been
 quoted with approval, among other instances by
 s, J., in Capehart v. Burrus, 124 N. C. 50, 32 S. E.
 The amended complaint alleges that "the defendant was
 ng a train of cars" at the time and place of the injury
 plaintiff, on which then, "and for a long time prior
 e, it negligently permitted the couplers to be out of re-
 nd defective to such an extent that the cars in said
 nd other cars belonging to the defendant at Clarkton,
 were to be made part of said train, could not be
 d without going between the cars." Is not this a clear
 ion of negligence, and of a violation of the United

Elmore v. Seaboard Air Line Ry. Co

States act of 1893 [U. S. Comp. St. 1901, p. 3174]? The complaint further alleges that, the train being uncoupled, and a part left below the beginning of the switch and a part above it (both on the main line), "the plaintiff was ordered by the conductor in charge of said train, whose orders the plaintiff was bound to obey, to remain near the cars on the main track below said side track, for the purpose of coupling those cars to the cars upon the side track, which order the said conductor well knew could not be performed without going between said cars on account of the condition of the cars, and the said cars were negligently permitted to roll very rapidly by means of what is known as 'kicking cars' along said side track and onto the main track, and negligently and violently came in contact with cars where plaintiff was"; that, by reason of the defendant having "negligently permitted the coupler attached to the cars on said side track to remain out of repair," the lip was closed, "which made it necessary for the plaintiff to go between said cars in order to couple the same," and that "while plaintiff was endeavoring to perform the order of said conductor, and while coupling said cars, and without fault on his part, he was greatly injured and damaged by reason of the negligence of the defendant as herein set forth," etc. Here the allegation is explicit of negligence in permitting couplers to be and remain out of repair both on the train on the main line and on cars on the side track, which were kicked back, and that they could not be coupled without going in between the cars; also negligence in violently kicking them back, and in the conductor ordering the plaintiff to make the connection, "which order the conductor well knew could not be performed without going between said cars," on account of the defective couplers. There was evidence tending to prove each and every allegation above stated. and the jury, which, under the constitution and laws, is guarantied to every litigant, no matter how humble, as the sole tribunal which may determine issues of fact, has sustained the charges, and the jury were unanimous, as the law requires of the triers of fact. And the parties, in order to secure triers of fact to which neither side could have any legal objection, had been allowed such challenges as were proper, for there is no exception on that ground. Had there been, notwithstanding, any ground to believe that the verdict was against the weight of the evidence, or to suspect that justice had not been done for any other reason, the trial judge, who heard the evidence, and knew all the incidents of the trial, had full authority to set the verdict aside. *Bird v. Bradburn* (at this term) 42 S. E. 936. His refusal to do so cannot be reviewed by us. We, who did not hear or see the witnesses, cannot possibly be more competent than the jury and the trial judge to determine from the imperfect transmittal of the evidence on paper, without tone or emphasis, as to the weight to be given to the respective parts thereof. There was evidence that "the coupler had been out of fix

Elmore v. Seaboard Air Line Ry. Co

months; that the conductor knew it; that the link was out with that link gone the cars will not couple, to the life, without using some means to open the thing; in the condition that coupler was in, it was not possible without taking hold with hand or foot." All these are quoted from the evidence in the record. And, it is stated in the evidence sent up: "The coupler was out. It was an automatic coupler. The link that the draw pin was out, so you could not use this without the use of the foot or something;" and, further, "The cars will not couple if the draw pin won't work." Even the defendant of the defendant says, "If the statement made by the man is true, and the chains were gone, it would be very hard for him to go in and lift it up." It has been stated that the absence of the link was not a very material part of the evidence by which a jury must reach its conclusion according to the weight they may give it contains no question. Does that link have anything to do with coupling? Ans. Yes, sir. You cannot couple if the draw pin won't work." Again: "Question. Why did you not go to go and see to them while they were standing there? The cars were rolling when the captain instructed the conductor to couple them." The conductor says, "The cars had cleared the switch, when I started down to the engine house and the plaintiff's evidence is: "Question. Where were you when the cars commenced moving? Ans. I was standing there by Captain Byrd, and he said, 'Son, you run up to couple those cars, while I run up to the warehouse to get the chains.' " To order the plaintiff to go in to make the coupler especially when the cars were moving, was of itself negligence, even before automatic couplers were required by the Act of March 2, 1893, 27 Stat. 531 [U. S. Comp. St. 174], and negligence. In a remarkably well considered case in the United States circuit court for Iowa, *Seaboard Air Line Ry. Co. v. Elmore*, 116 Fed. 867,—decided just before the opinion in this case was filed, in June last,—Shiras, J., said that "a carrier, by permitting couplers, originally designed to become worn out and inoperative, is within the prohibition of the act of congress of March 2, 1893, against interstate commerce not equipped with couplers coupling automatically." Also he says that the carrier was liable where, the coupler being out of order,

Elmore v. Seaboard Air Line Ry. Co

the employee "undertook to fix it so the coupling might be made, and while so engaged he was caught between the cars, and received injuries causing his death." This is "on all fours" except that here the negligence of the defendant crippled their man, but did not kill him. In that case, as in this, the defendant urged that it was error to permit the jury to determine that the "condition of the coupler was the proximate cause of the injury." Judge Shiras overruled the objection, and makes the following pertinent ruling, without which the statute would become a delusion, and cease to be any protection to the hundreds of thousands of laboring men whose lives and limbs were for so many long years exposed to needless peril for the lack of such statute. He says:

"The statutory requirement with respect to equipping cars with automatic couplers was enacted in order to protect railway employees, as far as possible, from the risks incurred when engaged in coupling and uncoupling cars. If a railway uses in its business cars which do not conform to the statutory requirements, either because they never were equipped with automatic couplers, or because the company, through negligence, has permitted the couplers, originally sufficient, to become worn out and inoperative, then the company is certainly not performing the duty and obligation imposed upon it by the statute, and is clearly, therefore, chargeable with negligence in thus using an improperly equipped car; and the company is bound to know that, if it calls upon one of its employees to make a coupling with a coupler so defective and inoperative that it will not couple by impact, and that to make the coupling the employee must subject himself to all the risks and dangers that inhered in the old and dangerous link and pin method of coupling, it is subjecting such employee to the very risk and danger which it is the purpose of the statute to protect him against, so far as that is reasonably possible. Subjecting an employee to risk to life and limb by calling upon him to use appliances which have become defective and inoperative through the failure to use proper care on the part of the master is certainly negligence, which will become actionable if injury results therefrom to the employee, and liability therefor cannot be avoided by the plea that, if the company was thus guilty of actionable negligence in this particular, it cannot be held responsible therefor because it was guilty of another act of negligence which aided in causing the accident. This accident happened because Voelker, in the performance of his duty, was called upon to place his person in a position where he might be caught between the cars he was expected to couple together. He was required to place himself in this dangerous position because of the negligent failure of the company to have upon the car a coupler in proper and operative condition, and certainly this negligent failure of the company was the proximate cause of the accident."

Elmore v. Seaboard Air Line Ry. Co

This is practically the same ruling which this was the pioneer court to make in *Greenlee v. Railway Co.* (May 26, 1898) 122 N. C. 977, 30 S. E. 115, 11 Am. & Eng. R. Cas., N. S., 45, and which has been reiterated in *Troxler v. Railway Co.*, 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580, 14 Am. & Eng. R. Cas. 711, and so many cases since, down to and including *Fleming v. Railway Co.* (at this term) 42 S. E. 905. Those cases practically settle also the issue of contributory negligence, for, as the injury would not have happened, and the plaintiff would not have had to go between the cars at all, if the couplers had been in proper condition, it is immaterial whether he went in negligently or not, for the negligence of the defendant in not having couplers, and in good working order, was the proximate cause. *Voelker v. Railroad Co.*, supra. In *Harden v. Railroad Co.*, 129 N. C. 355, 40 S. E. 184, the court affirmed the judge below, who had charged (quoting from *Greenlee's Case*) as follows: "If you find that the freight train was not fully provided with modern self-acting couplers, and that the plaintiff would not have been injured had the cars been so provided, you will find the first issue 'Yes,' and the second issue 'No.'" This ruling has just been reiterated in *Fleming v. Railway Co.* (at this term) 42 S. E. 905.

There was some conflicting evidence, but that was the province of the jury. The plaintiff's testimony, above referred to, is that, if the coupler had been in good condition, he would not have had to go in between the cars, nor to kick the bumper; and he is corroborated by the superintendent of the defendant company, who says, if the coupler was in the condition the plaintiff testified, it was "necessary for him to go in and lift it up." Whether his manner of "lifting it up" was negligent or not is immaterial in view of our uniform decisions from *Greenlee's Case* down to *Fleming v. Railway Co.* (at this term) 42 S. E. 905, that the proximate cause—the *causa causans*—is the negligence of the railroad company in not complying with the law, which requires that it shall have automatic coupling apparatus, which will not require an employee to go in between the cars at all. The plaintiff could not assume a risk which the law forbids the railroad company to impose upon him. Besides, assumption of risk does not apply to railway employees in this state since the act which is printed as chapter 56, Priv. Laws 1897. *Coley v. Railroad Co.*, 128 N. C. 534, 39 S. E. 43, 21 Am. & Eng. R. Cas. 891, and other cases sustaining it, which are collected and reaffirmed in *Mott v. Railway Co.* (at this term) 42 S. E. 601. Humanity, justice, and the soundest principles of public policy alike require that Act Cong. March 2, 1893, and the principles laid down by Judge Shiras in the above-cited case of *Voelker v. Railroad Co.*, and by the uniform rulings of this court from *Greenlee's Case* down to *Fleming's Case*, should be sternly upheld and rigidly enforced. In the report of the

Elmore v. Seaboard Air Line Ry. Co

interstate commission for 1902 it is said that in 1893, when the act requiring automatic car couplers was enacted, there were 433 men killed and 11,277 wounded in coupling cars in this country, and that by reason of the gradual enforcement of that law the number of killed and wounded in car coupling for the year ending June 30, 1902, aggregated a little over 2,000,—a diminution of more than 9,500 in the number of men killed and wounded annually, though the number of railway employees has increased 200,000 in the same period of time, which at the same ratio would have caused 15,000 men to have been killed and wounded annually in coupling cars, if there had been no forced use of automatic couplers by the law. The commission says the decrease of accidents in that particular (car coupling) has been 68 per cent. fewer killed and 81 per cent. fewer injured than in 1893 (without adding in the further loss which would have occurred among the additional 200,000 employees), which decrease they attribute to this legislation, and its enforcement by the courts. They point out that in no other particular have injuries to passengers or employees been diminished, but that in fact there is a decided increase. If the law is effectively enforced, the annual loss still existing of \$2,000 killed and wounded in manual coupling will entirely disappear. But if, notwithstanding the law requires automatic car couplers, they can be left off, or (which is the same thing) allowed to remain out of repair, and, when an employee is ordered in to make the coupling which has become nonautomatic, these powerful corporations can contest before the jury whether the railroad company is not relieved from all responsibility because the employee might have done the act illegally required of him in a more prudent manner, and carry that contest up from court to court, then the provisions of a law which was enacted for the protection of this vast body of useful and industrious men is a nullity, construed away by the courts, and they are handed over to the tender mercy of a power which saw with indifference the number of killed and wounded in coupling cars mount up year after year till the figures reached the annual total of near 12,000. In that steady increase there was no halt until the force of humane and irresistible public opinion compelled the use of automatic couplers, though their life and limb saving properties had been well known to railroad managers for a quarter of a century. The evidence is that this injury to the plaintiff could not possibly have happened if this law had been complied with by the defendant.

This court, which was the pioneer to lay down, independent of legislative enactment, the requirement of justice that such appliances should be used, should not be the first to construe away the efficacy of what is now a federal statute applicable to the defendant and all other railroads throughout the Union engaged in interstate commerce.

DOUGLAS, J. (dissenting). Dissenting in toto from the

Elmore v. Seaboard Air Line Ry. Co

opinion of the court, except in so far as it approves the Greenlee and Troxler Cases, both in its view of the law as applicable to this case and its assumption of fact, I shall briefly notice but one or two of its apparent errors. The opinion seems rather to forestall dissent by assenting "that it would seem almost to border on the absurd for this court to say that we can have no common knowledge of what a self-coupler is." In spite of this dictum, I venture to assert that neither this court nor the average citizen has any common knowledge of the mechanical constitution of an automatic or self-coupler. The only fact that would seem to be of common knowledge is that a coupler that will not couple itself is not a self-coupler, and that a coupler which has to be pulled and pushed into place is not automatic. A model was exhibited to this court, which was not used below, and was not proved to be similar to the coupler on the cars. This was a mere illustration of the general working of automatic couplers, and was not proof of any fact in controversy. There are, in fact, different kinds of self-couplers,—those most generally seen being the Janney and M. C. B. (Master Car Builders). I do not know the difference, but believe that the latter includes any coupler approved by the association. Many of these patent couplers are interchangeable, but still there is some difference. Again, the opinion characterizes certain testimony of the plaintiff as "mere opinion evidence," when in fact it appears to me a plain statement of existing facts,—that the bumper was not in the center, and had to be kicked into the center to make it couple. This fact does not seem to have been denied by any one. Again, the opinion says, "The fact still remains that there was no other defect except the missing link." This may or may not be true. If the coupler was negligently arranged, so as unnecessarily to allow so much lateral play as to destroy its character as a self-coupler, this would be an evident defect. Again, the opinion says that, "When he had opened the lip of the coupler, * * * he had discharged the order which had been given him by the conductor." I do not think so. His order was to couple the cars, and, if it was necessary to kick the coupler on the incoming car,—a method which is shown by the testimony to be frequently resorted to by railroad men,—then he was still carrying out his orders. But all these are findings of fact, which, I respectfully submit, are not within the province of this court. Again, the opinion says, "That he contributed to his own injury is too clear to admit of doubt from his own testimony." This gratuitous assertion of fact should be left to the jury. This court is not authorized to set aside the verdict of a jury simply because a majority of its members would not concur therein were they jurors. In any event, if this court undertakes to perform the functions of a jury in finding the facts, it would seem that it should at least do so by a unanimous verdict.

FEWINGS *v.* MENDENHALL.*(Supreme Court of Minnesota, Jan. 23, 1903.)*

[93 N. W. Rep. 127.]

Carriers—Duty to Protect Passengers from Strangers.*

A carrier of passengers is charged with the highest degree of care and foresight consistent with the orderly conduct of its business, in respect to the protection of its passengers from injuries resulting from its acts or omissions, from the acts or omissions of its servants, and from the acts of strangers who are under its control or directions; but it is charged with ordinary care and prudence only to guard against the lawless acts of third persons not under its direction or control.

Injury to Passenger—Missile Thrown by Mob—Negligence—Sufficiency of Evidence.

Defendant was engaged in operating a street car system, and his employees had inaugurated a general strike, which was bitterly contested, and resulted in much violence on the part of the lawless element among the strikers and their sympathizers. Defendant continued to operate his cars, and plaintiff was injured, when a passenger on one of them, by being struck upon the head by a stone thrown from the street into the car by a strike sympathizer, a person in no way under the control or direction of defendant. In this action to recover damages for such injury, it is *held*: (1) That defendant was not guilty of negligence in attempting to operate his cars during the strike; and (2) that the evidence is insufficient to justify a finding of actionable negligence against defendant as respects the act resulting in plaintiff's injury.

Carriers—Duty to Protect Passenger from Strangers—Negligence.

The rule of ordinary care and prudence is not so exacting as to require the person charged with its exercise to take unreasonable or extremely doubtful precautions to guard against the willful and lawless acts of strangers. The failure of defendant to pull down the blinds of the car in which plaintiff was riding or stretch a heavy canvas over the windows outside the car, was not negligence justifying a recovery against him.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; Wm. A. Cant, Judge.

Action by Fred. J. Fewings against Luther Mendenhall, as receiver of the Duluth Railway Company. Judgment for plaintiff, and from an order denying a motion for a new trial defendant appeals. Reversed.

Greene & Wood and Munn & Thygeson, for appellant.

John Jenswold, Jr., for respondent.

BROWN, J. Action to recover damages for personal injuries alleged to have been occasioned by the negligence of defendant. Plaintiff had a verdict in the court below, and defendant appealed from an order denying his motion for judgment notwithstanding the verdict or for a new trial. The case was here on a former appeal. 83 Minn. 237, 86 N. W. 96. The facts are there fully stated, but for an understanding of the questions presented at this time a restatement is necessary; but in doing so we follow substantially the

*As to the duty of carriers to protect passengers see next case post.

Fewings v. Mendenhall

at there made. Defendant, as receiver of the Duluth Railway Company, has operated its street car system since 1898. On May 2, 1899, a general strike was induced by the employees of the company, which was maintained after the plaintiff was injured as hereinafter stated. Defendant procured other men to take the place of the strikers, and continued to operate the street car lines. On Sunday May 7th, plaintiff took passage in a car operated by defendant, at Superior, in the state of Wisconsin, for Duluth. While the car was going northerly along Garfield street in Duluth, and as it approached Michigan street, a man, not in any way connected with the company as an employee or otherwise, not a passenger, nor in any way under the control or direction of defendant, threw a stone at the car in which plaintiff was so riding, which passed through the window thereof, and struck plaintiff on the head, whereby plaintiff was seriously injured. He brought this action to recover damages because of such injury, basing his claim to a right of recovery on the alleged negligence of defendant in failing to take proper precautions to prevent injuries from acts of this kind. The complaint alleges, among other things, that plaintiff, as a passenger, was exposed to imminent danger by reason of the violent and unlawful acts of the strikers and their sympathizers; and that defendant, in the exercise of due care and diligence, could have prevented the same and protected plaintiff and the other passengers in the car from injury; but, notwithstanding this, that he carelessly failed and omitted to take proper precautions to protect plaintiff of any danger, or to make any effort or take any proper precautions to prevent injury to him, or to provide or erect any barriers or other means to avert injury resulting from acts of the kind complained of. It was held on the first appeal that defendant was not guilty of negligence in attempting to operate the cars during the strike, and that the court erred in submitting that question to the jury. The case was remanded, and again tried, resulting in a finding by the jury that defendant was guilty of negligence in failing to take proper precautions to avert and prevent accidents of the kind complained of, and returned a verdict for plaintiff for the sum of \$10,383.33.

The principal question presented for consideration at this time is whether the evidence is sufficient to sustain a finding of negligent negligence against defendant. Other questions were discussed in the briefs of counsel, but the evidence upon those questions appears to be substantially the same as on the trial, and it is due to the parties that the question be decided and determined, that the litigation may be brought to a close, and further expense obviated. In the consideration of this question it is proper to inquire first the degree of negligence required of defendant under circumstances like those presented for in determining whether he was guilty of negligent negligence, which was the proximate cause of plaintiff's injury we

Fewings v. Mendenhall

must be guided by the rules of duty and care necessary to be exercised in such cases. Though no exceptions were taken to the charge of the trial court, wherein the jury was instructed that defendant was charged with the highest degree of care and foresight for the protection of plaintiff while a passenger, the question is properly presented by the errors assigned on the motion for a new trial and by the assignments of error in this court. The strike which the employees of the street railway company inaugurated was bitterly and stubbornly contested, and resulted in much lawlessness and acts of violence on the part of the strikers and their sympathizers towards the property of the company, with the purpose in view of preventing the operation of the cars and forcing a submission to their terms. The act which resulted in plaintiff's injury was not committed by an employee, a fellow passenger, or by one having any connection or relation whatever with the company, but by a boy who was in no way under the control of the company or any of its agents. He was a sympathizer with the strikers, and by his act of lawlessness no doubt thought he was aiding their cause. The question as to the extent of responsibility of a carrier of passengers and the degree of care essential to be exercised for their protection as to acts committed by strangers to the carrier has never, prior to this case, been presented to this court for its decision. The general rule that such carrier is required to exercise the highest degree of care and foresight consistent with the orderly conduct of its business is one that has very uniformly been applied by all the courts in cases where the act or omission complained of as negligence was in respect to a matter under the control of the carrier. A carrier of passengers is required to exercise the highest care in respect to the equipment of its road and transportation facilities, in providing suitable machinery for the operation of its cars, in the employment of competent and faithful servants and agents, and generally, as to all acts pertaining in any way to the conduct of its affairs in furtherance of its undertaking as a carrier; and in respect to such matters the rule has always been very strict. It is insisted by plaintiff that the rule applies to this case, and that it was the duty of defendant, in view of the condition surrounding the strike, to exercise the utmost care and vigilance to guard and protect plaintiff, while a passenger, from acts of violence at the hands of persons, whether under the control of defendant or not, and from dangers from whatever source arising. It is insisted that the act of the boy who threw the stone in question was such as the defendant might, from the circumstances and conditions of the strike, reasonably have anticipated, and could have been guarded against and prevented. We have been cited to no case where the high degree of care essential as to matters within the control of the carrier has been extended and applied with all its force and strictness to acts of persons beyond its control, and for which

Fewings v. Mendenhall

to such carriers. In respect to goods a carrier is an insurer for the safe transportation and delivery of the property intrusted to it for carriage, and is relieved from liability only by the act of God or the public enemy. A carrier of passengers is not an insurer of their safety, and is liable to them for such injuries as result from its failure to exercise proper care for their protection. A number of other cases are cited and relied upon by counsel, wherein the general rule is stated substantially as contended for by him, namely, that a carrier of passengers is required to exercise the utmost vigilance to protect passengers from insult and injury from whatever cause arising; but an examination of them shows that they are all cases where the carrier had permitted third persons to enter upon its premises or cars, and thereafter failed^d to exercise a proper degree of care to restrain them from acts of lawlessness; and there can be no question as to their soundness. The question before us is whether this strict rule applies to the act of a stranger, such as here shown. That it does not is sustained by some very respectable authorities. *Tall v. Packet Co.* (Md.) 44 Atl. 1007, 47 L. R. A. 120; *Railroad Co. v. MacKinney*, 124 Pa. 462, 17 Atl. 14, 2 L. R. A. 820, 10 Am. St. Rep. 601; *Thomas v. Railroad Co.*, 148 Pa. 180, 23 Atl. 989, 15 L. R. A. 416; *Railroad Co. v. Pillsbury*, 123 Ill. 21, 14 N. E. 22, 5 Am. St. Rep. 483. In our opinion, it would be unjust to require a carrier of passengers, either a steam or a street railway company, to exercise the utmost care and vigilance to guard and protect passengers from criminal acts of strangers, persons not under its control or subject to its orders, and for whose acts it is in no way responsible. And we hold, without further discussion, as respects the acts of such strangers, that carriers of passengers are liable to the exercise of ordinary care and prudence only. Such carrier is liable for all injuries resulting from the acts of strangers which are reasonably to be anticipated under the particular circumstances, and which ordinary care and prudence, had it been exercised, would have prevented.

It remains to consider whether, within this rule, the evidence is sufficient to sustain the charge against defendant of actionable negligence, the burden to show which was upon the plaintiff. The familiar rule that evidence of an accident is *prima facie* proof of negligence against the carrier, can have no application to this case, because the act resulting in the injury did not arise from any act or omission of defendant. The presumption of negligence in such cases arises only where the thing causing the injury complained of was under the exclusive control of the carrier or its servants or employees. The act complained of here being that of a stranger, it was incumbent upon plaintiff affirmatively to prove that defendant failed to exercise proper care to prevent it. The question arises whether the evidence was sufficient to charge defendant with negligence in this respect. What, if anything, should he

Fewinga v. Mendenhall

me, which he did not do, to protect plaintiff and other
 ers from acts of this kind? It is claimed that he should
 led down the blinds of the car in which plaintiff was
 It appears that the material of the blinds inside the
 was leather, and the contention is that, had they
 led down, the stone thrown by the boy would not have
 into the car, or in any way injured the plaintiff. It
 ontended that the defendant might have protected
 from this injury by stretching a heavy canvas over
 ows outside the car; and, lastly, that he should have
 l plaintiff of the conditions existing during the strike,
 that violent and lawless acts were being committed
 strikers and their sympathizers. As to the first two
 of plaintiff, —pulling down the inside blinds and
 g a heavy canvas outside the car over the windows,
 e of the opinion that the failure to do this is not suffi-
 which to base a recovery. It would be unreasonable
 e of defendant so to act, and though, perhaps, the
 d precaution would have prevented such an injury as
 e complained of, and conceding that defendant was
 to anticipate an unlawful act of this kind, the
 rdinary care and prudence is not so exacting as to re-
 e charged with its exercise to take doubtful or unrea-
 precautions to guard against the lawless acts of
 s. And, besides, it is reasonably clear that, had
 t pulled down the blinds of the car in question, or
 the outside of the windows with a heavy canvas, it
 ave provoked the strikers and their sympathizers to
 reater violence. They would naturally have assumed,
 g a car pass in that condition, that either the officials
 ad or nonunion or scab employees were aboard, and
 have incited the lawless element to greater efforts to
 the operation of the cars. As to the third proposi-
 at defendant was in duty bound to notify plaintiff of
 ent conduct of some of the strikers and their sympa-
 —we are unable to concur with plaintiff, for these

He was a resident of Duluth, and had occasion daily
 e cars of defendant in passing to and from his home
 ace of business. He knew that a strike had been
 ted by the street car employees, and the conditions
 ling it were so notorious and generally known as to
 the possibility, even, that he was not fully aware of
 erness of the strikers. He was in as good a position
 e defendant to anticipate dangers of this kind. What-
 e defendant knew concerning the acts of the strikers was
 and apparent to all persons of ordinary intelligence.
 nt exercised the precaution of inducing the city
 ies to swear in a large force of extra policemen to pre-
 ninal acts of the strikers and their sympathizers. If
 e unable to control the mob and prevent acts of this
 e are at a loss to know what defendant could have

Thweatt v. Houston, etc., Ry. Co

done to prevent them, short of armoring his cars, and this, of course, would be so unreasonable a requirement as not to be thought of for a moment. It is not reasonable to suppose that, had defendant given this warning to plaintiff, it would have had the effect claimed for it,—protected him.

Our conclusions upon the whole record are that the evidence relied upon is insufficient to charge defendant with actionable negligence. The questions on which we have disposed of the case at this time were not intended to be covered by the former decision. Some expressions in that opinion may be construed as announcing the law on certain phases of the case, but they were not so intended. But one question was there decided, and any expressions therein which may be inconsistent with the conclusions now arrived at must be regarded as obiter. Some members of the court, when the case was here before, were in some doubt upon the principal question now decided, but those doubts have been overcome fully by the further argument and consideration of the case, and we are all agreed upon the conclusions now reached.

The action has been tried several times. The facts are practically undisputed. The only claims of negligence relied upon by plaintiff in support of the verdict are those just pointed out, and for the reason that the failure of defendant in these respects is not sufficient to charge him with negligence within the rule of ordinary care and prudence, the case should be brought to an end, and further litigation and expenses obviated by a final judgment. It is therefore ordered that the order appealed from be reversed, and the cause remanded to the court below, with directions to enter judgment for defendant.

THWEATT v. HOUSTON, E. & W. T. Ry. Co.

(Court of Civil Appeals of Texas, Jan. 15, 1903.)

[71 S. W. Rep. 976.]

Carriers—Duty to Protect Passengers from Assault.*

While the crew of a train which had stopped at a regular meal station were eating their dinner, a passenger, who had remained in the car, was assaulted by an intruder and another passenger: *held*, that the company was not liable, as the leaving of the train with no one in charge while the crew were taking their meals was a reasonable regulation, and the assault one which could not reasonably have been anticipated by them.

Appeal from district court, Nacogdoches county; Tom C. Davis, Judge.

Action by J. A. Thweatt against the Houston, East & West Texas Railway Company. From a judgment for defendant on a directed verdict, plaintiff appeals. Affirmed.

Motion for rehearing overruled.

*See next case post and notes.

Thweatt v. Houston, etc., Ry. Co

s & King, for appellant.

er, Botts, Baker & Lovett, Feagin & Carter, and J. S. hin, for appellee.

RETT, C. J. The appellant brought this action against the appellee in the district court of Nacogdoches to recover damages for negligently permitting the appellant to be assaulted while he was a passenger on one of the company's trains. Appellant purchased a ticket at Garrettsville, Nacogdoches, and boarded the train upon its arrival, as it was a regular meal station, and a stop of 20 minutes was made there for dinner. After the conductor and other members of the crew had seen the passengers off and on the train and had gone to dinner, one Jopling entered the car where the appellant was sitting, and demanded of appellant that he should be due Jopling for buggy hire. They got into a dispute over the matter, and Jopling struck and injured the appellant. One Sapp, a deputy sheriff, who was a passenger on the train, interfered, and put Jopling off the train. After Jopling had been put off, the appellant continued to use boisterous and violent language, when Sapp took him into custody, and ejected him from the train, and turned him over to a local officer. The train crew had no way to expect the assault, and were at dinner, and not on duty, and knew nothing of the assault and ejection until it was all over. Upon this state of facts the trial judge instructed a verdict for the defendant.

It is a well-established doctrine that a passenger is entitled to protection by a carrier from injury by a fellow passenger or a third person, and it is the duty of the carrier to use a reasonable degree of care to prevent it. Whenever a carrier, through its agents or servants, knows, or has opportunity to know, of a threatened injury, or might have reasonably anticipated the happening of an injury, and fails or neglects to take proper precautions or use proper means to prevent or avert such injury, the carrier is liable. 5 Am. & Eng. Law (2d Ed.) p. 553. The carrier is liable for an injury upon a passenger by an intruder or a fellow passenger if such assault could have been prevented by the carrier or its servants by the exercise of proper care. Id. p. 555. But a carrier should not be held responsible for acts of violence by one passenger to another, or by an intruder, if its servants were not present, and could not have reasonably anticipated the violence to the passenger. *G., H. & S. A. Ry. Co. v. G.* (Tex. Civ. App.) 36 S. W. 485; *Batton v. Ry. Co.*, 591, 54 Am. Rep. 80; *Putnam v. Ry. Co.*, 55 N. Y. 4 Am. Rep. 190; *Connell's Executors v. Railway* (Va.) 2 E. 468, 32 L. R. A. 792, 57 Am. St. Rep. 786; *Royston v. Railway*, 67 Miss. 376, 7 South. 320; *Felton v. Railway*, 577, 29 N. W. 618. The crew were at dinner, after having attended to their duties in connection with the stopping of the train at the station. Garrison was a regular meal

Savannah, etc., Ry. Co. v. Boyle

station, and the leaving of the train without any one in charge while the crew were taking their meals was a reasonable regulation. The servants and agents of the appellee could not reasonably have anticipated the assault upon the appellant. It appeared from the uncontradicted evidence that the appellee was not liable, and there was no error in directing a verdict in its favor. The judgment of the court below will be affirmed.

Affirmed.

On Rehearing.

(Feb. 12, 1903.)

In his motion for a rehearing the appellant challenges the correctness of the conclusions of the court in which it was stated that Sapp was a deputy sheriff, and that, after Joplin had been put off the train, the appellant continued to use boisterous and violent language, when Sapp took him into custody, and ejected him, and turned him over to a local officer; the objection being that Sapp was not a deputy sheriff of Nacogdoches county and authorized to make arrests in that county; that Garrison, in whose custody the appellant was placed, was not an officer; and that the preponderance of the evidence did not show that appellant was using violent and boisterous language. While the conclusions were inaccurate in the respect complained of, still we do not deem them material to the disposition of the case, since we are of the opinion that the assault upon the appellant by Jopling as well as by Sapp was not reasonably within the contemplation of the appellant or its servants in charge of the train, and, not being present, and being ignorant of it, they were not negligent in failing to protect him therefrom; but we make the following correction: Sapp was a deputy sheriff of Angelina county. There was evidence that the appellant used violent and boisterous language before Sapp ejected him. Sapp turned the appellant over to one Garrison, to hold until the constable could come, and he was arrested by the constable that afternoon. The motion for a rehearing will be overruled.

Overruled.

SAVANNAH, F. & W. RY. CO. v. BOYLE.

BOYLE v. SAVANNAH, F. & W. RY. CO.

(*Supreme Court of Georgia, July 18, 1902.*)

[42 S. E. Rep. 242.]

Duty to Protect Passengers from Assaults by Strangers.*

Whenever a carrier, through its agents and servants knows, or has opportunity to know, of a threatened injury to a passenger from a third person, whether such person is a passenger or not, or when the circumstances are such that injury to a passenger from such a source might

*As to the duty of carriers to protect their passengers, see notes at end of case.

Savannah, etc., Ry. Co. v. Boyle

ably be anticipated, and proper precautions are not taken to prevent the injury, the carrier is liable for damages resulting therefrom.

Tramps Stealing Ride.

Presence upon a train of two negro tramps, secreted and stealing thereon, would not alone be sufficient to cause the employees in charge of the train to suspect that such tramps were armed with deadly weapons, and to anticipate that when brought into the train under guard they might endeavor to escape, and while an employee was endeavoring to prevent the escape make a murderous assault with such weapons upon one to whom the railroad company owed the duty of protection, and who was taking no part in the effort to prevent the escape. (Abuse by the Court.)

From superior court, Liberty county; P. Seabrook,

Plaintiff, by L. L. Boyle against the Savannah, Florida & Western Railway Company. From the judgment both parties appealed. Error. Judgment on one bill of exceptions reversed, and on the other reversed with directions.

L. Clay, Shelby Myrick, and W. G. Charlton, for defendant.

J. H. Higgs & Oliver, for plaintiff.

BB, J. Boyle sued the railway company, alleging in his petition substantially the following facts: The plaintiff was an express messenger, and his duties required him to ride upon the train of the defendant, and the defendant received him upon its train in that capacity. On a day named, two negro tramps secreted themselves on the front platform of the car in which plaintiff was riding in the discharge of his duties, and, being discovered by the conductor, were taken into the car by him and the baggage master, and placed in that end of the coach set apart for the use of the express company, where the plaintiff was attending to his duties as messenger. The conductor and baggage master did not search the tramps, did not place a guard over them, and did not bind them, but attempted to detain them in the coach carelessly and negligently by tying one of the two ends of a rope around one wrist of each tramp, leaving a play of about four feet between them, thus permitting the free use of their entire bodies. The tramps attempted to escape from the car by jumping from the side door of the car, and were caught and restrained by the baggage master, who happened to be passing at the time. In the struggle which resulted, the tramps drew revolvers, which they had secreted about their persons, and one of them discharged his revolver at plaintiff, who was six feet away; the ball striking plaintiff in the left knee joint, he at the time taking no part in the struggle between the tramps and the baggage master. During the struggle, the baggage master and both tramps fell to the floor, and one of the tramps raised on his knees, and fired again at plaintiff, but the ball did not strike plaintiff, but went through the top of the car. As a result of the wound in the knee joint, plaintiff suffered great pain and agony, was prevented from

attending to his regular duties for a period of some weeks, and was forced to incur large expense in medical attention, etc. It is alleged that the injuries resulting to plaintiff "were due entirely to the gross and inexcusable negligence and want of caution and foresight" on the part of the defendant, its servants and employees in charge of the train, in placing the tramps in the car, in failing to search and take from them the revolvers concealed in their clothing, in failing to securely bind them, and in failing to extend to plaintiff such other and further protection as was necessary to prevent the injuries; all of which, it is alleged, it was the duty of the defendant to have done. It is also alleged that the plaintiff did not in any way consent to or contribute to his injuries, by participating in the struggle between the baggage master and the tramps, or otherwise. To this petition, the defendant interposed a general demurrer, to the overruling of which it excepted. The case subsequently proceeded to trial, and upon motion of the defendant the judge granted a nonsuit. To this judgment, the plaintiff excepted. The exception which complains of the overruling of the demurrer will be first disposed of.

There does not seem to be any serious controversy between counsel as to what is the law of this case. It is conceded that the duty which the railway company owed to the plaintiff was the same duty which it would owe to a passenger under similar circumstances. It is the duty of a railway company to protect its passengers from insult or injury at the hands of fellow passengers, or of third persons, when the circumstances are such that a person in the exercise of that degree of diligence known to the law as extraordinary care would see, or should apprehend, that the passenger was in danger of insult or injury; and when the circumstances are such that the employees in charge of the train, in the exercise of the degree of diligence above referred to, should have foreseen that an insult or injury was to be reasonably apprehended, and failed or refused to use the means at hand to protect the passenger therefrom, the railway company is liable to the passenger for any damages he sustains as a consequence of such failure or refusal. "The general rule," says the American & English Encyclopædia of Law [volume 5 (2d Ed.)] 553, "would seem to be that whenever a carrier, through its agents or servants, knows or has opportunity to know of a threatened injury, or might have reasonably anticipated the happening of an injury, and fails or neglects to take the proper precautions, or to use proper means, to prevent or mitigate such injury, the carrier is liable." Mr. Elliott in his work on Railroads (volume 4, § 1639) in referring to the duty of protection against third persons or other passengers which railroad companies owe to their passengers, says: "It is their duty to use proper care and vigilance to protect them from injuries by such persons, that might reasonably have been foreseen and anticipated." Mr. Fetter, in referring to the subject now under considera-

Savannah, etc., Ry. Co. v. Boyle

s: "Knowledge of the passenger's danger, or of facts
 umstances from which that danger may reasonably
 ed, is necessary to fix the carrier's liability in this
 cases." 1 Fet. Carr. § 98. Mr. Hutchinson says:
 v now seems to be well settled that the carrier is
 o protect his passenger from violence and insult,
 atever source arising. He is not regarded as an
 f his passenger's safety against every possible source
 r, but he is bound to use all such reasonable precau-
 human judgment and foresight are capable of, to
 s passenger's journey safe and comfortable." Hutch.
 596. See, also: Spohn v. Railroad Co. (Mo.) 26
 ng. R. Cas. 252; Felton v. Railroad Co. (Iowa) 27
 ng. R. Cas. 229; Sira v. Railroad Co., 115 Mo. 127,
 905, 37 Am. St. Rep. 386; Id., 58 Am. & Eng. R.
 Railroad Co. v. McEwan (Ky.) 2 Am. & Eng. R.
 S.) 438; Packet Co. v. White (Tenn.) 41 S. W. 583,
 A. 427; Railroad Co. v. Jefferson, 89 Ga. 554, 16 S.
 L. R. A. 571, 32 Am. St. Rep. 87.

not a case where the passenger claims damages for
 n that the conductor and other employees in charge
 in failed or refused to protect him after it became
 that the injury might result to him from the
 upon the train of a third person; but the plaintiff's
 ends upon whether the circumstances alleged in the
 were such that the employees in charge of the train,
 exercise of extraordinary care for his protection,—that
 the utmost vigilance and care, or that extreme care
 ion which very prudent persons exercise,—should
 eseen that the tramps who had been arrested by them,
 ght into that part of the coach in which the plain-
 y required him to ride, were armed with deadly
 and would attempt to escape, and, while making
 empt, would discharge the deadly weapons at one who
 ng no part in the efforts made by an employee to
 such escape. If an extremely prudent employee
 ve foreseen that this would have probably happened,
 as the duty of the employees on the train to take all
 le precautions to prevent such an occurrence, and it
 ve been their duty to search the tramps to see if they
 ed, and to have securely bound them. If there was
 in the circumstances under which the tramps were
 or in their manner when brought into the train, to
 extremely prudent person to apprehend that they
 ngerous characters, and would probably resort to
 in order to escape from the train, and nothing to
 to such a person that they were probably armed with
 eapons, then a failure to search the persons of the
 and to securely bind them, would not be such negli-
 the part of the employees in charge of the train as
 r the company liable to the plaintiff. There is noth-

ing alleged in the petition as to the character of these tramps. It does not appear whether they were known or unknown to the employees in charge of the train. There is nothing in the allegations showing that the employees should, on account of their knowledge or past experience, as extremely prudent persons, have known or apprehended that tramps engaged in stealing a ride upon the train at the place where, and the circumstances under which, these were discovered, were probably dangerous characters, and their presence a menace to passengers and others to whom the railway company owed the duty of protection. The allegations are simply that the persons were negroes, that they were tramps, and that they were engaged in stealing a ride upon the train. Is even an extremely prudent person bound to presume that a negro tramp stealing a ride upon a train is such a dangerous person that he should not be permitted to stay upon the train unsearched and unbound? Simply because a person is a negro, he is not to be necessarily deemed dangerous. On the contrary, experience has demonstrated that as a rule negroes are not dangerous persons. Is a tramp necessarily a dangerous person? The word "tramp" indicates "a foot traveler; a trampler; often used in a bad sense for a vagrant, or wandering vagabond." Webst. Int. Dict. It is defined by the Standard Dictionary to be "an idle wanderer; itinerant beggar; vagrant; vagabond." Because a man is a tramp, he is not necessarily dangerous. The idea conveyed to the mind by the word is that simply of an idle, worthless fellow who wanders about the country seeking to secure a living without toil. Simply because these men were negro tramps, it was not to be inferred, even by an extremely prudent person, that they were characters so dangerous as to make it altogether unsafe for any person to be lodged in the same car with them. But it is said that these negro tramps were violating the law. This is true. To steal a ride upon a train is a crime in this state, but it is only a misdemeanor. While it may be that even an ordinarily prudent person would have reason to apprehend that negro tramps under arrest for a misdemeanor would escape, if afforded a reasonable opportunity, still an extremely careful person could not reasonably apprehend that in making such an attempt they would, in order to effectuate it, make a murderous assault with a deadly weapon either upon one who made an effort to thwart this attempt, or upon another who was taking no part in such effort. It is true that the petition alleges in general terms that the defendant was guilty of negligence, but it also sets forth what is claimed by the pleader to be the act of negligence, and the only act of negligence alleged is the failure of the company's servants to search the tramps for weapons, and to securely bind them, or place a guard over them. The conclusion of the pleader that this is negligence does not prevent the court from passing upon the question as to whether the facts alleged show the

Notes

pany to have been negligent. There is nothing in the allegations of the petition from which it appears that the employees in charge of the train, in the exercise of that high degree of care which the railway company owed to the plaintiff, failed to protect him from injury at the hands of those who were upon its train, with its consent or with its knowledge, could and should have foreseen that the two negroes would, after having been arrested and brought into the car, attempt to escape, and in so doing commit a murderous assault upon those endeavoring to prevent the escape, or upon persons who were taking no part in such efforts. The petition should have set forth a cause of action, and should have been dismissed on demurrer. The judgment overruling the demurrer should therefore be reversed.

In reference to the exception of the plaintiff that the court refused to grant a nonsuit, as it appeared that the evidence supported the averments of the petition substantially as laid, the court should not have granted a nonsuit. See *Flewellen v. Flewellen*, 114 Ga. 403, 40 S. E. 301, and cases cited; *King v. Roberts*, 114 Ga. 634, 40 S. E. 792. But as the question is now reached that the petition should have been dismissed on demurrer, while the judgment granting the nonsuit will be reversed, direction will be given that the effect of the reversal shall not be to reinstate the case, which will have been dismissed when the judgment of this court reversing the judgment overruling the demurrer shall have been entered in the court below.

Judgment in one case reversed; the other, reversed with costs. All the justices concurring, except LEWIS, J., absent on account of sickness.

NOTES.

CARRIERS OF PASSENGERS—DUTY TO PROTECT PASSENGERS.

General Rule.

Knowledge of the Commission of the Wrong.

Knowledge, or Duty to Know, of Passenger's Peril.

Reason to Apprehend Passenger's Peril.

A. General Rule.

B. Presence of Dangerous Persons on Vehicle or Vessel.

C. Disorder among Passengers.

D. Intermingling of White and Colored Passengers.

E. Negligence of Passengers in Getting on or off the Vehicle.

F. Scuffling of Hackmen near Station.

Limitation of Carrier's Liability.

A. In General.

B. Absence of Knowledge, etc., of Passenger's Peril.

C. Performance of Duty, or Inability, to Protect.

D. Acts for Which Carrier Liable.

I. GENERAL RULE.

It is of the general obligation of carrier of passengers to exercise care in transporting their passengers safely, there arises the duty to exercise care to protect them against the negligence or wilful acts of their fellow passengers, or of strangers. The general rule which determines the carrier's liability in this respect may be stated as follows: A carrier is

Notes

responsible for an injury suffered by a passenger through the negligence or wilful act of another passenger, or of a stranger, if the carrier has knowledge of the wrong or trespass at the time of its commission, or if he knows, or with proper care can know, that the safety of the passenger is in peril, or that injury to him is reasonably to be apprehended, and can, by the exercise of due care, prevent or mitigate the injury. See *Lake Erie, etc., R. Co. v. Arnold*, 26 Ind. App. 190, 59 N. E. 394; *Connell v. Chesapeake, etc., R. Co.*, 93 Va. 44, 24 S. E. 467, 57 Am. St. Rep. 786, 32 L. R. A. 792.

II. KNOWLEDGE OF THE COMMISSION OF THE WRONG.

There can, of course, be no question but that the carrier is liable for injuries sustained by a passenger at the hands of fellow passengers, or of strangers, if he knows, at the time, of the wrong being done the passenger, and does not make every reasonable effort to prevent or mitigate the injury. Thus, if the agents and servants of the carrier have knowledge that an assault is being committed upon a passenger, and do not make every reasonable effort to protect him, the carrier is liable for the injuries which the passenger may sustain. *Murphy v. Western, etc., R. Co.*, 23 Fed. 637; *Richmond, etc., R. Co. v. Jefferson*, 89 Ga. 554, 16 S. E. 69, 52 Am. & Eng. R. Cas. 438, 32 Am. St. Rep. 87, 17 L. R. A. 571; *Lake Erie, etc., R. Co. v. Arnold*, 26 Ind. App. 190, 59 N. E. 394; *Evansville, etc., R. Co. v. Darting*, 6 Ind. App. 375, 33 N. E. 636. Where a passenger on defendant's train, who had been assaulted by other passengers, appealed to the conductor for protection, and the conductor remonstrated with the disorderly passengers, but became frightened and ran away, and made no further effort to protect plaintiff when he was again assaulted, it was held that defendant was liable. *New Orleans, etc., R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689. Curiously enough, this case, though followed, has been subjected to some criticism in the later Mississippi cases. See *Royston v. Illinois, etc., R. Co.*, 67 Miss. 376, 7 So. 320; *Illinois, etc., R. Co. v. Minor*, 69 Miss. 710, 11 So. 101, 52 Am. & Eng. R. Cas. 441, 16 L. R. A. 627. Plaintiff entered defendant's railway station with the intention of becoming a passenger. While in the waiting-room, she was subjected to insulting and abusive language by the wife of the station agent. The agent was present and overheard the abuse, but did not interfere. It was held, that defendant was liable. *Texas, etc. R. Co. v. Jones* (Tex. Civ. App. 1897), 39 S. W. 124. A railroad company has been held liable for an assault upon a female passenger in the waiting-room at one of its stations, in the presence, or with the knowledge of the company's agent, by a drunken and disorderly man, whom it permitted to enter and remain in the waiting-room. *Houston, etc., R. Co. v. Phillio* (Tex. 1902), 69 S. W. 994, reversing 67 S. W. 915. If the threats of a conductor and fellow passengers induce a passenger to jump from a moving train, the carrier is responsible for his injuries. *Spohn v. Missouri, etc., R. Co.*, 87 Mo. 74, 26 Am. & Eng. R. Cas. 252, 101 Mo. 417, 14 S. W. 880, 116 Mo. 617, 22 S. W. 690. And if a passenger is aided and abetted by the conductor of a train in expelling a passenger from one of the cars, the company is responsible for injuries inflicted by the use of excessive and unnecessary force. *International, etc., R. Co. v. Miller*, 9 Tex. Civ. App. 104, 28 S. W. 233.

III. KNOWLEDGE, OR DUTY TO KNOW, OF PASSENGER'S PERIL.

Even if the carrier has no knowledge of the mistreatment of a passenger, at the time, yet, if he has knowledge, or with proper care can know, that an injury to the passenger is imminent, the carrier is liable for a failure to make every reasonable provision for the protection of the passenger. Where a passenger upon a railroad train was assaulted by a fellow passenger, and appealed to the conductor for protection, but the conductor, instead of affording him protection, went away and left him, whereupon the passenger was again assaulted, it was held that the company was liable. *Flannery v. Baltimore, etc., R. Co.*, 4

Notes

key (D. C.) 111. When the conductor of a train, upon being informed that plaintiff, a woman, had been abused and called foul names by a man who was under the influence of liquor, failed to interfere but kept on collecting tickets, and the disorderly passenger afterwards continued his abuse, a judgment for plaintiff was sustained. *Wright v. Chicago, etc., R. Co.*, 64 Minn. 7, 65 N. W. 944, 31 L. R. A. 551. Plaintiff was a passenger upon a train which carried a number of non-union laborers. Notwithstanding the fact that the car containing the laborers had been attacked at a previous stop, the train was again stopped at a place which was not a regular station, in the midst of an armed mob of striking workmen, and a number of nonunion men, most whom the animosity of the mob was excited, were taken into the smoker where plaintiff was riding, without warning to him. At the next railroad crossing, about one and three-eighths miles distant, the plaintiff was captured by a mob of strikers, who broke into the smoker, the nonunion men, and fired pistols in and around the car, wounding plaintiff grievously. The railroad company was held liable for plaintiff's injuries. *Chicago, etc., R. Co. v. Pillsbury*, 123 Ill. 9, 14 N. W. 31 Am. & Eng. R. Cas. 24, 5 Am. St. Rep. 483, rejecting opinion N. E. 803. In an action to recover for injuries received by plaintiff at the hands of a number of men, who robbed and assaulted him just after he had boarded defendant's train, it was held that, although there was no evidence to show that the assault upon plaintiff could have been anticipated, or could possibly have been foreseen, yet, if plaintiff's cry for help could have been heard by the agents and servants, if each of them was at his post of duty on, or near, the train, it should be presumed that they heard the cry and the carrier would be liable. *Wright v. Chicago, etc., R. Co.*, 4 Colo. App. 102, 35 Pac. 196.

IV. REASON TO APPREHEND PASSENGER'S PERIL.

GENERAL RULE.

A carrier may neither have knowledge that a passenger is being treated, nor have knowledge, actual or imputed, that he is in danger, and yet be liable for injuries sustained by him at the hands of fellow passengers, or of strangers. If the carrier knows, or, with proper care, can know, that injury to the passenger is reasonably to be apprehended, and does not make every reasonable effort to protect the passenger, he is responsible for the injuries which the passenger may sustain.

PRESENCE OF DANGEROUS PERSONS ON VEHICLE OR VESSEL.

If the agents and servants of a carrier have knowledge of the presence on the vehicle or vessel of disorderly or dangerous persons, from their language or actions there is reasonable ground to apprehend danger to passengers, and fail to take proper precautions to avert the danger, the carrier is liable for resulting injuries to passengers. Thus, if the conductor of a train has reason to believe that one of the passengers is a dangerous lunatic, it is his duty to take action at once for the safety and protection of his passengers against the violence of the lunatic man. *St. Louis, etc., R. Co. v. Greenthal*, 77 Fed. 150, 10 C. C. A. 100, 6 Am. & Eng. R. Cas., N. S., 261, affirming *St. Louis, etc., R. Co. v. Greenthal*, 54 Fed. 116, 10 U. S. App. 677, 4 C. C. A. 8 Am. & Eng. R. Cas. 111. Similarly, if there is reasonable cause to apprehend injury to the other passengers at the hands of an intoxicated passenger, the carrier should take steps to avert the danger. On this ground a railroad company has been held liable for the death of a passenger at the hands of a fellow passenger, whose condition of intoxication and conduct had been such that the conductor, as a man of common understanding, knowledge and experience, should have apprehended that he might attack some of the other passengers, but who was permitted to remain on the train unguarded. *King v. Ohio, etc., R. Co.*, 18 Am. & Eng. R. Cas. 386. In another case, which was an action to recover for the death of a passenger at the hands of an intoxicated fellow passenger, it appeared that while deceased was a passen-

Notes

ger upon defendant's street car, the car was boarded by a person who was very drunk, boisterous, and disorderly, and who assaulted a passenger on the rear platform and acted like a maniac. He was ejected from the car but got on again when the car started, and no further effort was made to eject him, notwithstanding his continued disorderly conduct. He remained on the car until he assaulted deceased, without the slightest provocation, and inflicted injuries which resulted in death. A verdict against defendant carrier was sustained. *United Railways & Electric Co. v. State*, 93 Md. 619, 49 Atl. 923, 54 L. R. A. 942.

C. DISORDER AMONG PASSENGERS.

If the safety of passengers is threatened by disorder among some of them, it is the duty of the carrier to make every reasonable effort to restrain the disorderly passengers, or, if necessary, to remove them from the vehicle or vessel, and, if the carrier is guilty of any neglect of this duty to preserve order among the passengers, he is liable for any injury to passengers which may reasonably be anticipated, or naturally be expected, to occur, in view of all the circumstances and the number and character of the persons who are being carried. *Holly v. Atlanta, etc., R. Co.*, 61 Ga. 215, 34 Am. Rep. 97; *Partridge v. Woodland Steamboat Co.* (N. J. 1901), 49 Atl. 726; *Pittsburgh, etc., R. Co. v. Hinds*, 53 Pa. St. 512, 91 Am. Dec. 224. Thus, a railroad company is responsible for injuries received by a passenger, in consequence of a quarrel and fight between two of his fellow passengers, which is witnessed by the conductor, who refuses to interfere, although some of the passengers request him to suppress the disturbance. *Pittsburgh, etc., R. Co. v. Pillow*, 76 Pa. St. 510, 18 Am. Rep. 424. A carrier by steamboat is responsible for injuries to a passenger by a shot fired from a gun negligently handled by a fellow-passenger, if the servants of the carrier fail to preserve order on the boat, but permit the promiscuous handling and firing of guns by the passengers. *West Memphis Packet Co. v. White*, 99 Tenn. 256, 41 S. W. 583, 38 L. R. A. 427. In an action to recover damages for an injury received by plaintiff, a passenger on defendants' steamboat, from the falling and consequent discharge of a loaded musket, by one of a great number of riotous and drunken soldiers engaged in an affray, and occupying a part of the boat assigned to passengers, it appeared that plaintiff had been suffered to enter the boat and pass to this part of it without any warning from the officers of the boat, or others, of the presence of these soldiers, and that defendant made no effort to preserve the peace or remove the offenders. Upon conflicting evidence the jury found for the plaintiff. Judge Shipman in his charge to the jury instructed them that "the defendants were bound to exercise the utmost vigilance in maintaining order, and guarding the passengers against violence from whatever source arising, which might reasonably be anticipated, or naturally be expected to occur in view of all the circumstances, and of the number and character of the persons on board." *Flint v. Norwich, etc., Transp. Co.*, 34 Conn. 554, same case, 6 Blatchf. (U. S.) 158, Fed. Cas. No. 4,873, new trial denied, 7 Blatchf. (U. S.) 536, Fed. Cas. No. 4,874, affirmed, 80 U. S. 3, 20 L. Ed. 556. There were present, upon defendant's excursion train, a number of drunk and disorderly negroes, who, with other passengers, were standing in the aisle of one of the front cars. The conductor, when appealed to by passengers to suppress the disorder, did nothing, although he could have sent the offensive passengers to the rear cars where there were vacant seats. When a row began in the car in which plaintiff was seated, and a race collision seemed imminent, the conductor merely removed them to the next car, where they also created a disturbance. The conductor, then, simply put the negroes out of the car, leaving them on the platform, to renew the conflict as soon as opportunity offered. It was held that the jury were warranted in concluding that the subsequent shooting, in which plaintiff was struck, was a result reasonably to be apprehended from the surrounding circumstances, and which might have been avoided by ordinary care on the part of defendant. *Louisville, etc., R. Co. v. McEwan*, 21 Ky.

Notes

L. Rep. 487, 51 S. W. 619, same case, 17 Ky. L. Rep. 406, 31 S. W. 465, 2 Am. & Eng. R. Cas., N. S., 438. It has been held that if a passenger on a street car, who becomes frightened by a fight on the car between some of the passengers, asks the conductor to let her off, the company is responsible for injuries sustained by her in consequence of the negligent failure of the conductor to comply with her request. *Cross v. Detroit*, etc., R. Co., 120 Mich. 137, 79 N. W. 11.

D. INTERMINGLING OF WHITE AND COLORED PASSENGERS.

It has been held that if the conductor of a train allows white passengers to remain in a car or compartment set aside for the exclusive use of colored passengers, the company becomes responsible for their conduct, and is liable for their mistreatment of colored passengers, even though the carrier's servants may not know what is taking place. *Wood v. Louisville*, etc., R. Co., 101 Ky. 703, 19 Ky. L. Rep. 924, 42 S. W. 349, 8 Am. & Eng. R. Cas., N. S., 711; *Quinn v. Louisville*, etc., R. Co., 98 Ky. 231, 17 Ky. L. Rep. 811, 32 S. W. 742. Plaintiff and two friends, all colored persons, took seats in the smoker of defendant's excursion train. Their presence in the car proved obnoxious to the white passengers who subjected them to annoyance and insult. When they appealed to the conductor for protection, he told them that he could do nothing, but advised them to remove to a car set apart for colored passengers. However, he did not insist on their doing so, although they could see that there was probability of trouble. The ill-treatment continued, and the conductor was appealed to again, but he did nothing to protect them, except to repeat his advice to leave the car. Finally, plaintiff and her friends were assaulted and expelled from the car by the white passengers. It was held that defendant was liable for the conductor's failure to afford plaintiff proper protection. *Britton v. Atlanta*, etc., R. Co., 88 N. Car. 536, 18 Am. & Eng. R. Cas. 391, 43 Am. Rep. 749.

E. NEGLIGENCE OF PASSENGERS IN GETTING ON OR OFF THE VEHICLE.

A street railway company, it has been held, is liable for injuries received by a passenger, on alighting from a street car at a transfer point, where the transfer was required to be made hurriedly, in consequence of the violent efforts of another passenger to get out of the car, while loaded with bundles, if the transfer, by reason of the character of the place where, and the circumstances under which it was made, was fraught with danger to passengers, which the conductor, who left the car before reaching the point of transfer, had reasonable grounds to apprehend. *Baldwin v. Fair Haven*, etc., R. Co., 68 Conn. 567, 37 Atl. 418. And a street railway company has been held liable for the death of a child in consequence of being thrown from the platform of a street car, where the conductor compelled him to stand, by the hasty exit of another passenger. *Sheridan v. Brooklyn*, etc., R. Co., 36 N. Y. 39, 93 Am. Dec. 490. But in a case wherein it appeared that when plaintiff, a passenger upon defendant's street car, was about to alight, the conductor stepped off the car to help her child to alight, and that as plaintiff was following, she was jostled and pushed by other passengers, it was held that defendant was not responsible for plaintiff's injuries. *Ferguson v. Citizens'*, etc., R. Co., 16 Ind. App. 171, 44 N. E. 936. While plaintiff, a boy fourteen years of age, was riding as a passenger, on the front platform of one of defendant's street cars, leaning against the dasher, he either fell off the car, or was pushed off by a rush of passengers from the car. It was held that the jury was properly charged that the company was not liable for the conduct of the passengers unless their conduct was unusual and disorderly, and could have been prevented by the persons in charge of the car. *Randall v. Frankford*, etc., R. Co., 139 Pa. St. 464, 22 Atl. 639, affirming 8 Pa. Co. Ct. R. 277.

F. SCUFFLING OF HACKMEN NEAR STATION.

In an action to recover for injuries received by plaintiff, while passing from the ticket office to the baggage room in defendant's station,

Notes

by being run into and knocked down by one of a couple hackmen who were engaged in a scuffle, there being evidence that hackmen were accustomed to await trains near the place where plaintiff was injured, and that they had frequently engaged in similar scuffles, it was held that defendant was liable for the injuries sustained by plaintiff, even though caused by the acts and conduct of intruders or strangers, if such acts and conduct were so continued, and so notorious that the servants of the defendant company in charge of the stations, and the passage-ways thereof, devoted to the use of passengers, knew of such acts and conduct, or should have known of them and of the dangers arising therefrom. *Exton v. Central R. Co. of New Jersey*, 62 N. J. L. 7, 42 Atl. 486, 14 Am. & Eng. R. Cas., N. S., 240, affirmed, without opinion, in 63 N. J. L. 356, 46 Atl. 1099.

V. LIMITATIONS OF CARRIER'S LIABILITY.

A. IN GENERAL.

Since carriers of passengers do not insure, or warrant, the safety of their passengers, and are liable only for the exercise of care for their safety, it follows that they are not liable to their passengers for the consequences of the negligence or wilful acts of fellow passengers, or of strangers, in every case. This particular liability is subject to certain well-defined limitations, which, though implied by what has already been said in this note, will now be discussed in detail.

B. ABSENCE OF KNOWLEDGE, ETC., OF PASSENGER'S PERIL.

In the first place, to charge a carrier with liability for injuries suffered by a passenger at the hands of fellow passengers, or of strangers, the carrier must have knowledge, or a reasonable opportunity to know of the existence of danger to the passenger, or of facts or circumstances from which danger may reasonably be anticipated. *St. Louis, etc., R. Co. v. Wilson* (Ark. 1902), 66 S. W. 661; *Wright v. Chicago, etc., R. Co.*, 4 Colo. App. 102, 35 Pac. 196; *Louisville, etc., R. Co. v. McEwan*, 17 Ky. L. Rep. 406, 31 S. W. 465, 2 Am. & Eng. R. Cas., N. S., 438, same case, 21 Ky. L. Rep. 487, 51 S. W. 619. Hence, a carrier cannot be held liable for the consequences of disorder among passengers which cannot reasonably be anticipated. *Cleveland v. New Jersey Steamboat Co.*, 125 N. Y. 299, 26 N. E. 327. Compare section IV, C., ante, this note. In an action to recover damages for the death of a passenger, who was riding on a flat car, by reason of being thrown from the car by fellow passengers, with whom he got into an altercation, the jury having found that defendant could not reasonably have anticipated that an assault would be committed on deceased as a result of employing flat cars to carry the passengers, and that prior to the accident, there was nothing in the conduct of any of the passengers, of which the trainmen had knowledge, to indicate that the deceased was in danger of being killed or injured, it was held that the company was not liable. *Felton v. Chicago, etc., R. Co.*, 69 Iowa 577, 29 N. W. 618, 27 Am. & Eng. R. Cas. 229. And it has been held that a street railway company is not, as to its passengers, guilty of negligence in attempting to operate its cars during a strike of its employees, unless the conditions are such that it ought to know, or ought reasonably to anticipate, that it cannot do so and at the same time guard from violence, by the exercise of due care on its part, those who accept its implied invitation to become passengers. *Fewings v. Mendenhall*, 83 Minn. 237, 86 N. W. 96, 55 L. R. A. 713. While plaintiff, a woman, was seated in the women's waiting-room at one of defendant's stations, awaiting a train, two or three unknown men entered, and behaved in a very disorderly manner, using vulgar and profane language, and being guilty of indecent exposure of the person. The company had no notice of the occurrence at the time. Neither did it have notice of any facts justifying the expectation of such a wanton and unusual outrage. It was held that defendant was not liable. *Batton v. South, etc., R. Co.*, 77 Ala. 591, 23 Am. & Eng. R. Cas. 514, 54 Am. Rep. 80. While, as has been seen (see ante, this note, section IV, B.), a carrier may sometimes be liable for

Notes

ries to passengers which are inflicted by a dangerous person, who allowed to come and remain upon the carrier's vehicle or vessel, this liability attaches only when the carrier knows, or should know, that the person is dangerous, and can reasonably be expected to anticipate injury in consequence of his presence. Thus, it has been held that a carrier is not responsible for the results of a sudden, unlooked-for, and violent attack by a passenger on a fellow passenger, although the assailant is intoxicated, and has addressed insulting remarks to his fellow-passenger, but remained quiet after being admonished by the conductor. *Putnam v. Broadway, etc., R. Co.*, 55 N. Y. 108, 15 Abb. Pr. (U. S.) 383, 14 Am. Rep. 190, reversing 36 N. Y. Super. Ct. 195. Plaintiff sustained injuries in consequence of another passenger, who was standing in the aisle of the car and supporting himself by one of the straps, stepping upon her foot. The passenger who caused the injury was intoxicated, and lurched at every turn, but was well behaved. It was held that plaintiff had no cause of action. *Thomson v. Manhattan R. Co.*, 75 Hun (N. Y.) 548, 27 N. Y. Supp. 608. Plaintiff was injured by the discharge of a pistol which dropped from the pocket of another passenger. The passenger who dropped the pistol was intoxicated, and prior to the accident had passed through the train several times, smoking a cigar, staggering somewhat, and peering into the faces of the passengers. He was otherwise orderly. On the ground that no connection between the passenger's intoxication and the dropping of the pistol appeared, and that the trainmen could not reasonably be expected to anticipate any trouble from his presence on the train, it was held that the carrier was not liable for the injury to plaintiff. *Galton, etc., R. Co. v. Long*, 13 Tex. Civ. App. 664, 36 S. W. 485. In an action to recover for injuries sustained by plaintiff in consequence of the act of a drunken passenger in uncoupling the rear coach of a train, thereby causing a collision between that car and the rest of the train, it was held that the question as to whether the company should have anticipated the happening of an event like that which caused the accident should have been submitted to the jury. *Texas, etc., R. Co. v. Grey* (Tex. Civ. App. 1902), 68 S. W. 534.

In an action to recover damages for the mistreatment of plaintiff, a colored person, by white fellow passengers, while she was riding in a compartment set apart for the exclusive use of negroes, it was held that the trial judge properly instructed the jury that plaintiff was not entitled to recover unless the jury should believe from the evidence that the conductor permitted the white passengers to enter the compartment set apart for colored passengers, or, knowing of their presence there, permitted them to remain in the car. *Bailey v. Louisville & N. R. Co.*, 19 Ky. L. Rep. 1617, 44 S. W. 105. Compare section IV, D., ante, this volume.

A carrier is not responsible for the consequences of the criminal acts of passengers or strangers which cannot reasonably be foreseen. Thus, it has been held that a railroad company is not liable for the death of a passenger upon one of its trains, who is shot by some unknown person, a passenger or intruder, who enters the car in which the passenger is sitting with intent to commit murder or robbery, if the company, through its servants, does not know, or have reasonable grounds for suspecting, that the passenger is in danger. *Connell v. Chesapeake, etc., R. Co.*, 93 Va. 44, 24 S. E. 467, 57 Am. St. Rep. 786, 32 L. R. A. 792. It has been held that the presence upon a train of two negro tramps, detected and stealing a ride thereon, would not alone be sufficient to require the employees in charge of the train to suspect that such tramps were armed with deadly weapons, and to anticipate that when brought upon the train under arrest they might endeavor to escape, and while an employee was attempting to prevent the escape make a murderous assault with such weapons upon one to whom the railroad company owed the duty of protection, and who was taking no part in effort to prevent the escape. *Savannah, etc., R. Co. v. Boyle*, 115 Ga. 836, 42 S. E. 792.

Where plaintiff and another passenger, with whom he had become involved in an altercation and fight, were separated by the conductor as

Notes

soon as possible, and there was nothing to indicate that the trouble would be renewed, but plaintiff's assailant suddenly and unexpectedly renewed the assault, it was held that the carrier was not liable. *Mullan v. Wisconsin, etc., R. Co.*, 46 Minn. 474, 49 N. W. 249, 47 Am. & Eng. R. Cas. 649. Plaintiff a female passenger, who was on the wrong train, was put off at one of defendant's stations to await the arrival of the proper train. There was nothing to show that the station was an unsafe or inappropriate place for a young and inexperienced female, traveling alone, to remain between trains. A male passenger who left the train when she got off offered to escort her to a hotel, to which the conductor assented. Instead of taking her to a hotel, he took her to a saloon, where he committed an assault upon her. On the ground that, under the circumstances, the conductor had no reason to believe that the assault upon plaintiff would be committed, it was held that defendant was not liable. *Sira v. Wabash R. Co.*, 115 Mo. 127, 21 S. W. 905, 58 Am. & Eng. R. Cas. 538, 37 Am. St. Rep. 386. A loaded freight train had been placed by the employees of a railroad company on a side track with the brakes set tight and the switch set to throw the cars off should anything happen. A boy turned the switch so as to let the cars on to the main track, and opened the brakes, thus starting the cars, which, reaching the main track, collided with an approaching passenger train upon which plaintiff was a passenger. It was held that the company was not liable for the injuries sustained by plaintiff in the collision. *Fredericks v. Northern, etc., R. Co.*, 157 Pa. St. 103, 27 Atl. 689, 58 Am. & Eng. R. Cas. 91, 22 L. R. A. 306. The fact that a passenger is in need of special protection, while traveling, ordinarily does not charge the carrier with liability for the consequences of not affording him the necessary protection, if the fact that he needs special protection is unknown to the carrier at the time of entering into the contract to carry. It was so held, and judgment was rendered for defendant carrier, and an action for assaults upon plaintiff, while traveling upon defendant's railway, committed as follows: Plaintiff had been employed in the eviction of pitmen from their houses, and had thereby incurred the ill-will of the pitmen in the neighborhood in which he was traveling. When he took his ticket defendant's servants had no notice that he was exposed to greater danger than one of the traveling public, although he was threatened with violence by a number of pitmen at the station, in the hearing of some of defendant's servants, before the train started, and got into the guard's van for safety, but was removed and placed in a third class carriage by defendant's servants, who at this time knew that he had been engaged in the evictions, and feared violence from the pitmen. The pitmen crowded into the compartment in which he was, thereby greatly overcrowded. Defendant's servants when applied to by him did nothing towards attempting to get the pitmen out, or to get plaintiff a seat in another carriage, and he was assaulted and injured by the pitmen during the journey to the first station at which the train stopped. At that station the pitmen got out of the compartment and others got in and the assaults upon plaintiff were repeated by them. This happened at each station at which the train stopped and at each station he complained of the assaults to the guard, who did nothing to secure his safety. *Pounder v. North Eastern R. Co.* (1892), 1 Q. B. 385, 61 L. J., Q. B. 136, 65 L. T. 679, 52 Am. & Eng. R. Cas. 433. While the general principle, which is enunciated in this case, as to the duty of a carrier to afford a passenger special protection, is undoubtedly correct, it is doubtful whether the carrier's servants performed their full duty to the passenger, after becoming acquainted with his dangerous position. See the criticism of the case in note, 32 Am. St. Rep. 93, and compare *Chicago, etc., R. Co. v. Pillsbury*, digested in section III, ante, this note.

A passenger who contracts a contagious disease from a ticket agent of a carrier while purchasing his ticket, cannot, it has been held, recover damages, if the carrier does not know, and has no reason to know, that the agent has the disease. *Long v. Chicago, etc., R. Co.*, 48 Kan. 28, 28 Pac. 977, 53 Am. & Eng. R. Cas. 45, 15 L. R. A. 319.

Notes

PERFORMANCE OF DUTY, OR INABILITY, TO PROTECT.
 Though the carrier may have knowledge, or be charged with knowledge, of the passenger's peril, or of facts or circumstances from which danger may reasonably be apprehended, he cannot, of course, be held liable unless there has been an omission of duty on his part to protect the passenger. If a carrier's servants, when they learn that a passenger is in danger of being harmed by fellow passengers, make a reasonable effort to protect him, the carrier's duty is discharged, and he cannot be held responsible for injuries which the passenger may sustain. *Tall v. Baltimore Steam-Packet Co.*, 90 Md. 248, 44 Atl. 1007, 107 L. R. A. 120. When two women, acquaintances who had been drinking together, boarded a train, and, after a while, one of them began abusing the other and assaulted him, it was held that the conductor, in stopping them and preventing the assault from being repeated, did all that could reasonably be expected to do. *Kinney v. Louisville, etc., Co.*, 99 Ky. 59, 34 S. W. 1066. Two passengers upon a steamship became involved in a quarrel over a game of cards. One of them used an insulting epithet to the other, who left the room but returned a few minutes, and approached the passenger with whom he had been quarreling. The captain, whose attention had been called to the possibility of a quarrel, sprang forward and intervened, but not in time to prevent the assault, who had remained in the room from striking the other, and hitting him down. The latter drew a pistol and fired, but missed his mark and hit plaintiff. It was held that, the captain having done everything in his power to prevent the occurrence, the carrier was not liable. *Baltimore Steam-Packet Co.*, 90 Md. 248, 44 Atl. 1007, 47 L. R. A. 120. Where a train is boarded by disorderly persons, who rush upon the train with such violence and in such numbers as to overwhelm the carrier, as well as the passengers, the railroad company is not responsible for the consequences of the disorderly persons being on the train. It is not the duty of railroad companies to furnish their trains with a police force adequate to such emergencies. They are bound to furnish cars and men enough for the ordinary transportation, but they are not bound to anticipate or provide for such an unusual occurrence." *Pittsburgh, etc., R. Co. v. Hinds*, 53 Pa. St. 512, 91 Am. Dec. 224.

CASES FOR WHICH CARRIER LIABLE

As shown by the preceding sections of this note, most of the cases in which it has been sought to charge carriers with liability for the consequences of negligence and wilful acts of fellow passengers and servants, have been based upon acts of violence. But the liability of a carrier is not limited to acts of violence; passengers, especially women and children, are entitled to be protected against the use of profane or obscene language, insults and abuse, and similar misconduct by fellow passengers, or strangers. *Batton v. South, etc., R. Co.*, 91, 23 Am. & Eng. R. Cas. 514, 54 Am. Rep. 80; *St. Louis, etc., R. Co. v. Wilson* (Ark. 1902), 66 S. W. 661; *St. Louis, etc., R. Co. v. Smith*, 71 Tex. 491, 9 S. W. 451, 37 Am. & Eng. R. Cas. 94, 10 Am. St. L. R. A. 667; *Texas, etc., R. Co. v. Kingston* (Tex. Civ. App. 1902), 68 S. W. 518; *Collins v. Texas, etc., R. Co.*, 15 Tex. Civ. App. 39 S. W. 643; *Texas, etc., R. Co. v. Jones* (Tex. Civ. App. 1903), 39 S. W. 124. However, the carrier's liability is subject to the limitation that he cannot be expected to guard against the consequences of rudeness or bad manners on the part of strangers, or other passengers, which does not amount to a breach of the peace. It has been held that a woman is not entitled to recover damages from a railroad company for personal injuries, where it appears from the testimony that, when she was about to descend from the lower car to the ground, she was jostled off by another passenger rushing by her to enter the car. *Ellinger v. Philadelphia, etc., R. Co.*, 53 Pa. St. 213, 25 Atl. 1132, 58 Am. & Eng. R. Cas. 425, 34 Am. St. L. R. A. 697. And a railroad company is not liable for injuries sustained by a passenger through the act of an intending passenger, who, upon entering a station, violently pushes the door open, causing it

Mott v. Southern Ry. Co

to strike the passenger with force, just as she is about to pass out. *Graeff v. Philadelphia, etc., R. Co.*, 161 Pa. St. 230, 28 Atl. 1107, 58 Am. & Eng. R. Cas. 431, 41 Am. St. Rep. 885, 23 L. R. A. 606. A railroad company it has been held, is not liable to a passenger on account of men and boys around one of its stations jeering and laughing at her. *Missouri, etc., R. Co. of Texas v. Kendrick* (Tex. Civ. App. 1895), 32 S. W. 42.

THEODOR MEGAARDEN.

MOTT v. SOUTHERN RY. CO.

(Supreme Court of North Carolina, Nov. 11, 1902.)

[42 S. E. Rep. 601.]

Railroad Employee—Assumption of Risk.

Priv. Laws 1897, c. 56, which provides that any "servant or employee of a railroad company" who shall suffer injury in the course of his employment by any defect in machinery shall be entitled to maintain an action against such company, renders inapplicable the doctrine of assumption of risk in case of a servant injured while assisting in the removal of a tire from an engine, through defendant's negligence; the statute not being limited to employees running trains, but embracing all servants of railway companies.

Appeal from superior court, Iredell county; Shaw, Judge.

Action by Chas. D. Mott against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

Long & Nicholson, Armfield & Turner, and W. G. Lewis, for appellant.

F. H. Busbee, for appellee.

CLARK, J. The plaintiff was injured while in the employment of defendant company. He was ordered by one who had a right to command him to aid a foreman to take a tire off an engine, which tire weighed 800 or 1,000 pounds, and had to be heated red hot to obtain the expansion necessary to secure its removal. The plaintiff alleges that while he was engaged in helping to remove this tire it slipped by the negligence of defendant and its servants, as specified in the complaint, and fell upon the iron bar the plaintiff was using, crushing him and injuring him seriously. The jury found, upon issues submitted to them, that the plaintiff was injured by the negligence of the defendant as alleged in the complaint, and that the plaintiff did not by his own negligence contribute to his injury, and assessed the plaintiff's damages at \$500. The court submitted, over plaintiff's objection, another issue: "Did the plaintiff assume the risk of injury when he accepted service of the defendant?" To the submission of this issue, the plaintiff excepted. The jury responded "Yes" thereto, and by reason of such response the judge rendered a judgment in favor of defendant, and plaintiff appealed.

The submission of the issue as to assumption of risk was error, the finding of the jury thereon is immaterial, and the

Mott v. Southern Ry. Co

is entitled to judgment upon the findings
 es. The case of Coley v. Railroad Co
 . E. 43, and same case on rehearing, 129
 195, are conclusive of this. Those cases
 authority in Thomas v. Railroad Co., 129
 201; Cogdell v. Railway Co., 129 N. C. 39
 ley v. Tobacco Co., 130 N. C. 34, 40
 v. Railway Co., 130 N. C. 186, 41 S. E. 1
 es at this term. In Cogdell's Case, supra
 e, and so ruled, that the judge, under the
 Case, properly refused to submit an
 on of risk when the cause of action was for
 the course of his employment by a r

et ratified February 23, 1897 (printed, for s
 made public, as chapter 56 in the Private L
 as follows:

on 1. That any servant or employee of a
 y operating in this state, who shall suffer i
 or the personal representative of any such
 l have suffered death, in the course of his
 ment with said company, by the negligenc
 incompetency of any other servant, e
 the company, or by any defect in the
 appliances of the company, shall be entitl
 action against such company.

2. That any contract or agreement, expr
 ade by an employee of said company t
 of the aforesaid section shall be null and v
 ley v. Railroad Co., 128 N. C. 534, 39
 C. J., after an able and full discussion o
 nd its bearing upon the doctrine of ass
 s, at page 541, 128 N. C., and page 46, 39 S
 part of the record, consisting of prayers for
 judge's charge, is predicated upon the fir
 ion of risk, which are eliminated by the vi
 the case. * * * The prayers of the
 if not all of them, are addressed to the
 and it is not necessary for us to discuss
 his view of the act of 1897." After full arg
 reful consideration on rehearing, the court
 C. 407, 40 N. E. 195) the view expressed b
 Douglas, J., saying (page 409, 129 N. C
 S. E.) that our statute is "an unconditio
 he kindred doctrines of fellow servant a
 risk, as applied to railroad companies";
 N. C., and page 197, 40 S. E., "We have
 ation in holding the act of February, 1897
 , and that it deprives all railroad compani
 state of the defense of assumption of r
 in contract, express or implied, and whet

Flanagan Bank v. Graham

directly, or under the doctrine of fellow servant." No case has ever been more thoroughly argued and more carefully and deliberately considered than *Coley v. Railroad Co.* It was argued before us by able counsel three times,—first at September term, 1900,—and was carried over under an advisari to the spring term, 1901, when it was reargued by leave of the court; the opinion affirming Judge Hoke, who tried the cause below, being written by Chief Justice Furches. It was again argued on rehearing at fall term, 1901; the court reaffirming its former decision in a well-considered opinion by Mr. Justice Douglas. And these opinions have since been approved in several cases, as already cited.

It was suggested here that the act applied only to employees running the trains, but the language of the statute is both comprehensive and explicit. It embraces injuries sustained by "any servant or employee of any railway company * * * in the course of his services or employment with said company." The plaintiff was an employee, and was injured in the course of his service or employment.

The issue and finding thereon as to assumption of risk being irrelevant and immaterial, the cause must be sent back, with directions to enter judgment in favor of the plaintiff in accordance with the findings upon the other issues. *House v. House* (at this term) 42 S. E. 546.

Reversed. |

FLANAGAN BANK v. GRAHAM et al.

(*Supreme Court of Oregon, Jan. 19, 1903.*)

[71 Pac. Rep. 137.]

Chattel Mortgages—Foreclosure—Destruction of Property.

Where all the property covered by a chattel mortgage is destroyed, or so changed and mixed with other property as to be impossible of identification, a decree of foreclosure on such property would be useless, and should not be granted.

Contract for Construction of Railroad—Obligation to Furnish Rolling Stock.

Under a contract by which the general manager of a railroad company, who held all the stock issued, except one share each held by the other directors, agreed to build the road in a substantial manner, "so as to be successfully operated when built, and to have said road in operation" within a stated time, in consideration of all donations and bonuses pledged to the company and of all its first mortgage bonds, such contractor was required to equip the road with engines and cars sufficient for its successful operation.

Rolling Stock—Delivery to Company Where Purchased by General Manager as Contractor.

Where a contractor, required to furnish the engines and cars for a railroad, is also general manager of the road, engines and cars purchased by him in his own name will be deemed delivered to the railroad company when he puts them into use on the railroad.

Liens—After-Acquired Property.

A contractor who had agreed to construct a railroad and furnish the rolling stock therefor in consideration, in part, of all its first mortgage bonds, executed a chattel mortgage to a director and general

Flanagan Bank v. Graham

sel of the railroad company, covering all engines, cars, and materials therefor which he should thereafter acquire. He thereafter purchased, in his own name, engines, cars, and materials, and delivered them to the company, and the vendor, who had no knowledge of such chattel mortgage, though it was filed of record, accepted such payments in payment therefor: *held*, in an action to foreclose such chattel mortgage, that the lien thereof was inferior to that of the mortgage given by the railroad company to secure such bonds.

Appeal from circuit court, Coos county; J. W. Hamilton, judge.

Action by the Flanagan & Bennett Bank against R. A. Graham and others. From a judgment for defendants, plain-appellate. Modified.

This is a suit by plaintiff, a corporation, to foreclose two chattel mortgages, the first of which was executed by R. A. Graham to Flanagan & Bennett, as partners, on January 20, 1891, to secure the payment to them of \$6,039.54, and such other amount as they should advance to Graham within 60 days thereafter, not exceeding \$10,000 in all, and interest, including horses, harness, carts, wagons, scrapers, tools, camp stoves, tents, stoves, cooking utensils, and all property and elements used by the said Graham in railroad construction, and all other property for like use that he might thereafter acquire; the other being executed by Graham to Flanagan & Bennett, as partners, on September 14, 1891, as additional security for the debt described in the first, and as security for other sums of money for which the said Graham became indebted to them, and for advances which they might thereafter make to any extent to Graham, and was intended to cover all of the railroad cars, car wheels, axles, fastenings, bolts, and all material for the construction of the same, now on the line of the road of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and in Coos county, Oregon, and at present being at or in Marshfield, Coos county, Oregon, and Coquille city, in said county, and such other cars, car wheels, and material for construction of rolling stock which may be put on said railroad or in connection therewith. Also all rolling stock on said railroad, or which may hereafter be put on said railroad while these presents shall continue in effect, and including locomotives, engines, tenders, and cars of every description." The Flanagan & Bennett Bank subsequently succeeded to the interest of Flanagan & Bennett, partners, in these mortgages and the debts which they were given to secure, which indebtedness has since increased to a large amount. The complaint shows that a part of the property so mortgaged has since come into possession of the defendants Beaver Hill Coal Company and the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, and is held by them subject and subordinate to the lien of plaintiff's mortgages. It is further shown that the defendant Farmers' Loan & Trust Company claims to have a lien by virtue of a trust deed or mortgage upon such property, or a

Flanagan Bank v. Graham

portion thereof, but that the same, whatever it may be, is subsequent and subject to plaintiff's said mortgages. There is also an allegation that the railroad company, in consideration of the sale and transfer to it of the property described in the chattel mortgages, or a portion thereof, assumed and agreed to pay the said indebtedness of Graham to plaintiff, and a personal decree is demanded, for the amount alleged to be due, against both Graham and the railroad company, and the foreclosure of the mortgages is prayed for against all parties defendant. The defendants Beaver Hill Coal Company, the Farmers' Loan & Trust Company, Coos Bay Railroad Company, and W. S. Chandler, receiver of the latter, answered, denying nearly all the material allegations of the complaint, but admitting that the locomotives, tender, rolling stock, and equipments, claimed by plaintiff to be subject to the lien of its mortgages, were acquired by the railroad company, and alleging that they were rightfully acquired through various persons and at various times, but denying that the same, or any portion thereof, are subject to such pretended mortgages, or that the said railroad company assumed or agreed to pay any part of said pretended indebtedness of Graham to the plaintiff. It is further alleged that the trust company has acquired a lien upon all of such property, superior to any of the pretended equities of the plaintiff. The decree of the trial court was in favor of the defendants, dismissing the complaint, and plaintiff appeals.

Wirt Minor, for appellant.

J. Cauch Flanders, for respondents.

WOLVERTON, J. (after stating the facts). The legal issues presented are few, although the record is voluminous, and incumbered with a vast variety of exhibits, more or less confusing, and difficult to reconcile so as to arrive at an entirely satisfactory solution of the controversy.

As to the chattel mortgage first given by Graham to Flanagan & Bennett, the property involved, unless the steam excavator may be said to be included, has ceased to have any practical existence, or at least it has not been presently so identified as to make it possible that the law may lay hold of it and subject it to the payment of plaintiff's demands. Many of the horses have died, and such as remain have not been traced to any definite possession, and the wagons, carts, scrapers, tools and implements, camp equipments, and other property then owned and used by Graham in his construction work, have become worn out and so scattered and dissipated that it is not practicable to locate any part of them, or to determine within whose possession any considerable portion thereof is to be found; so that it is impracticable for the court to make legal application of them to the discharge of any alleged incumbrance. To suffice for this conclusion, we advert to the

Flanagan Bank v. Graham

y of Mr. Bennett. He says: "I suppose the horses; if any of them are living, I do not know it. The—there may be some of that in existence, but I do not. The 30 wagons and 52 carts,—I could not say about whether any of them are in existence or not; they were along the line of the railroad of the Coos Bay & Railroad & Navigation Company. The 50 slush I understand, are some of them scattered along the the last I saw of them was up near Myrtle Point, or the track of the railroad, but a great many of them, I were used in building the Klondike spur, and I think a great many of these wheel cars and slush scrapers, I could not say how many, and the tools, camping outfit, mining utensils, I suppose a great many of them are there. What amount of it is left I could not say, but I whatever is left is along the line of the railroad, some—and I suppose Mr. Chandler has possession of it, I do not know that. The pile driver and hammer, engines, ropes and blocks, tackle, etc., I do not know where that last, and I could not say where it is." Mr. Chandler, who is now receiver of the road, testified that none of the property has come into his possession. He has the steam excavator, but none of the property described generally in the mortgage; neither has the Beaver Hill Coal Company possession of any of it. True, the pleadings would seem to be on the part of the railroad company and the Beaver Hill Coal Company that the property had come into their possession, but if it is there now it is impossible of identification, and it would be a useless and vain proceeding to decree foreclosure upon property having no practical present value. Hence we conclude that plaintiff is not entitled to a decree as to this property, and we do not understand why the defendant now seriously insisted upon by its counsel. This mortgage contains the following clause, namely: "Also in addition to the above, we hereby give and grant unto said Graham herein any and all property which said Graham may hereafter acquire for use in connection with the above, or which may be an enlargement or addition thereto;" and it is our opinion that this is suitable and adequate to constitute the mortgage a lien upon the steam excavator, which was purchased by Graham through J. D. Spreckels & Bros. Co. on January 1, 1893, and subsequently employed along the line of the railroad. But, considering the general nature of the property mortgaged, it does not seem to us by reasonable construction of the instrument that this machine was to be included. This is the first mortgage.

To determine the potency and validity of the second mortgage, a lien upon the property therein described, both as to the property then in existence and such as was thereafter to be acquired, involves an inquiry into the history of the operation of the railroad company, its control and management, and Graham's business relations thereto, as well as the

Flanagan Bank v. Graham

manner in which the alleged rights of the relative parties concerned were acquired. The original incorporators of the railroad company were J. W. Bennett, E. G. Flanagan, T. R. Sheridan, and A. M. Crawford, and the first board of directors was composed of T. R. Sheridan, R. A. Graham, F. W. Burnett, O. J. Seeley, W. B. King, E. G. Flanagan, and W. E. Baines, the first meeting being held August 19, 1890. T. R. Sheridan was elected president, F. W. Burnett vice president, and W. E. Baines secretary and treasurer. R. A. Graham was elected general manager, and as such was "to have the general management of the business of the company." F. W. Burnett was elected general solicitor, chargeable with the duty of acting as its counsel. On this date the company, being duly authorized thereto, made and entered into a contract with Graham, which, with its preamble, reads as follows: Whereas, the said corporation has been organized for the purpose, among others, of building and operating a line of railroad from a point on Coos Bay, at the town of Marshfield, in the state of Oregon, running thence to a point at the city of Roseburg in said state; and whereas, the said corporation is at present wholly without means of constructing such railway line; and whereas, certain subscriptions, subsidies, and guaranties have been made by individuals and corporations in favor of the party of the first part, on condition that said railway line be completed and in operation within a limited time, which subsidies amount in the aggregate to about \$225,000; and whereas, the said corporation also has powers under its charter and the laws of the state to issue its bonds to the amount of \$25,000 per mile of said proposed road, to be secured by a mortgage upon all its property now owned or to be acquired; and whereas, said R. A. Graham, party of the second part, proposes to undertake the construction of said road from Marshfield to Roseburg, in consideration of receiving from said party of the first part an assignment of all of said subsidies, subscriptions, and guaranties (except rights of way and terminal facilities), and also the bonds of the same so secured as aforesaid to the amount of \$25,000 per mile of said road, as the same shall be located and constructed between said points: * * * Now, therefore, this memorandum witnesseth that, in consideration of the agreement of the said party of the second part to undertake the construction of said line of railroad between the points hereinbefore named, said railroad to be a standard gauge, and be built in a substantial and proper manner so as to be successfully operated when built, and to have said railroad in operation within the time limited by said subscriptions and subsidies, or within such further time as shall hereafter, by resolution of said board of directors, be determined upon, the party of the first part hereby agrees: First, to cause to be assigned to said R. A. Graham or his assigns all subscriptions, subsidies, and guaranties made to said party of

Flanagan Bank v. Graham

part, as an inducement for the building of said road; second, to cause to be issued and delivered to said corporation or his assigns the first mortgage, 30 years, 6 per cent. bonds of the party of the first part to the amount of \$100,000 per mile of said proposed road between Marshfield and Marshfieldburg, as the same shall be located and constructed, secured by the said bonds by mortgage or trust deed upon said road, and all property of said corporation now held or hereafter acquired in manner and form satisfactory to said corporation or his assigns." The board, at a meeting held April 1, 1891, adopted a form of bond and mortgage which had previously been submitted to and approved by the Farmers' Loan & Trust Company, and the president and directors were authorized and empowered to sign and execute the same in behalf of the company. At this meeting, F. J. Bennett resigned as director, vice president, and general manager, and J. W. Bennett was elected director and vice president. Bennett qualified as director May 1, 1891, and as vice president September 12, 1891, and qualified at which date he was re-elected vice president. It is shown that Bennett acted as general solicitor for the company from the time of his first election as such until for several years thereafter. On June 1, 1891, it was decided at a meeting of the board of directors, Bennett advised that the Farmers' Loan & Trust Company had suggested to the form of the mortgage theretofore adopted that the board directed that another mortgage be prepared to conform to its behests, "in such form, and with such provisions, as may be acceptable to the said trust company." The board designed to convey all the property of this corporation now owned or hereafter acquired, as security for its loans. Pursuant to this authority, the company duly executed and delivered to the trust company a mortgage or deed, embracing property as follows: "All locomotives, tenders, cars, carriages, tools, machinery, and every kind of manufactured or unmanufactured materials, coal, wood, and every kind belonging or appertaining to the railway; and, also, all line or lines of telegraph, telephones, stations, implements and materials, and all real or personal, rights, privileges, and franchises, appurtenances, and appurtenances thereunto belonging or now held or hereafter acquired." There is some controversy as to when this mortgage was executed, the plaintiff contending that it was on June 1, 1891, and the defendant that it was not until October, and that it was not recorded until December 1, 1891. This inquiry, however, is not deemed especially important to the present case. The bonds for the first section of five miles of road constructed were issued by authority of the board of directors on January 9, 1892, for the second section on May 12,

Flanagan Bank v. Graham

1892, the third, on August 8, 1893, and for the fourth and fifth, October 28, 1893. Those for the first two sections were delivered by the trust company to Graham, and for the last three to J. D. Spreckels & Bros. Co., in pursuance of Graham's instructions. The capital stock of the railroad company consists of 40,000 shares, at \$100 per share, and there were issued 19,994 shares to O. J. Seeley, in trust for R. A. Graham, and 6 shares to such persons as it was desired to have serve as directors of the company. These were canceled and reissued to others as occasion demanded in changing the personnel of the directorship, so that Mr. Graham was constituted the owner and holder of practically all the subscribed capital stock of the concern, the manager of the company, and a contractor to build and construct the road under the agreement of August 19, 1890, by virtue of which he was to become the owner of all the subsidies, except the right of way guaranties, and all the bonds of the company as fast as they were issued, and of these conditions all of the directors acting at the time must necessarily have been cognizant. On October 15, 1890, Spreckels Bros. & Co. advised Graham that it had purchased on his account 30 miles of 45-pound steel T-rails, and necessary fish plates, bolts, etc.,—payments to be made, \$50,000 cash on receipt of property in San Francisco, and the balance in 90 days after final delivery, with interest at 7 per cent. Graham confirmed this purchase, but when the rails arrived in San Francisco he was unable to pay for them, and all but 10 miles were sold, with his consent. Spreckels Bros. & Co., however, would not let him have the balance until he gave security for payment. This was accomplished about August 24, 1891, by an arrangement whereby Graham executed his two notes, with Collins of the First National Bank of San Diego as surety, payable, one in four and the other in six months, and agreed to give Spreckels Bros. & Co. the bonds, and a majority of the stock of the railroad company, and the subsidies, as security additional to Collins' indorsement. This arrangement was confirmed by subsequent correspondence of the parties. On February 24th, Spreckels Bros. & Co. wrote to Graham, advising him that his second note of \$17,000 was then due, and requested him to forward securities at once, otherwise it must insist upon payment, and, on the 27th, Graham answered, saying, "I beg to state that the delay in not delivering you the securities which were promised must have been very aggravating," and explaining that it was caused by the bank note company's not having them ready. He further wrote that the first section of five miles had been accepted by the company, and the bonds ordered by the trustees, and that the board would have another meeting "early next month, and will accept the next section, and the bonds will be issued on that." On March 23, 1892, Graham delivered 48 of the bonds, being Nos. 1 to 48, inclusive, of the first issue. On September 3, 1892, Spreckels Bros. & Co.

Flanagan Bank v. Graham

to Graham an additional \$10,000, and took his note, with a written pledge on the face of it of 47 additional bonds, being Nos. 79 to 125, inclusive, as security for its payment. On that day another agreement was entered into, in substance, that, in consideration of certain advances made by Spreckels Bros. & Co. to enable Graham to complete the construction of the railroad from Marshfield to Myrtle Point, as per his contract with said road, Graham is to deliver to Spreckels Bros. & Co. all the bonds of said railroad to be issued, from No. 1 to No. 663, inclusive, a majority of the capital stock, as security for advances with interest at 7 per cent., to be charged on entire advances, and 5 per cent. bonus on advances made on and after September 3, 1892. It was further agreed that Spreckels Bros. should receive 10 per cent. commission for any sales of bonds negotiated by it, and also 10 per cent. on amount of the cost of construction of the road from Myrtle Point to Myrtleburg. On September 13, 1893, this agreement was carried so as to entitle Spreckels Bros. & Co. to 6 per cent. of the proceeds of sales of bonds, and at the same time it gave it an option of purchasing the railroad stock at \$100 per share. All the bonds issued, being 625 in number, went into the hands of Spreckels Bros. & Co. under these agreements save 5, and 10,000 shares of the capital stock to retain subsidies. Outside of these securities, Graham gave credit whatever with Spreckels Bros. & Co., and it was his understanding that he was relying wholly on the securities. In its dealing with Graham, and the advancement of funds to him, Spreckels Bros. & Co. kept its account with him individually, as manager of the railroad, or with the railroad itself. It was his understanding, however, that it was his understanding that the advances were made for the purpose of building and equipping the road to Myrtle Point; that in reality Spreckels Bros. & Co. was dealing with Graham as manager of the road, and not as an individual, and that the purchases of stock were made in behalf of the railroad company; that when rolling stock was purchased and placed on the road, it immediately became the property of the company, and a part of the assets thereof, as represented by the bonds. When the road was completed to Myrtle Point, Spreckels Bros. made other advances to apply on the pay roll for the operating expenses of the railway. Large advances were made by Spreckels Bros. & Co. to Graham under these several agreements, and for betterments and operating expenses, until, on November 1, 1897, they amounted in the aggregate to \$12,520, for which Graham gave his note, pledging anew 10,000 shares of the capital stock, all of the bonds then issued from No. 1 to No. 625, inclusive, except 5, and certain property, being subsidies acquired by Graham under his contract to construct the road, and authorized Spreckels Bros.

Flanagan Bank v. Graham

& Co., in case the note was not paid when due, to dispose of said property and apply the proceeds in payment thereof. Subsequently, a suit was instituted in the superior court of the city and county of San Francisco, state of California, by Spreckels Bros. & Co. against Graham, to foreclose its lien upon the property thus pledged, resulting in an agreement between the parties, which in the end culminated in Spreckels Bros. & Co. becoming the owner of all of said property, and it has since continued in such ownership.

Now, as to the acquirement of the property, which it is insisted is covered by the second mortgage of Flanagan & Bennett Bank, or the one executed September 14, 1891: Locomotive No. 1 was purchased July 15, 1891, by Graham of the New York Equipment Company, under an agreement conditioned that the title should remain in the equipment company until payments were made in accordance with the stipulations therefor, being a cash payment of \$1,000, and \$500 at the end of each month thereafter for four months, making the last to fall due November 15, 1891. The locomotive was originally purchased for the Southern California Railroad Company, and was to be delivered at San Diego on its tracks. Subsequently, however, in October, 1891, it was delivered at Coos Bay, and, by indorsement on the contract of date April 16, 1892, Graham assigned and transferred his interest therein, and to the property described, to the Coos Bay Railroad Company. He purchased of the Risdon Iron Works, along in March and April, 1891, the ironwork complete, together with hard-wood brake beams, for 30 cars, which were delivered at Coos Bay sometime in April. The remaining woodwork of these cars was subsequently supplied at the railroad company's shops. The cars were constructed with such material, and have since been in use on the road in its operation. Ironwork for 20 coal cars was obtained about January 18, 1895. Locomotive No. 2 arrived at Coos Bay February 5, 1893, the steam excavator or shovel February 19, 1893, and the coach was purchased in January, 1893. This is as far as we can accurately trace the acquirement of this species of property by Graham, and is sufficient for our present purpose. Generally speaking, this property was paid for through advances made by Spreckels Bros. & Co. at the instance of Graham, under their several agreements hereinbefore noted. All of such property in its present condition may be denominated "rolling stock," and that which is in dispute here may be scheduled as follows: 2 locomotives, 26 flat cars, 4 box cars, 12 logging trucks, 3 hand cars, 3 push cars, 1 coach, 2 cabooses, and 20 coal cars; and there is, in addition to this last, 1 steam excavator. This property, since its existence, has been assessed to the railroad company generally, and the company has been using it in the operation of its road, under the supervision of R. A. Graham as manager, and, generally, we may say that it has been treated by the parties concerned as be-

Flanagan Bank v. Graham

to the railroad company. We are now to determine the relative rights of the railroad company, the trust company and the Flanagan & Bennett Bank.

Link Graham's construction contract with the railroad company made it obligatory upon him to equip the road, that is, to furnish rolling stock, along with the construction of the road, laying the rails, etc. In a resolution premising the making of the contract on the part of the railroad company, it was declared that the immediate purpose of the organization was to construct and operate a standard-gauge railroad, and the contract requires Graham to build in a substantial and proper manner, "so as to be successfully operated when the road is to have said road in operation" within the time specified. Graham has himself placed this construction upon the contract, and it has been treated in that light by the parties concerned; so that we are impelled to such an interpretation at the present time. In the natural way of thinking, it seems that the one that the course of events would suggest, it seems that Graham by his purchases became the owner of the rolling stock prior to any acquirement of title by the railroad company. The purchases were made with funds advanced by the pledging of property that he was entitled to under his contract of construction, and the title to the property purchased first rested in him. Beyond this, however, the railroad company was entitled to have the property turned over to it unincumbered, as it added value to the railroad and was a security for the payment of the bonds, the value of which depended thereon, along with the roadbed and other improvements. The property became the company's, at least as soon as any part of the road was accepted and it was put into its operation. There was no especial delivery of the locomotive to the company of any part of it, unless it may be that locomotive No. 1 was so delivered by the assignment of the contract of purchase on April 16, 1892; but from the terms of the parties, Graham being both contractor for construction and manager of the road, fair dealing would suggest that there was a delivery by him as contractor to the company of which he was manager as soon as the locomotive was put to the use upon the company's road for which it was purchased and designed.

The general principle governing a mortgage intended to secure property not in existence or after-acquired seems to be that in law it is ineffectual and void, but in equity it is regarded as an executory agreement, which, if ineffectual per se, nevertheless, under the present legal title, operates to impress a lien upon the property to the agreement of the parties, when the property is actually brought into existence, and may be said to be governed under the familiar maxim that "equity considers that which ought to be done." The instrument called a mortgage, under such conditions, is construed as operating as if it were a present contract to give a lien, which, as between

Flanagan Bank v. Graham

the parties and all others having notice or knowledge thereof, takes effect or attaches to the subject as soon as it comes into the ownership of the mortgaging party. Jones, Chat. Mortg. (4th Ed.) § 170; Holroyd v. Marshall, 10 H. L. Cas. 191; Mitchell v. Winslow, 2 Story, 630, Fed. Cas. No. 9,673; France v. Thomas, 86 Mo. 80; Beall v. White, 94 U. S. 382, 24 L. Ed. 173; Kribbs v. Alford, 120 N. Y. 519, 24 N. E. 811; Ludlum v. Rothschild, 41 Minn. 218, 43 N. W. 137; Cameron Co. v. Marvin, 26 Kan. 612; Dodge v. Smith (Kan. App.) 46 Pac. 990. At the time of the execution of plaintiff's second mortgage, none of the property described and intended to be included was in existence as it is in its present form. The iron, including car wheels, and the hard-wood brakes sufficient and necessary for the construction of 30 freight cars, were then in the possession of Graham on the line of the railroad; but these materials have long since been built into cars, and have gone into the possession of the railroad company and become its property. This material was so manufactured into cars, presumably with the consent of Flanagan & Bennett and the bank, as they were purchased for that purpose, and so manufactured, in pursuance of the objects and purposes of the incorporation; so that, in effect, all of this property must be deemed as after-acquired, and should be so treated. Now, the situation is that Bennett, who was a copartner in the firm of Flanagan & Bennett at the time this mortgage was taken by the firm; was instrumental, as a director of the railroad company, in having the mortgage or trust deed to the trust company executed, and must have had full and ample notice and knowledge of the purposes for which it was executed, and that the rolling stock added value to the bonds to be secured thereby. Whether this instrument was prior in time of its execution to Flanagan & Bennett's mortgage of September 14, 1891, is of little moment, as Bennett assuredly knew at the time of the execution of the latter mortgage that the railroad company was to place a lien upon the property, in part security for the payment of its bonds, unincumbered by any other claim of lien whatever. He was also apprised of the fact that Graham was to come into the ownership of these securities, and that they were to play an important part in enabling him to construct the road and equip it under his contract with the company. In this light it would be inequitable for his firm to take a mortgage subsequently and enforce it against the bondholders. Spreckels Bros. & Co. had no actual notice of plaintiff's mortgage. It was, perhaps, charged with constructive notice, the mortgage having been placed on file as required by law, but this does not change the result, as the bondholders have a superior equity in any event. There is another feature of the case that militates somewhat against the plaintiff, which is, that in 1896 Mr. Bennett took the mortgage off the files, supposing that Graham was solvent and amply able to pay, and that he would pay the obligations

Metropolitan St. Ry. Co. v. Rouch

the mortgage was given to secure in due time, and after the notes were renewed; so that the conduct of the company was not altogether consistent with a continuous claim under the chattel mortgage. It is argued that Flanagan & Bennett having secured their mortgage from Graham prior to the transfer of the property to the railroad company, the railroad company could mortgage only what interest it had, and, ordinarily, the trust company's mortgage would be subordinate to theirs. This would be so, ordinarily, but the rule has no application here, as Bennett, being a member of the firm of Flanagan & Bennett, was largely instrumental in procuring the execution of the mortgage by the railroad company for the sole benefit of the bondholders, the mortgage being resolved upon long prior to the execution of the Flanagan & Bennett mortgage, the latter firm cannot be permitted to thus impair the security of such bondholders. As against the railroad company, the plaintiff's claims suffice for an enforcement of the liens, but not as against the bondholders. The allegation that the railroad company assumed to pay Flanagan & Bennett's claims against the firm is not proven.

The decree of this court will therefore be that plaintiff have the closure of its mortgage of September 14, 1891, without a final decree against the railroad company, but that it be subordinate and subject to the mortgage or trust deed of the plaintiff to the Farmers' Loan & Trust Company. The decree of the court below will therefore be modified accordingly.

METROPOLITAN ST. RY. CO. v. ROUCH.

(*Supreme Court of Kansas, Jan. 10, 1903.*)

[71 Pac. Rep. 257.]

Obstruction on Street Car Track—Duty of Driver of Vehicle to Turn Out—Instruction.*

In an action for damages for an injury occasioned by a collision between a street car and plaintiff's buggy while he was driving on or unusually near the street car track, an instruction to the jury to effect that the rights of the plaintiff as a traveler upon that portion of the street occupied by the railway track and the rights of the street car company were equal, should have been qualified so as to state the duty of the traveler to turn aside to permit an approaching street car to pass.

Negligence—Instructions.

In such an action, an instruction that, even if the jury should find the evidence that the plaintiff was negligent in having his vehicle on or near the track of the defendant, so that it was struck by a street car, still plaintiff would be entitled to recover if they should find that the injury was caused entirely by the negligence of the defendant in failing to provide a headlight sufficient to enable the plaintiff to discover an obstruction in time to stop the car and prevent a collision.

See the care required of persons driving along street railway tracks. See foot-note appended to *Tunison v. Weadock* (Mich.), 4 R. 203, 27 Am. & Eng. R. Cas., N. S., 203.

Metropolitan St. Ry. Co. v. Rouch

vent injury, and that the injury to the plaintiff would not have happened, notwithstanding the negligence of plaintiff, if such headlight had been on the car, is self-contradictory, and therefore erroneous, in that it postulates negligence in the plaintiff proximately causative of and directly contributive to the collision and injury, in the presence of which no negligent act of the defendant could be a sole or entire cause.

Same—Same—Same.

The instruction mentioned in paragraph 2, above, was further erroneous in that it permitted the jury to disregard negligence on the part of the plaintiff proximately causative of and directly contributive to his injury. Such negligence is sufficient to defeat recovery.

(Syllabus by the Court.)

In banc. Error from district court, Wyandotte county; E. L. Fischer, Judge.

Action by Felix Rouch against the Metropolitan Street Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Miller, Buchan & Morris, for plaintiff in error.

Bird & Pope and Rush L. Fisette, for defendant in error.

BURCH, J. Felix Rouch suffered injury in person and property resulting from a collision of the buggy in which he was riding with a car of the Metropolitan Street Railway Company on what is known as "Southwest Boulevard," in Kansas City, Mo. The defendant was driving longitudinally on the track of the railway company in an unlighted place, on a dark night, with his buggy top in such a condition that he could not readily see behind him. The color of the buggy top was such that in the darkness it blended with the color of the pavement, and was not easily discoverable by the motorman of an approaching car. He did look back from time to time, but after a considerable interval from his last observation, and just as he had stopped his horse from a trot to a walk to turn off the track, the buggy was struck by a car coming from his rear. The principal charge of negligence against the company was that the headlight of the car was insufficient to enable the motorman to discover objects on the track in time to prevent injury, and that the car was run at such a rate of speed that it could not be stopped in time to avoid a collision after the discovery of an obstruction. The affirmative defense of contributory negligence on the part of the plaintiff was asserted against him. While the plaintiff's own testimony tended strongly to convict him of such contributory negligence as would prevent recovery, still different minds might have drawn different conclusions from all the circumstances presented by his evidence, and the case was properly submitted to the jury. On the trial the railway company asked the following instruction: "You are instructed that, while the plaintiff had the right to use the street, and any and all parts of it, as might be necessary in traveling thereon, yet the defendant, in operating its cars on a fixed track, is not expected nor re-

Metropolitan St. Ry. Co. v. Rouch

to turn out for persons occupying its tracks, but, so far as passage along its tracks is concerned, it has the superior right of passage, and men driving horses must turn out, and give way to the cars to pass." This was refused, and instead the court instructed the jury that the rights of the railway company and the plaintiff as a traveler in the street were equal. Comp. Neg. § 1374, it is said: "While it is sometimes said that ordinary vehicles have equal rights in the use of the highway with railroad cars, yet this must necessarily be understood with reference to the difference in construction and use between ordinary vehicles, which may move from either side at pleasure, and railway cars, which cannot leave their tracks. It is, therefore, a sound view that a railway company, which is permitted by law to lay its tracks through a public highway, is not subject, in the running of its cars, to the ordinary law of the road, but that it has the exclusive right of way upon that portion of the highway occupied by its tracks, so that an ordinary vehicle passing along the highway must give way to the cars, and the duty of turning out to give way for its cars, and the drivers of such vehicles cannot require the driver of the railway car to stop, or to do any other act, to avoid a collision, where it can avoid the result by turning out. But even this exclusive right to the use of those portions of the street covered by its tracks does not exclude the public from using such portions of the street, so that to do so will not obstruct or impede the passage of its cars. In section 1375 it is also said: "But while it is the duty of the traveler, as far as he reasonably can, to keep off the tracks of the street railway company, so as to permit the unobstructed passage of cars thereon, yet there is no law obliging him at all times, and under all circumstances, to refrain from driving upon such tracks; and we think that the courts refuse to impute contributory negligence to such an act. The better opinion is that the rights of the traveler and the railway company in the use of the highway are equal, but with this limitation: that, as a car of the railway company cannot quit its tracks and turn out in order to pass the traveler, the traveler must turn out for it." In section 1453 it is further stated: "A street railway company, whose track is laid along a public street, and on the whole thereof, is not, as a steam railway company is, entitled to the exclusive use of its track; but the public have a right to use that portion of the roadway occupied by its track for the purposes of ordinary travel. In this regard their right is undoubtedly subordinate to the right of the street railway company in such a sense that they are obliged to yield the right of way on the approach of a car, since the car traveling on a track cannot yield the right of way to them." It is doubtful if the refusal of the instruction asked for, or the giving of the instruction prepared by the court prejudiced the defendant in view of all the facts and of other instructions relating to the proper conduct of the parties, still

Metropolitan St. Ry. Co. v. Rouch

any statement of the law to the jury which announces equality of right should embody the qualification indicated in the work quoted above.

The court also gave the jury an instruction which reads as follows: "(14) In this case, even if you find from the evidence that the plaintiff was negligent in having his buggy on or so near the track of the defendant that it was struck by one of its moving cars, still the plaintiff is entitled to recover if you further find from the evidence that the injury was caused entirely by the negligence of the defendant in failing to have on its said car such a headlight as would have enabled the motorman to have discovered the buggy of the plaintiff in time to have stopped the car before it collided with such buggy by a proper use of the appliances on said car for stopping it, and that the injury to the plaintiff would not have happened, notwithstanding the negligence of the plaintiff, if such a headlight had been on such car." Whatever injury occurred in this case resulted from the collision of the buggy and the car. Having the buggy on or near the track was absolutely necessary to a collision. Without that no collision could possibly occur. Having the buggy on or near the track was, therefore, a proximate cause of the collision, and directly contributed thereto. The plaintiff might or might not have been negligent in having the buggy on or near the track, but, if he were negligent in so doing, he was negligent in a matter that was proximately causative of and directly contributive to the collision, and hence to the injury. When, therefore, the court postulated negligence in the plaintiff in having his buggy on or near the track, so that the car struck it, the court postulated negligence proximately causative of and directly contributing to the collision and the injury. But if the plaintiff's negligence was a cause of the collision, and contributed thereto, the collision could not have been caused entirely by anything else. While the defendant's negligence might be in part causative of and contributive to the collision, it could not be the sole or entire cause when another proximate cause and direct contribution had been hypothesized on the part of the plaintiff. The instruction, therefore, presented to the jury a contradiction and an impossibility.

A part of instruction No. 11, given to the jury, reads as follows: "But if you find that the plaintiff, by any act or omission on his part, was guilty of negligence, as hereinbefore defined, and that such negligence directly contributed in causing the collision and injuries, if any, then you will find for the defendant, regardless of whether or not it or its servants were also negligent." In other words, if the plaintiff was negligent in having his buggy on or near the tracks, so that the car struck it, thereby proximately causing and directly contributing to the collision and the injury, the defendant's negligence should be disregarded; that is, the defendant's negligence in having an insufficient headlight should be disregarded. But

Cox v. South Shore & B. St. Ry. Co

Instruction No. 14 the jury were told that, notwithstanding the plaintiff was negligent in a matter proximately caused and directly contributing to the collision and injury, such negligence could be utterly ignored if the defendant were negligent in having an insufficient headlight. Reduced to their simplest forms, the propositions were as follows: Instruction 1: Negligence of plaintiff proximately causing and directly contributing to the injury bars recovery. Instruction 4: Negligence of plaintiff proximately causing and directly contributing to the injury does not bar recovery. Instruction No. 14 authorized the jury to ignore want of ordinary care on the part of the plaintiff proximately caused and directly contributing to his injury, it was erroneous. Negligence defeats recovery in this state. If the court in mind a rule applicable to a state of facts in which a plaintiff negligently places himself in a position of peril at the hands of a defendant, and then is injured under such circumstances that his negligence is not the proximate cause, but that of the defendant is, such rule was not presented to the jury.

The judgment of the court below is reversed, with direction to grant a new trial. All the justices concurring.

COX v. SOUTH SHORE & B. ST. RY. CO.

Supreme Judicial Court of Massachusetts, Plymouth, Jan. 9, 1903.

[65 N. E. Rep. 823.]

Death on Street Railway Track—Burden of Proving Due Care on Part of Deceased *

In an action against a street railway company for negligent death, the burden of proof was upon plaintiff, administrator, to show that deceased was in the exercise of due diligence when he was killed.

—Same—Evidence.

In an action against a street railway company for negligent death, there was no evidence as to what deceased did for several minutes intervening between the time when he was seen walking on the north side of the street and the time when he was seen lying face downward across the track immediately in front of the car on the south side of the street, whether he tried to pass before the approaching car and fell or stood too near the car, or was seized by vertigo, there was not sufficient proof that deceased was in the exercise of due care to justify a recovery.

Exceptions from superior court, Plymouth county; Jabez Judge.

Verdict by Edward Cox, Jr., as administrator of Edward Cox Sr., against the South Shore & Boston Street Railway Company. Judgment for plaintiff, and defendant excepts. Exceptions sustained, and judgment entered.

*Foot-note appended to *Schneider v. Market St. Ry. Co.* (Cal.), 100 Cal. 692, 34 P. S. 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Cox v. South Shore & B. St. Ry. Co

J. E. Handrahan, for plaintiff.

H. F. Hurlburt and D. E. Hall, for defendant.

LATHROP, J. The accident occurred on Center street, in the city of Brockton, near the corner of Short street. The latter street is about 848 feet west of Beaver brook, which is the boundary line between Abington and Brockton. Center street is a country road, running through a sparsely settled district. It is 50 feet wide from wall to wall, with a roadbed in the center, and a strip of rough ground sloping down to the wall on each side, 8 to 10 feet wide. There were no sidewalks on the street. The roadbed of the defendant is on the southerly side of Center street, the southerly rail being about 12 feet from the wall. At the time of the accident the state highway commission was reconstructing portions of Center street in the vicinity of Short street; but the surface of the highway had not been disturbed for a distance of 150 feet easterly from Short street. From the center of the junction of Short street and Center street, for a distance of 50 feet westerly, the center of the street had been filled with gravel for grading. Between this and the northerly rail of the defendant's track was a strip two or three feet wide of the surface of the old road unobstructed by any gravel.

The intestate was seen before the accident, both in Abington and Brockton. When last seen he was about 200 feet from Short street, walking in a westerly direction, on the north side of Center street. The only witnesses who saw the intestate immediately before the accident were the motorman and a passenger who sat on the front seat of the car. The motorman testified that he first saw the intestate about 25 feet in front of the car, lying face downward across the southerly track, his head, shoulders, and body, to just below the chest, being over the rail. The passenger on the front seat testified that he saw the body lying across the track. None of the other passengers was upon the front seat, and, although the car was an open one, no one of them saw the intestate until his body was discovered immediately in the rear of the forward truck. Some of them were witnesses for the plaintiff, and all testified that the first they knew of the accident was the rising up of the car as if it were going over something, and those who got off the car testified that his body was found across the rail a short distance behind the front truck of the car, with the legs and lower portion of his body under the car, and with his head and shoulders south of the south rail.

Notwithstanding the testimony of the plaintiff's witnesses, the bill of exceptions states that the theory of the plaintiff was that the intestate was not run over by the car as he was lying on the track, but that he was first knocked down by the car while in an upright position, standing on or near the track. This view of the case was supported by two medical men, who examined the body soon after the accident,

Beasley v. Texas & P. Ry. Co

performed an autopsy. They testified as experts that in opinion the injuries were caused by the man's being by the car, and that he was not run over by it.

It does not seem to us, however, of any importance, on the question of due diligence on the part of the intestate, whether he was on the ground or upright when the car struck him. The burden of proof was upon the plaintiff to show that his intestate was in the exercise of due diligence when he was

There is in this case an utter failure to show this. If we regard entirely the testimony of the defendant's witnesses, the motorman and the passenger on the front seat, the intestate was not seen for several minutes before the accident.

When last seen he was on the north side of the road. When he was dead he was on the south side across the track. What he was doing in the meantime, what care he exercised, whether he tried to cross the tracks in front of an approaching car and fell, whether he stood too near the track with the intention of getting in the way of the car, whether he was seized with an attack of disease or vertigo, are all matters upon which there is no evidence. It is purely conjectural whether the plaintiff was in the exercise of due diligence or not; and for this reason the defendant's first request for instructions, which was that "in all the evidence the plaintiff does not show that his intestate was in the exercise of due care at the time of the accident, and therefore is not entitled to recover," should have been given. *Hinckley v. Railroad Co.*, 120 Mass. 257; *Wheeler v. Railroad Co.*, 156 Mass. 503, 31 N. E. 655, 53 Am. Eng. R. Cas. 467; *Moore v. Railroad Co.*, 159 Mass. 399, 15 N. E. 366, 14 Am. & Eng. R. Cas., N. S., 210; *Chandler v. Railroad Co.*, 159 Mass. 589, 35 N. E. 89; *Murphy v. Railroad Co.*, 167 Mass. 64, 44 N. E. 1087.

This view of the case renders it unnecessary to consider whether there was sufficient evidence of negligence or carelessness of the defendant, or of the carelessness of its servants or agents.

According to the terms of the bill of exceptions, judgment should be entered for the defendant. So ordered.

BEASLEY *et al.* v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Fifth Circuit, May 13, 1902.)

[115 Fed. Rep. 952.]

Issue—Contract Restricting Location of Stations—Validity.

A contract by which a railroad company agrees to establish and maintain a station at a particular place, and not to establish or maintain any other station within a certain distance therefrom, is contrary to public policy, and cannot be enforced in a court of equity; and it would seem that the illegality of the agreement should not deprive one who on the faith of it, and without wrongful intent, has expended valuable property to the company, of a remedy at law.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Beasley v. Texas & P. Ry. Co

Mrs. Matilda R. Beasley, complainant in the circuit court, appellant here, brought her bill against the Texas & Pacific Railway Company, and therein alleged: "(1) That she is the owner in her own separate right of a large plantation in the parish of Caddo, in said Western district of Louisiana, situated on the right descending bank of Red river, in a rich alluvial district. (2) That in the year 1899, a corporation organized under the laws of Louisiana, with its domicile at Shreveport, under the name of the Texarkana, Shreveport & Natchez Railway Company, with G. W. Fouke as president, was engaged in constructing a railway from Texarkana, in the state of Texas, to the city of Shreveport, Louisiana. (3) That the route of said railroad traversed your orator's plantation for a distance of one (1) and five-eighths (5-8) miles, and through the land of her friend W. F. Dillon for a distance of four and a half miles (4½), and that the right of way through these lands was well worth more than six thousand dollars (\$6,000.00). (4) That, in order to secure said right of way through all of said lands, the said Texarkana, Shreveport & Natchez Railway Company entered into a contract of purchase from orator of a right of way through orator's land for the consideration of five hundred dollars (\$500.00), and the further consideration that said railway company shall establish and build and maintain a depot and platform, and a switch and side track, to be not less than fifteen hundred feet in length, at such point upon said strip of land so conveyed as might be designated by your orator, and the further consideration that the said grantee or its assigns shall not build or establish, or permit to be built or established, any other depot along the line of said railroad within three miles north or south of the one above stipulated for, as will be seen by a duly certified copy of said act of sale, hereto annexed and made a part of this bill; and that the said W. F. Dillon thereupon signed and executed a deed of sale of the right of way through his lands above mentioned, without other costs to said grantee than the considerations above stipulated in favor of your orator. (5) That under said contract the said grantee built its road over said lands, and established and built a depot and switch at Uni Station on said plantation, and your orator spent more than eight thousand dollars for buildings and improvements in the way of building a town, upon the faith that no rival depot would be built or established in less than the distance of three miles. (6) That there is no public necessity or demand for any depot within said limits. (7) That on the 9th day of February, 1901, the said Texarkana, Shreveport & Natchez Railway Company sold said railroad from Texarkana to Shreveport, with all of its right of way and other property and franchises, to the Texas & Pacific Railroad Company, a corporation organized under the acts of congress of the United States above recited in the beginning of this bill. (8) That said Texas & Pacific Railroad Company purchased said railroad

Beasley v. Texas & P. Ry. Co

ht of way and franchises subject to the obligations and
 ions contained in the said act of sale from your orator,
 bound by the same not to build, operate, or establish a
 n said railroad within three miles of said depot at
 ation. (9) That, in violation of said contract and
 on, the said Texas & Pacific Railway Company is now
 cting a depot on said railroad at a point called
 r,' within less than three miles, to wit, about one and
 hth (1 1-8) miles, from the said depot at Uni Station on
 s plantation, and unless restrained and enjoined by the
 nd process of this court it will proceed to build and
 said depot in violation of said contract, and that your
 will be damaged by the destruction of the value of im-
 ents placed upon said property, and by the loss of all
 ges derived from said contract, amounting to more
 ty thousand dollars (\$50,000.00), which loss and destruc-
 her property will be irreparable, and for which she has
 uate remedy at law, and that this suit arises under the
 the United States, within the meaning of the acts of
 s of March 3, 1875, as amended by the act of congress
 ch 3, A. D. 1887, and August '13, A. D. 1888.' The
 of the bill was for an injunction pendente lite, to be in
 rse made perpetual.

Texas & Pacific Railway Company appeared, and filed
 rrer to the bill, and for cause of demurrer showed:
 it appeareth by the plaintiff's own showing in her said
 t she is not entitled to the relief prayed for therein
 this defendant, for the reason that it appears from the
 ons of said bill that she has a full, adequate, and com-
 edy at law, if any remedy she has, and this court is
 t jurisdiction; and, further, there being no allegation
 rment in said bill that this defendant is not
 or able to respond to any recovery she may obtain
 urt of law.' This demurrer was heard, and on argu-
 as sustained by the circuit court, and thereupon the
 inant's bill was dismissed; whereupon the complainant
 at this appeal, assigning as error the ruling on the
 er.

J. Hall and E. W. Sutherlin, for appellant.

L. Randolph, T. J. Freeman, W. B. Spencer, W. W.
 and C. P. Cocke, for appellee.

re PARDEE, McCORMICK, and SHELBY, Circuit

DEE, Circuit Judge (after stating the facts). As the
 court rendered an absolute decree dismissing the bill,
 would probably bar proceedings instituted at law for
 overy of damages, it is probable that the court in hear-
 e demurrer allowed other causes of demurrer to be orally
 ed in addition to the cause assigned upon the record.

Beasley v. Texas & P. Ry. Co

The rule permitting this is thus declared in 1 Bates, Fed. Proc. § 204, as follows:

“A defendant is not limited to one cause of demurrer, but may assign as many causes as his counsel may deem proper, either to the whole bill or to each part of the bill demurred to, and if any one of the causes assigned be held good by the court the demurrer will be allowed; and the defendant may on the argument, at the hearing, orally assign other causes of demurrer, different or in addition to those assigned upon the record, which if valid will support the demurrer, although the causes of demurrer stated upon the record be held to be invalid.”

In this court the appellee urges in support of the decree appealed from that the bill is defective, because one of the original contracting parties, the Texarkana, Shreveport & Natchez Railway Company, is not made a party; that the complainant has a complete and adequate remedy at law; and that the contract as alleged, in so far as it stipulates and restricts as to the location of depots along the line of railway, is contrary to public policy and void. As there is no averment that the Texarkana, Shreveport & Natchez Railway Company is doing anything or proposes to do anything in violation of its contract with complainant, and no relief is prayed against said railway company or affecting it, it does not seem to be a necessary party to the suit, and if it is a necessary party the defect can be cured by amendment to the bill.

It is not clear that the complainant has, for the wrong alleged, a complete and adequate remedy at law. Damages are not always easily ascertained, and sometimes do not and cannot adequately compensate. A remedy which prevents a threatened wrong is in its essential nature nearer adequate and complete than a remedy which permits the wrong to be done, and then attempts to compensate by damages assessed by a jury. See 3 Pom. Eq. Jur. § 1357.

These remarks are pertinent to the case in hand, for the bill alleges only indirect and remote damages, and the case presented seems to be one in which before a jury it would be very difficult to point out and prove much if any actual damage. However, in the matter of damages from the threatened wrong in this case, if the bill is defective in not being sufficiently specific or in not alleging direct damage, the complainant might perhaps amend, and, before her bill should be dismissed on that sole ground, she should be given an opportunity to amend.

The objection based on public policy presents the real difficulty in maintaining this bill. The appellee, as owner and operator of the Texas, Shreveport & Natchez Railway Company, is a public common carrier, operating public franchises, and is under duties and obligations to the state and public. Operating in Louisiana and under a Louisiana charter, it is, by article 284 of the Louisiana constitution of 1898, subject,

Beasley v. Texas & P. Ry. Co

the building and location of depots (and in other matters), to the control of the Louisiana commission. Aside from this, it is bound in public interest, and in its own interest, to establish stations, and build and locate such depots, along and to the convenience of the public, the transportation of business, and the rapid and economical transportation of goods and passengers may require.

Railroad Co. v. Scott was involved the right of the railroad company to abandon a depot originally located, constructed, and maintained in consideration of the right of the public, and this court said:

"It must be that such an agreement is made subject to the exigencies of business, the public interests, and to the modification, and growth of transportation routes, as may affect the requirements of the railway company's business." 23 C. C. A. 424, 429, 77 Fed. 726, 37 L. R. A.

Florida Cent. & P. R. Co. v. State, 31 Fla. 509, 13 So. 106, 20 L. R. A. 419, 34 Am. St. Rep. 30, 56 Am. & Eng. R. Cas., N. S., 306, in dealing with a restrictive contract as to the location of railroad depots, the supreme court of Florida well says, on principle and authority:

"We cannot admit that an individual is entitled to call for the interference of a court of equity to compel a railroad company to locate unchangeably its depot at a particular spot to secure the private advantages of such individual. Railroad companies, in order to fulfill one of the ends of their creation—the promotion of the public welfare—should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require. To grant the relief asked for by the complainant we would regard as against public policy. In *People v. Chicago & A. R. Co.*, 175, 22 N. E. 857, 40 Am. & Eng. R. Cas. 352, the court says: 'It is in recognition of the paramount duty of railroad companies to establish and maintain their depots at such places, and in such manner, as to subserve the public necessities and convenience, that it has been held by all the courts with very few exceptions, that contracts materially restricting their power to locate and relocate their depots are against public policy, and therefore void.' The same doctrine was pronounced by Chief Justice Shaw in *Fuller v. Dane*, 18 Mass. 72; and also in *Railroad Co. v. Ryan*, 11 Kan. 602, 15 Kan. 357; *Railroad Co. v. Seely*, 45 Mo. 212, 100 Am. 69; *Currie v. Railroad Co.*, 61 Miss. 725, 20 Am. & Eng. R. Cas. 303. In *Mobile & O. R. Co. v. People*, 132 Ill. 1, 1 N. E. 643, 22 Am. St. Rep. 556, the court says: 'The location of stations for the receipt and discharge of passengers is one of the most important considerations in the operation of a railroad and the enjoyment of it by the public, the

Beasley v. Texas & P. Ry. Co

railway company cannot be compelled, on the one hand, to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed, on the other hand, to locate them so far apart as to practically deny to the communities on the line of the road reasonable access to its use. A railway company cannot be compelled to maintain or continue a station at a point when the welfare of the company and the community in general requires that it should be changed to some other point. A railway company cannot bind itself by contract with individuals to locate and maintain stations at particular points, or to not locate and maintain them at other points. The company must be left free to establish and re-establish its depots wherever the public welfare or wants of the public may require.' The same doctrine is held in *Holladay v. Patterson*, 5 Or. 177, in which case the court says: 'A railroad company is a quasi public corporation, and the public have an interest in the location of their lines of roads and depots. An agreement which tends to lead persons charged with the performance of trusts or duties for the benefit of others to violate or betray them will not be enforced.' "

In *Texas & P. R. Co. v. City of Marshall* it is held that a contract to forever maintain a terminus, shops, and offices at a particular place, without regard to the business of the company and the interests of the public, is not one to be enforced in a court of equity. 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385.

The present bill alleges "that there is no public necessity or demand for any depot within said limits," i. e., within three miles north and south of Uni Station; but we take this to be largely a conclusion of the pleader, and not to be taken as conclusively admitted by the demurrer. Whether or not the interest of the public or the railway company demands a depot within the said limits is a question involving facts and judgment which a court of equity, under proper allegations, might perhaps deal with, but which, in our opinion, should be left to the determination of the officials of the railway company under the regulations of the railroad commission. It is not probable, and certainly not to be assumed on a naked allegation, that the railway company will voluntarily locate and build a depot not believed by the officials of the company to be necessary for the transaction and furtherance of the railway's business or the just and proper convenience of the public.

In *Texas & P. R. Co. v. City of Marshall*, *supra*, a case much relied upon by both parties, there is an intimation that, while equity will not grant relief in cases of this kind, there may be a remedy at law in an action for damages.

It would seem that where, under a contract which is in part contrary to public policy, a valuable consideration in the way of property has passed, the courts should not deny all relief, and

Mathieson v. Omaha St. Ry. Co

allow one party to be enriched at the expense of another guilty of actual turpitude; and it has been held that, under a contract absolutely void, because unlawful, a title property has been transferred, while no action based on the contract will lie to recover the property, still the right of recovery may be permitted in a proper case, based on a performance of the contract, because of the desire of the court to do justice as far as possible to the party who has paid or delivered property under a void agreement. In justice he ought to recover. See *Pullman's Palace Car Co. v. Central Transp. Co.*, 171 U. S. 138, 18 Sup. Ct. 33 L. Ed. 108.

The real question presented in the court below, and renewed in this court, is whether the complainant for the matters set forth in her bill can have relief in a court of equity, and it is incidentally involved here as to whether the complainant for the same matters can have relief in a court of law. For the reasons given, we are of opinion that the complainant can have no remedy in equity. As to the right to a remedy elsewhere, we express no opinion further than as is outlined.

The decree appealed from is absolute as to the dismissal of the bill, and, as it may be considered a bar to an action at law, it is ordered and adjudged that said decree be reversed, the cause remanded to the circuit court, with instructions to enter a decree dismissing the bill for want of jurisdiction in equity, and without prejudice to any action at law to which the complainant, as advised by counsel, may think herself entitled.

MATHIESON v. OMAHA ST. RY. CO.

(*Supreme Court of Nebraska, Dec. 3, 1902.*)

[92 N. W. Rep. 639.]

Witness of Street Car—Opinion Evidence.*

A witness need not be an expert in order to be permitted to give his opinion of the rapidity of motion of familiar objects like railway and street cars, but he must be shown to have had, and to have availed himself of, an opportunity for observation in the case.

Ordinance—Evidence.

An ordinance regulating the speed of electric street cars is immaterial in a case in which it is not shown at what rate of speed a car was moving when it had caused an injury, was, in fact, at the time moving.

Commissioners' opinion. Department No. 3. Error to the circuit court, Douglas county; Baxter, Judge. Not to be officially reported."

Robinson v. Louisville Ry. Co. (C. C. A.), 1 R. R. R. 838, 24 Am. & Eng. R. Cas., N. S., 838; *Louisville & N. R. Co. v. Stewart*, 21 Am. & Eng. R. Cas., N. S., 34; *McVey v. Chesapeake & O. Ry. Co.* (W. Va.), 13 Am. & Eng. R. Cas., N. S., 788, and note, 799.

Mathieson v. Omaha St. Ry. Co

Action by Nels Mathieson against the Omaha Street Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Weaver & Giller and Frank T. Ransom, for plaintiff in error.

John Lee Webster, for defendant in error.

AMES, C. The defendant in error is a street railway company operating a line of electric street railroad traversing Leavenworth street in the city of Omaha. At about 11 o'clock of a certain night, the plaintiff, who was traveling along Twentieth street, which intersects Leavenworth street at right angles, approached the defendant's tracks with a team of horses hitched to a wagon in which he was riding. When the fore feet of the horses were at or on the outer rail of the track, the plaintiff discovered the headlight of an approaching car. He immediately whipped up his horses and drove them across the track, but the advancing car caught the hind wheels of his wagon, causing injuries on account of which this action was brought. If the defendant was negligent, it was because of its conduct in one or the other of two particulars, or by reason of concurring misconduct in both respects: First, because of failure of the motorman, in view of a threatened collision, to stop the car in due time before it came in contact with the wagon. There is no evidence in the record, or at least counsel have called our attention to none, indicative of such a failure, or, indeed, tending to prove that the defendant's servants knew of the presence of the team and wagon until the collision took place. Second, because the defendant was at the time operating its car at an excessive and negligent rate of speed. Upon this point there is also an absence of substantial evidence. The plaintiff testified, as already noted, that he did not observe the approaching car until his team were already upon the outer rail of the track, and that he then became much excited because of the threatening circumstances, and attempted to drive his team over the tracks. That in order to accomplish this object it was necessary to advance a distance of only 21 feet, and that he urged his horses to a speed of five or six miles an hour, and that before he could clear the way, and, as it seems to him, within two seconds after he first saw the headlight, the collision took place. He estimates, or attempts to do so, that the car, when he first saw it, was about 200 or 250 feet from the crossing, but he did not compare its position at the time with neighboring buildings or with any other fixed landmark, and evidently had, in the excitement of the moment, no opportunity for so doing. He seems to have seen nothing but the headlight, which, as it was moving towards him in a nearly direct line, afforded him no means of measuring a distance which, because of the suddenness of the impact with his wagon, was presumably much less than he conjectured. It is at least quite

Kernan v. Market St. Ry. Co

reasonable to suppose that the almost immediate collision was due to a short interval between the two vehicles as that was due to the rapid motion of the car. Plainly, either position is a mere guess not rising to the dignity of evidence. In this state of the record, the plaintiff offered to prove by his own testimony what was the rate of speed at which the car was running. The court excluded the evidence, and rightly so, upon the ground that the competency of the witness had not been shown. It is conceded that a witness need not be an expert in order to be permitted to give his opinion of the rapidity of motion of familiar objects like street cars and trains, but he must be shown to have observed the car and to have availed himself of, an opportunity for observation in the case in hand. This the plaintiff not only failed to do, but his own account of the transaction pretty well establishes the contrary. There was no other evidence offered or introduced upon the point. An ordinance of the city of Omaha regulating the rate of speed of the defendant's car at the place in question was offered and excluded, but, of course, in the absence of evidence that the speed employed was greater than that prescribed, the regulation was immaterial.

The plaintiff also testified what, in his opinion, was the length of time consumed by his team and wagon in crossing the track, in order that, by comparing the distances, it might be ascertained how rapidly the car was moving, if it was 100 or 250 feet away when the plaintiff's attempt at crossing was begun; but, as we have noted, one of the essential elements of this problem, to wit, the distance of the car from the crossing, is not proved, and hence there is an absence of indispensable datum for the making of such a calculation. At the close of the trial the court instructed the jury to render a verdict for the defendant, and rendered a judgment accordingly. There was clearly an insufficiency of evidence of negligence on the part of the defendant, and we are therefore called upon to decide whether or not there was evidence of negligence by the plaintiff also.

We recommended that the judgment of the district court be affirmed.

BERT and DUFFIE, CC., concur.

PER CURIAM. The conclusions reached by the commissioners are approved, and, it appearing that the adoption of their commendations made will result in a right decision of the case, it is ordered that the judgment of the district court be affirmed.

KERNAN v. MARKET ST. RY. CO.

(*Supreme Court of California, Sept. 17, 1902.*)

[70 Pac. Rep. 81.]

Accident at Street Railway Crossing—Negligent Signals—Speed. Where, in an action against a street railroad for injuries, there is evidence that the car was going at a high and unlawful speed, and that no bell had been rung or alarm given at a crossing which

Kernan v. Market St. Ry. Co

was about half of a short block from where plaintiff was struck, a contention that the evidence showed no negligence was of no merit. **Same—Care Required of Pedestrians.***

Persons crossing a street railroad on a populous street are held only to what, under all the circumstances, is the exercise of reasonable care.

Same—Contributory Negligence.

In an action against a street railroad for injuries from being struck by a car, there was evidence that the respondent, when she left the sidewalk to cross the street, which was a narrow one, had an unobstructed view of the street both ways, and that she looked both ways, and saw no car approaching, and heard no signal of approach: *held*, that a finding that there was no contributory negligence would not be disturbed.

Department 2. Appeal from superior court, city and county of San Francisco; Wm. R. Daingerfield, Judge.

Action by Ann Kernan against the Market Street Railway Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Wm. H. L. Barnes, for appellant.

A. Morgenthal, for respondent.

McFARLAND, J. This is an action to recover damages for personal injuries alleged to have been caused by a car of the defendant, a street railroad company. The verdict and judgment were for the plaintiff in the sum of \$1,000, and defendant appeals.

It is not contended by appellant that the court below committed any error of law in ruling upon the admissibility of evidence or in instructing the jury. The sole contention is that a nonsuit should have been granted, and that the verdict was against the evidence, because the evidence failed to show any negligence of appellant at the time of the accident, and because, upon the facts, respondent was, as a matter of law, guilty of contributory negligence. We do not think that the contention is maintainable on either point.

As to the negligence of appellant, the evidence was clearly conflicting, within the meaning of the rule that in such case a finding will not be here disturbed. No doubt, some juries would have found differently on this issue; but there was certainly considerable evidence that at the time of the accident the car was going at a high, unlawful, and dangerous rate of speed, and that no bell had been rung, nor other alarm given, at the crossing of Perry street, which was about one-half of a short block from the point where respondent was struck.

As to the alleged contributory negligence of respondent, we think that the evidence presented a case where it was for the jury to say whether the respondent exercised reasonable care in crossing the street, and not a case where a court can say,

*As to whether the stop, look and listen rule is applicable to street railway crossings, see foot-note appended to *Keenan v. Union Traction Co.* (Pa.), 2 R. R. R. 64, 25 Am. & Eng. R. Cas., N. S., 64.

Louisville Ry. Co. v. French

might in some instances, that, as a matter of law, there contributory negligence. The accident occurred on a public street in a populous part of the city, along which the defendant had its street railway track, over which it operated street cars by electricity. In such case a person desiring to cross the street must, of course, exercise due care and caution, and if he does not do so, and his want of care contributes proximately to the injury, he cannot recover; but it has been repeatedly decided that he is not held to that high degree of care which is required in the case of an ordinary steam railroad running through the country, on which heavy trains of freight cars are moved at a high rate of speed, and cannot be quickly stopped or controlled. Persons crossing a street railroad on a populous street are held only to what, under all the circumstances, is the exercise of reasonable care. See *Strong v. Railroad Co.*, 61 Cal. 328, 8 Am. & Eng. R. Cas. 273; *Swain v. Railroad Co.*, 93 Cal. 184, 28 Pac. 829; *Driscoll v. Railroad Co.*, 97 Cal. 553, 32 Pac. 591, 33 Am. St. Rep. 203; *Cross v. Railroad Co.*, 102 Cal. 316, 36 Pac. 673, 1 Am. & Eng. R. Cas. 262; *Clark v. Bennett*, 123 Cal. 278, 55 Pac. 908. In the instant case there was evidence that the respondent, when she stepped from the sidewalk to cross the street, which was a narrow one, had an unobstructed view of the street both ways, and that she looked both ways, and saw no car approaching, and heard no signal of its approach. Considering all the evidence on the whole, it cannot be correctly said that the jury was bound to find that the respondent was guilty of contributory negligence, or that the law must ascribe to her such negligence. The judgment and order appealed from are affirmed.

concur: HENSHAW, J.; TEMPLE, J.

LOUISVILLE RY. CO. v. FRENCH *et al.*

(Court of Appeals of Kentucky, Jan. 8, 1903.)

[71 S. W. Rep. 486.]

Accident at Crossing—Collision with Pedestrian Not on Footwalk.

Where a complaint alleging that, while plaintiff was going along an avenue, and crossing a street, a street car struck him, there may be recovery, though the collision did not occur exactly at the footwalk, but within the intersection of the street and avenue.

—Same—Duty of Motorman.*

Though the collision of a street car with a pedestrian is not exact at the footwalk, still, it being at the intersection of streets, it

is to the care required of those in charge of street cars to avoid collisions, see notes appended to *Memphis St. Ry. Co. v. Wilson* (Tenn.), 4 R. R. R. 708, 27 Am. & Eng. R. Cas., N. S., 708; *Memphis St. Ry. Co. v. Norris* (Tenn.), 4 R. R. R. 659, 27 Am. & Eng. R. Cas., N. S., 659; *Adams v. Wilmington & N. Electric Ry. Co.* (N. C.), 4 R. R. R. 307, 27 Am. & Eng. R. Cas., N. S., 307; *Kaiser v. Orleans & C. R. Co.* (La.), 4 R. R. R. 237, 27 Am. & Eng. R. Cas., N. S., 237.

Louisville Ry. Co. v. French

is proper to charge that it was the motorman's duty to decrease the car's speed as it approached the intersection, and to give notice of its approach by the usual signals, and to have it under control, and to keep a lookout to avoid injuring one there using the street or crossing.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by Wm. T. French, by next friend, against the Louisville Railway Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

Fairleigh, Straus & Eagles, for appellant.

B. H. Young and M. W. Ripy, for appellees.

BURNAM, C. J. One of the defendant's trolley cars struck the plaintiff, a boy nine years of age, at the intersection of Ormsby avenue and Eighteenth street, in the city of Louisville, inflicting severe injuries, and this suit was brought by his next friend for damages. A jury trial resulted in a verdict for the plaintiff, and defendant has appealed.

They assign three reasons why the judgment of the lower court should be reversed. First. That the trial court erred in not instructing the jury that, if the collision did not occur at the footway crossing of Eighteenth street and Ormsby avenue, but between the intersection of the streets, plaintiff could not recover under the pleadings in the case; and that, as there was testimony that the collision did not take place immediately on the crossing, but after the car had passed beyond it, the jury should have been instructed that a less degree of care was required on the part of the agents of defendant in charge of the car to avoid collision with foot travelers than at footway crossings. The plaintiff, in his petition, alleges that whilst he was going along Ormsby avenue, and crossing Eighteenth street, a trolley car belonging to the defendant, running at a high rate of speed, without giving any signal or warning of its approach, ran against him, and as the result thereof his back, bladder, and kidneys, were injured, and his health permanently impaired. The answer was a traverse and a plea of contributory negligence. As is usual in such cases, the testimony was quite conflicting. The mother of the plaintiff testified that he was hurt exactly at the crossing of Ormsby and Eighteenth streets; that the car was running at a high rate of speed, and did not ring the bell or give any signal of its approach; that plaintiff had stopped on the crossing to await the passage of a milk wagon, going in the opposite direction to the trolley car; and that as it passed he started across the street, and was struck by the car. Mrs. Bedinger, a witness for appellee, testifies that she saw plaintiff standing on the crossing waiting for the wagon to get out of his way, and that as soon as it did so he started across; that just at this moment the defendant's car passed at a high rate of speed, without ringing the bell, or giving any other signal of its

Louisville Ry. Co. v. French

ach, and struck the plaintiff just as he came from behind wagon. On the other hand, a number of persons, who introduced as witnesses for the defendant, testified, in essence, that when the trolley approached the crossing the bell was sounded, and the speed of the car diminished; and about 30 feet beyond the crossing the car met a wagon coming into the city; and that, as the front end of the car struck the back end of the wagon, plaintiff ran out from between the wagon against the side of the car; that they did not know until he came from behind the wagon, too late to have stopped the car. The trial court instructed the jury substantially that it was the duty of the motorman in charge of the car to lessen its speed as it approached the intersection of fourteenth and Ormsby avenue, and to have given notice of its approach by the usual signals, and to have had the car under his control, and to have kept a lookout ahead to avoid striking any person using the street or crossing at that point; and if the jury believed that he failed to discharge these duties, and to exercise ordinary care to prevent injury to persons using the crossing, and plaintiff was injured by reason of this failure, that they should find for him, provided they also found from the evidence that the plaintiff at the time was not himself guilty of negligence which helped to bring about the injury, and but for which he would not have been injured. On the other hand, they believed that the motorman discharged the duties indicated, and exercised ordinary care to prevent injury to persons using the crossing, that they should find for the defendant. The petition proceeds upon the theory that the collision occurred upon the footway crossing, and the plaintiff's testimony to support this contention. The instructions of the court are drawn in conformity with the averments of the petition. And, whilst there is testimony conducing to show that the actual collision was a short distance from the footway crossing, it was the intersection of the two streets, and this slight divergence between the averments of the petition and the testimony as to the actual point of collision is, in our opinion, wholly immaterial. The defendant, in operating dangerous machinery, at a high rate of speed, over the streets of a great city, is bound to know that men, women, and children have an equal right to its use, and will be on it; and it is defendant's duty to be constantly on the lookout, and to take all reasonable precautions to avoid injury to them, and this duty obtains not only at the footway crossing, but at every other point of a public street, and one of the precautions is to give notice of their approach by the usual signals, and, when necessary to avoid injury to persons, to slow up, and, if necessary, stop their car. The duty, under the circumstances, is no more than ordinary. The instructions given by the trial court conform substantially to this view of the law, and which has been frequently announced by this court, and by the ablest text-writers

Burns v. Metropolitan St. Ry. Co

on this subject. In our opinion, the trial court did not err in failing to give the instruction asked by the defendant on this point.

The third ground of complaint is, that the finding of the jury is flagrantly against the weight of evidence. The question of negligence is one of fact, and our duty is performed when we see that there is sufficient evidence to support the verdict. The jury, under our system, are the sole judges of the weight and credibility of the testimony. If it be true that the defendant failed to give notice of their approach to the footway crossing by the customary signals, and put it out of their power to stop the car by the high rate of speed at which they were going, after they saw, or could by the exercise of ordinary care have seen, the danger of the plaintiff, they were guilty of negligence. There was sufficient proof on this point, if the jury gave credit to it, to justify their verdict.

Judgment affirmed.

BURNS v. METROPOLITAN ST. RY. CO.

(Supreme Court of Kansas, Jan. 10, 1903.)

[71 Pac. Rep. 244.]

Contributory Negligence—Burden of Proof.

In an action for personal injuries, based on the negligence of a defendant, the burden of proof is on the latter to show contributory negligence on the part of the plaintiff, unless the evidence introduced by the plaintiff to sustain his case tends to show that his want of care contributed to the injury.

Accident at Street Railway Crossing—Care Required of Pedestrian.*

A traveler on a city street, who is about to cross the tracks of an electric street car company, must exercise his faculties of sight and hearing, and under special circumstances must use other careful and prudent means to ascertain whether a car is approaching.

Same—Same.

The prevailing rule respecting the care required of a traveler over steam railway tracks applied to one crossing a street railway.

Same—Reciprocal Rights.*

The reciprocal rights of the traveler and a street car company considered.

(Syllabus by the Court.)

In banc. Error from court of common pleas, Wyandotte county; W. G. Holt, Judge.

Action by Dennis Burns against the Metropolitan Street Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

L. F. Bird and H. G. Pope, for plaintiff in error.

Miller, Buchan & Morris, for defendant in error.

SMITH, J. The plaintiff in error was injured in a collision

*As to whether the stop, look and listen rule is applicable to street railway crossings, see foot-note appended to *Nashville Ry. v. Norman* (Tenn.), 4 R. R. R. 350, 27 Am. & Eng. R. Cas., N. S., 350.

Burns v. Metropolitan St. Ry. Co

an express wagon in which he was riding and an trolley car operated by defendant in error. He was attempting to drive over the rails of the company on Union in Kansas City, where the cars run nearly east and on double tracks. He was going north. He stopped when a west-bound car passed in front of him, but was struck when going east on the south track. There were two hacks which were six or seven feet high standing in the street near the west of his wagon before he started to cross. The trolley car was about 12 feet high. Burns testified that he first saw the car about 20 feet distant, after his wagon was well across the tracks; that no bell was rung or other signal given by the motorman. One of the witnesses for plaintiff below testified that Burns did not look towards the west for an approaching car, and that it could be seen for the distance of 200 feet. The plaintiff below was familiar with the track, the running of cars, and all surroundings. The railway company defended, denying generally the allegations of the petition, and also charged the plaintiff with contributory negligence. The plaintiff and defendant below introduced evidence in support of the issues in the case. There was a verdict and judgment for the street car company.

The plaintiff in error complains, first, of the refusal of the court to give to the jury the following instruction: "The burden of proof in this case is upon the defendant to prove that the defendant was negligent, and that his negligence directly caused the injury complained of, and it must establish the same by a preponderance of the evidence." The instruction under consideration leaves out of consideration any negligent act of the plaintiff appearing in the evidence introduced to support his case. It is misleading in that it tends to minimize the effect of any negligent conduct of his which might have caused the action had the railway company introduced no evidence. If the plaintiff below, in establishing his case, had shown that his own negligence contributed directly to the injury, he failed to make out a prima facie right of recovery. See *Railway Co. v. Adams*, 33 Kan. 427, 6 Pac. 529. In such case the giving of the instruction asked would lead the jury to believe that some affirmative proof introduced on the part of the railway company, tending to show such contributory negligence as the plaintiff had already shown, was necessary to obtain a recovery. In *Railroad Co. v. Burrows*, 62 Kan. 89, 10 Pac. 439, an instruction in a personal injury case which required the jury that, before the defendant could avail itself of the plea of contributory negligence of the plaintiff, it must first establish by the fair weight of the evidence the facts in such case was held to be misleading. See, also, *Railway Co. v. Adams*, 61 Kan. 671, 60 Pac. 819. The instruction under consideration does not differ in substance from those criticised in the two cases above cited. The fault to be found in it lies in the omission of the qualifying condition that the burden of

Burns v. Metropolitan St. Ry. Co

proof is not thrown on the defendant to show contributory negligence of the plaintiff if the latter has himself made it appear. Complaint is made of the fourth instruction given by the court, in which it was said: "It was the duty of the plaintiff to take notice of the fact that cars were liable to pass along the tracks of the defendant at any time, and that they could not turn out of the track, and it was his duty to make a vigilant use of his senses of sight and hearing when about to cross the tracks of the defendant, to ascertain if there was a present danger in crossing, and if he failed so to do, and if by looking and listening for approaching cars he would have discovered the car in question approaching in time to have avoided colliding with it, then he cannot recover." This direction was amplified by another, in which the jury were told that if the plaintiff could, by looking or listening, "or by other careful and prudent acts," have discovered the approach of the car in time to have avoided the collision, he could not recover. We are well satisfied that the trial court stated correctly the law in these instructions.

In Thompson's Commentaries on the Law of Negligence (volume 2, § 1438), the learned author states that it is the general disposition of courts in their later expressions to apply the rule prevailing in respect to steam railways, and to hold that the failure of a traveler to use his faculties of sight and hearing before he attempts to cross a street railway is negligence per se. The rule stated is founded in reason. At the place of this accident, street cars were constantly passing and repassing at intervals of a few moments. As was said in the case of *Railway Co. v. Adams*, supra, a railway track itself is a warning of danger. This is so, because trains may be expected at any time. Street cars run many times more frequently than trains on steam railways, and are more silent in their movements. The shorter the intervals between street cars, the better the public is served. The chances of escaping injury taken by the traveler who crosses the tracks of a steam railway without looking or listening are greater by far than those of a person who in the same negligent way goes over street railway tracks in a populous city. Certainly no less vigilance ought to be exercised in the latter case than in the former. Concerning the direction to the jury that the plaintiff below ought not to recover if, in addition to looking and listening, he could, by the exercise of "other careful and prudent acts," have avoided injury, we find no error in this requirement. It is asserted that the view of the plaintiff below was obstructed by two hacks standing between him and the approaching car. This fact, considering the familiarity of the injured party with the operation of the cars, made it a proper matter for the jury to determine whether he ought not to have stopped and waited with his wagon, or even made inquiry of bystanders who had an unobstructed view of the approaching car.

Gray v. Washington Water Power Co**Same.**

The instructions were not conflicting, as the latter, instead of contradicting the former, made definite and certain that which was before indefinite.

Appeal—Review.

An appellate court will not be justified in reversing a judgment where an error has been committed if it further appears that such error was immaterial.

Damages—Mental Suffering.*

Compensation may be had for mental suffering and distress of mind because of disfigurement.

Appeal from superior court, Spokane county; Leander H. Prather, Judge.

Action by John R. Gray and wife against the Washington Water Power Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

See 68 Pac. 360; 70 Pac. 255.

Stephens & Bunn and W. F. Townsend, for appellant.

W. H. Plummer and Thayer & Belt, for respondents.

DUNBAR, J. Respondent Carrie Gray was driving in a one-horse buggy on the streets of Spokane. Her horse became frightened and ran away, and it is alleged that when the buggy struck the rails of appellant's street car line, which was maintained on the street, the respondent was thrown from the buggy and was injured, and that the injury was caused by the negligence of the appellant in not maintaining its rails flush with the streets, in accordance with an ordinance of the city. A more extended statement of this cause may be found in 27 Wash. 713, 68 Pac. 360. Upon the trial of the cause a verdict was rendered in favor of the plaintiff, and upon motion for a new trial the same was granted on the ground that the running away of the horse and the loss of control of the horse were the proximate cause of the accident and injury complained of. This question came to this court on appeal, and it was decided, in *Gray v. Water Power Co.*, 27 Wash. 713, 68 Pac. 360, that the loss of control of a runaway horse would not prevent a recovery, notwithstanding the defective condition of the street. The rule was announced that, where two causes combine to produce an injury to a traveler on a highway, both of which are in their nature proximate, the one being a culpable defect in the highway and the other some occurrence for which neither party is responsible, the municipality is liable, provided the injury would not have been sustained but for such defect. This rule was applied to the appellant company, which was operating its cars under a grant of power from the city imposing the duty upon it to keep its rails flush with the street, and the judgment for a new trial was reversed, and the cause remanded, with instructions to deny the motion. Judgment was then entered in favor of respondents for the amount of damages found by the jury, from which judgment this appeal is prosecuted.

*See note, 18 Am. & Eng. R. Cas., N. S., 46.

Gray v. Washington Water Power Co

condition that the tops of the rails were not flush with the face of the street, but projected above the same sufficient high to cause an obstruction to public travel, and also claim that there were no planks laid along the rails at said point in the manner mentioned in the ordinance or at all; and also claim that the alleged absence of planks, and the alleged projection of the rails above the surface of the street, was caused by the negligent failure of the defendant to maintain its tracks and roadbed as required by said ordinance. And I instruct you that if you believe from the evidence that said track was on May 2, 1901, in the condition claimed by the plaintiff, you believe that such condition constituted an obstruction to public travel, and also believed that it was by reason of such alleged dangerous condition of the track that the plaintiff's carriage Gray was, without negligence on her part, thrown from her carriage as claimed by her, and received the injuries complained of, then I instruct you that the plaintiffs are entitled to recover damages from the defendant." It is contended that by the terms and tenor of this instruction the jury was authorized to render a verdict for respondents, as against the appellant if, without fault on the part of Mrs. Gray, she sustained injuries on appellant's tracks at a point where the rails were not planked in accordance with the literal wording of the ordinance. But the court could not have been understood to have meant to have subjected the defendant to an absolute liability in the case of a failure to use planks as required by the ordinance, for the condition was prescribed that the jury must find, in addition to the failure to use the plank, that the condition wrought by such failure constituted an obstruction to travel. If there were any doubt about the meaning of the instruction, the court, which we think there is not, it is made clear by instruction 17, which is as follows: "If you should find from the evidence that, although the defendant did not put planks along the sides of its rails as required by said ordinance, yet you should find from the evidence that the defendant did by some other method protect its rails so that they would not endanger the traveling public, as hereinbefore stated, then you will not consider said ordinance in determining whether or not the defendant was negligent in the respect mentioned." These two instructions, considered together, cannot possibly bear the construction placed upon them by counsel for appellant.

Instruction No. 16, the giving of which is assigned as error, is as follows: "It was the duty of the defendant to construct and maintain its tracks in the street in such a way as to be safe for travel thereon by means of a buggy or other vehicle drawn by the ordinary horse, having the ordinary disposition allowing for the ordinary incidents of caprice or fright when driven by an ordinarily careful and prudent person." This instruction involves in some degree the same objection which is urged to instruction No. 5, and it is insisted that it enforces the standard of perfection, and charges the appellant with

Gray v. Washington Water Power Co

impossible task of constructing and maintaining its tracks in such a manner as to render the streets absolutely safe for the purpose of travel in vehicles drawn by ordinary horses. If this were true, the instruction would doubtless contain reversible error, for a reasonably safe place, or a street reasonably safe for travel, is unquestionably the requirement of both reason and authority. But we do not think this instruction imposes such a duty. The essence of it was that the street must be kept safe for ordinary use under ordinary circumstances, and we do not think it can be construed as imposing the duty of absolute safety. Such language is not employed, and counsel for appellant, in his brief, finds it necessary to employ language that is not used in the instruction, and imputes to the instruction the same meaning it would have if the language he used in his criticism were used in the instruction, *i. e.*, "to render the streets absolutely safe." If the court had used the words "absolutely safe," there would have been no doubt as to what was meant. But we find from a review of the authorities that the words "safe" and "care" and "safe place" are frequently used interchangeably with "reasonably safe," "reasonably safe place," and "reasonable care." "Safe" and "unsafe" are words frequently used in comparison by courts in discussing the question of a reasonably safe place, and evidently without any intention of changing the well established rule of reasonable care or a reasonably safe place. But in any event, detached portions of an instruction cannot be considered by an appellate court. All the instructions on the same subject must be construed together, to arrive at the intention of the court and the probable understanding of the jury.

Instruction 5 asked for by defendant, and, as modified by the court, given, was as follows: "You are instructed that the defendant is not required or compelled to construct a street railway track or tracks at the point or place of the accident, or at any other point or place, so as to provide for or against runaway horses, rigs, or teams; that is, it is required to construct and maintain its road in such condition only as is reasonably safe for ordinarily reasonable and prudent persons using the streets at the ordinary and usual rate of speed, and driving a reasonably safe and gentle horse, allowing for the disposition of an ordinarily safe horse, and the ordinary incidents of caprice or fright, driven by an ordinarily careful and prudent person." So that it would seem that the reasonable degree of safety imposed by the law was given to the jury in plain and unequivocal terms, and, conceding the contention of counsel for appellant that contradictory instructions raise a *prima facie* presumption of prejudicial error, we do not think the principle is applicable to the conditions under discussion. Doubtless the reason for the presumption is that the jury is confused, rather than enlightened, and is as liable to follow the wrong instruction as the right one. But these instructions

Gray v. Washington Water Power Co

condition that the tops of the rails were not flush with the surface of the street, but projected above the same sufficiently high to cause an obstruction to public travel, and also claimed that there were no planks laid along the rails at said point in the manner mentioned in the ordinance or at all; and they claim that the alleged absence of planks, and the alleged projection of the rails above the surface of the street, was caused by the negligent failure of the defendant to maintain its track and roadbed as required by said ordinance. And I instruct you that if you believe from the evidence that said track was on May 2, 1901, in the condition claimed by the plaintiffs, and believe that such condition constituted an obstruction of public travel, and also believed that it was by reason of said alleged dangerous condition of the track that the plaintiff Carrie Gray was, without negligence on her part, thrown from her carriage as claimed by her, and received the injuries complained of, then I instruct you that the plaintiffs are entitled to recover damages from the defendant." It is contended that by the terms and tenor of this instruction the jury was authorized to render a verdict for respondents, as against appellant if, without fault on the part of Mrs. Gray, she sustained injuries on appellant's tracks at a point where they were not planked in accordance with the literal wording of the ordinance. But the court could not have been understood to have meant to have subjected the defendant to an absolute liability in the case of a failure to use planks as required by the ordinance, for the condition was prescribed that the jury must find, in addition to the failure to use the plank, that the condition wrought by such failure constituted an obstruction to travel. If there were any doubt about the meaning of the court, which we think there is not, it is made clear by instruction 17, which is as follows: "If you should find from the evidence that, although the defendant did not put planks along the sides of its rails as required by said ordinance, yet if you should find from the evidence that the defendant did by some other method protect its rails so that they would not endanger the traveling public, as hereinbefore stated, then you will not consider said ordinance in determining whether or not defendant was negligent in the respect mentioned." These two instructions, considered together, cannot possibly bear the construction placed upon them by counsel for appellant.

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Gray v. Washington Water Power Co

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Gray v. Washington Water Power Co

do not seem to be contradictory. On the contrary, the last instruction, instead of contradicting the first, made plain, definite, and certain that which was before indefinite. If modified instruction No. 5 had immediately followed and been a part of instruction No. 16, the latter part of the instruction would certainly have been understood as amplifying and making more definite the first part. It performed that office none the less effectively because it was given in a subsequent instruction. In addition to this, even if the instruction had been technically erroneous, under the circumstances of this case, and the special findings of the jury, the error would have been harmless, conceding the rule that, when error is committed, it will be held to be prejudicial unless it affirmatively appears to the contrary.

The really practical contest in this case was the alleged contributory negligence of Mrs. Gray, and the alleged negligence of the company in maintaining its rails above the surface of the streets. The jury was instructed that the plaintiffs could not recover unless it found that the rails of the track, at the time and place of the accident, were above the surface of the ground; that there was no contributory negligence on the part of Mrs. Gray; and that the raised condition of the street was the proximate cause of the injury. The jury found, in answer to a special interrogatory, that the track was raised above the surface of the street, and found for the plaintiffs under the further instruction that they could not find for the plaintiffs unless they found that Mrs. Gray was thrown out by the buggy striking the car rail at such place, and without contributory negligence on her part. So that, under the ruling of this court on the former appeal, no other verdict could have consistently been returned by the jury. An appellate court will not be justified in reversing a judgment where an error has been committed if it further appears from the whole record that such error is immaterial, or, in other words, if the record, as a whole, overcomes the presumption of prejudice which is established by the commission of error, and shows affirmatively that no substantial rights of the appellant have been injuriously affected. In this case, in addition to what we have said in relation to the two main issues controverted, the jury, having found that the track was raised in violation of the law, and that the accident was caused by the buggy striking the rails without fault on the part of Mrs. Gray, must have concluded that the track was not maintained in a reasonably safe condition.

The objection urged to instruction No. 9 is that it indorsed the doctrine of compensation for mental suffering and distress of mind for disfigurement. On this subject the authorities are somewhat divided, though the decided weight of authority, we think, is to the effect that compensation can be recovered for such damages. We also think that such decisions are sustained by the better reasoning. Some of the cases cited by

Gray v. Washington Water Power Co

appellant, while permitting compensation for mental suffering induced by physical pain, distinguish such mental suffering from suffering arising from causes other than physical pain, viz., such suffering as arises from the contemplation of a maimed body or deformed face; and the reason assigned is that this element of damage is too vague and indefinite to be susceptible of proof. But we think this discrimination cannot be maintained in sound reasoning, and that mental suffering which is induced by the relations of mind and body is as difficult to measure as mental suffering induced by mortification and disfigurement. Not all people suffer equally from the same bodily injury. The finer and more delicate the physical organization, the more acute will be both the physical and mental suffering. In practice, mental suffering is always an element considered by juries in slander and libel cases, in actions for false imprisonment and breach of promise, and in many other cases of like character, and ought to be. The wound to one's sensibilities is none the less painful when one's character is slandered. The law ought not to grant redress alone to the business man who sustains commercial damage, and refuse redress to others who have sustained a more poignant affliction. And he who negligently causes an injury to another who is faultless, which makes the latter an object of pity and abhorrence to his fellow men, and an object of ridicule to the thoughtless and unfeeling, and deprives him of the comfort and companionship of his fellows, ought to respond in damages for the injury sustained. It is true that there is no gauge furnished by the law for measuring such damages, and that it is, to a great extent, sentimental. But there is an element of sentiment in all damages,—even in the possession and use of money itself,—for a given amount of money may be of far more value to one person than to another. While all these considerations tend to prevent the assessment of damages in any case from being absolutely adequate or measured with exactness and understanding, they will not prevent the approximate measurement, and must be submitted to the best judgment of the jury. We are unable to see anything in the further contention that under this instruction the jury was authorized to bring in a verdict for double damages.

Objection was made to instruction No. 17 and modified instruction No. 5, but is not discussed in appellant's brief. They seem to us, however, to correctly state the law applicable to the case.

We think the instructions, as a whole, were fair, and favorable to appellant; and the jury, under such instructions, having found the issuable facts against appellant, no matter what the opinion of this court might be on those questions of fact, we do not feel justified in disturbing the verdict. The judgment will therefore be affirmed.

REAVIS, C. J., and MOUNT, FULLERTON, and ANDERS, JJ., concur.

ALABAMA MIDLAND RY. CO. *v.* HATCHER.*(Supreme Court of Georgia, Dec. 12, 1902.)*

[43 S. E. Rep. 49.]

Negligence—Question for Jury.

Under previous rulings of this court, "whether the commission of or omission to do particular acts by a railroad company was negligence as to one who has been injured by the running and operation of a train of cars must, as a general rule, be determined by a jury; and it is error for the judge, on the trial of a case brought to recover damages for such injuries, to charge the jury that the omission to do a certain act was negligence, when not expressly made so by law." *Railway Co. v. McKinney*, 42 S. E. 229, 116 Ga. 13, and cases cited. Instructions.

The other charges of which complaint was made were not erroneous for any reason assigned in the petition for certiorari.

(Syllabus by the Court.)

- Error from superior court, Decatur county; W. N. Spence, Judge.

Action by William H. Hatcher against the Alabama Midland Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Hawes & Hawes, for plaintiff in error.

J. H. Gilpin and A. H. Russell, for defendant in error.

PER CURIAM. Judgment reversed.

LUMPKIN, P. J., absent on account of sickness.

HOLMES *et ux.* *v.* UNITED STATES.*(Circuit Court of Appeals, Ninth Circuit, October 6, 1902.)*

[118 Fed. Rep. 995.]

Public Lands—Exceptions from Forest Reservation—Rights of Settlers on Unsurveyed Land.

While the mere occupancy and improvement of public land give no right as against the United States, yet the occupancy and improvement of unsurveyed public land, in good faith, by a settler who makes it his home, with the intention of making entry of the same under the homestead or pre-emption laws when it shall have been surveyed, has always been recognized as lawful, and as giving the settler a possessory claim, which entitles him to preference when the land is opened for entry; and, in view of such recognition, such a settler must be regarded as having made a "valid settlement pursuant to law," within the meaning of the president's proclamation of December 20, 1892, setting apart, as a forest reservation, certain public lands in California, but excepting all lands within the prescribed boundaries "which may have been prior to the date hereof embraced in any legal entry or covered by any lawful filing duly of record * * * or upon which any valid settlement has been made pursuant to law;" and under the rule of the later decisions of the supreme court, that the withdrawal of lands from entry by the interior department as being within a railroad grant did not defeat the rights

Holmes v. United States

sequent settlers thereon where the withdrawal was in fact unauthorized, it is immaterial that the land of such settlers had been withdrawn, and had never been formally restored to the public domain.

Act for Benefit of Settlers on Railroad Lands—Effect of Inclusion in Forest Reservation.

Act Jan. 13, 1881 (21 Stat. 315 [U. S. Comp. St. 1901, p. 1003], giving all persons who have settled and made valuable and permanent improvements upon any odd-numbered section of land withdrawn by a railroad withdrawal, in good faith, and with the permission of the railroad company, and with expectation of purchase from the United States, if for any cause it shall be restored to public domain, the right so given a settler is not defeated by the fact that after the withdrawal has been set aside the land is included within the boundaries of a forest reservation, created by proclamation of the president, before it has been surveyed so as to give the settler an opportunity to purchase.

Error to the Circuit Court of the United States for the Eastern District of California.

105 Fed. 41.

The United States brought an action of ejectment against the plaintiffs in error to recover the possession of the unsurveyed S. E. $\frac{1}{4}$ of section 7, township 4 N., range 9 W.; the land being included in a reservation made by the president of the United States on December 20, 1892, pursuant to an act of congress approved March 3, 1891 (26 Stat. 1003 [U. S. Comp. St. 1901, p. 1537]), which provides that the president of the United States may, from time to time set apart and reserve, in any state or territory having public land bearing forests, in any part of the public lands withdrawn or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the president shall, by public proclamation, declare the establishment of such reservations and the limits thereof." The proclamation excepted from the reservation "all lands which may have been, prior to the date hereof, embraced in legal entry or covered by any lawful filing duly of record in the proper United States land office, or upon which any settlement had been made pursuant to law, and the period within which to make entry or filing of record had not expired: * * * provided that this exception shall continue to apply to any particular tract of land unless the settler, homestead man, settler or claimant continues to comply with the law under which the entry, filing, settlement, or location was made." 27 Stat. 1051. The plaintiffs in error, Albert O. Holmes and Susan L. Holmes, his wife, made separate claims; the former claiming the right to occupy the land by reason of the following facts: That in April, 1892, he settled upon the land in controversy in good faith to make a home for himself, and with the intention of claiming the same under the homestead laws of the United States, and being then and at the commencement of the action surveyed public land; that at the date of his settlement the

Holmes v. United States

land had been withdrawn from entry by the United States land department, as being within the limits of the grant made by congress to the Southern Pacific Railroad Company by the act of March 3, 1871, for which reason he was not permitted to file on the land; that within six months after his settlement he established his actual residence in a house on the land, and has since resided there with his family, and that it is his intention as soon as the land is surveyed, if permitted to do so, to file his homestead application, and to make his entry under and in pursuance of the act "for the relief of settlers on the public lands," approved May 14, 1880 [U. S. Comp. St. 1901, p. 1392]. Susan L. Holmes relied upon the following facts: That in April, 1890, with the permission and license of the Southern Pacific Railroad Company, she settled upon and made valuable improvements on the land in controversy, in good faith and with the expectation of purchasing the land of said company, and that she has since continuously resided thereon. She claimed to be entitled to acquire the land under the act "for the relief of certain settlers on restored railroad lands," approved January 18, 1881 (21 Stat. 315 [U. S. Comp. St. 1901, p. 1594]), and the "act to provide for the adjustment of land grants made by congress," etc., approved March 3, 1887 (24 Stat. 557 [U. S. Comp. St. 1901, p. 1595]). The land in controversy had been withdrawn from entry by the land department, as being within the limits of the grant to the Southern Pacific Railroad Company of March 3, 1871, and also within the overlapping limits of the grant to the Atlantic & Pacific Railroad Company, by act of July 27, 1866. The latter company did not construct any portion of its line in California, and, in consequence of such failure, congress, by Act July 6, 1886 (24 Stat. 123), forfeited and restored the unearned lands to the public domain. The withdrawal by the land department, however, was continued in force, notwithstanding said forfeiture, upon the assumption that the lands were included in the grant of March 3, 1871, to the Southern Pacific Railroad Company. On July 8, 1891, Susan L. Holmes made application to the Southern Pacific Railroad Company to purchase the land in controversy. The company received her application, and, in writing, informed her that, "if there be two or more applications for the same tract of land, the actual settler, who in equity is best entitled to purchase, will be given the preference," but notified her that the company reserved to itself the right not to sell the land by itself, but to sell it in conjunction with other lands. Thereafter suits were brought by the United States against the Southern Pacific Railroad Company to determine the status of the lands within said overlapping limits, and the supreme court on October 18, 1897, held that the lands within the overlapping limits became, upon the passage of the forfeiture act of 1886, the property of the United States, and were thereby restored to the public domain, and

Holmes v. United States

the Southern Pacific Railroad Company never acquired interest therein. 18 Sup. Ct. 18. On September 6, by the order of the commissioner of the general land office, all lands lying within the overlapping limits of the rail- grants were restored to the public domain, with the exception of lands lying within the reservation; but, as to lands, permission was given to all persons having claims therein, initiated prior to the creation of such reservation, to present such claims for consideration by the authorities of the United States land office. The circuit court, upon this state of facts, held that by reason of the fact that the land was withdrawn from entry by the action of the land department at the time of the settlement thereon by the plaintiffs in error, remained so withdrawn up to the time of the proclamation of the president on December 20, 1892, setting apart the land as a portion of a public reservation, the plaintiffs in error could acquire no right in the land which they could set against the action of ejectment brought by the United States to recover its possession.

M. McDonald and Borden & Carhart, for plaintiffs in error.

H. Valentine, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is conceded that the land in controversy had not, prior to the date of the proclamation of the president, been embraced by legal entry or covered by any lawful filing of record in the United States land office; but it is contended that it is upon which a valid settlement had been made pursuant to law, and that the statutory period within which to make entry or filing had not expired. The circuit court decided the question adversely to the plaintiff in error Albert O. Holmes, for the reason that at the time when he made his settlement the lands were withdrawn from entry and settlement; citing *Maddox v. Burnham*, 156 U. S. 544, 15 Sup. Ct. 39 L. Ed. 527, and *Wood v. Beach*, 156 U. S. 548, 15 Sup. Ct. 410, 39 L. Ed. 528. In so ruling, the circuit court followed the law as it was understood, and as it had been followed by a series of decisions of the supreme court. A few months after the decision of the circuit court was rendered, however, the supreme court, in *Hewitt v. Shultz*, 180 U. S. 21, 21 Sup. Ct. 309, 45 L. Ed. 461, overruled its prior decisions, and denied the efficacy of the act of withdrawal to exclude from settlement lands which was not in fact withdrawn by the operation of a present grant, and which, but for withdrawal, would have been open to entry and settlement under the public land laws. By the decision in that case and the subsequent case of *Railroad Co. v. Bell*, 183 U. S. 675, 21 Sup. Ct. 232, 46 L. Ed. 383, the court has held that the

Holmes v. United States

withdrawal of lands by the secretary of the interior for the reason that they were supposed to be within the limits of a grant to a railroad company could not injuriously affect the right of a settler upon such land, who claimed the right to enter and settle the same as public land of the United States. The question of the right of Albert O. Holmes, therefore, is to be dealt with as if there had been no withdrawal of the land. But the land was, and still is, unsurveyed land. If it had been surveyed, and Holmes had tendered a filing thereupon, or had attempted to enter it as a homestead at the local land office, his possessory right would be entitled to protection, under the authority of *Ard v. Brandon*, 156 U. S. 537, 15 Sup. Ct. 406, 39 L. Ed. 524. But in *Buxton v. Traver*, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. Ed. 920, it was held that no portion of the public domain is open to sale until it has been surveyed, and that a settler upon the public lands in advance of the public surveys acquires no right except the preferential right to secure the land after the survey. Of the right of such a settler, the court said:

"The United States make no promise to sell him the land, nor do they contract with him upon the subject. They simply say to him, 'If you wish to settle upon a portion of the public lands, and purchase the title, you can occupy any unsurveyed lands which are vacant and have not been reserved from sale; and, when the public surveys are made and returned, the land not having been in the meantime withdrawn from sale, you can acquire, by pursuing certain steps, the right to purchase them.'"

Conceding that the mere occupation of public land gives no right as against the government, and that the president had the power, under the act of congress, to set apart the land in controversy in a public reservation, and that neither of the plaintiffs in error had acquired any interest therein which they could successfully set up as against that right, we come to the inquiry whether it was the intention of the act of congress and the proclamation of the president to include this land in the reservation. The exceptions expressed in the proclamation are three,—lands "embraced in a legal entry," or "covered by a lawful filing of record," and lands "upon which any valid settlement has been made pursuant to law." By the last of these exceptions it was contemplated that there might be a valid settlement on the public lands, other than those which were embraced in legal entries or covered by lawful filings, as those terms were used in the public land laws. Does the settler upon unsurveyed land, who makes it his home with the intention, as soon as the land is surveyed, to take the necessary steps to secure and protect his entry as a homestead, and to acquire title under the homestead law, and who makes valuable and permanent improvements on the land, make a "valid settlement pursuant to law"? In *Clemens v. Warner*, 24 How. 394-397, 16 L. Ed. 695, it was said:

Holmes v. United States

the law deals tenderly with one who in good faith goes to the public lands with a view of making a home thereon." *Buxton v. Traver*, 130 U. S. 232, 9 Sup. Ct. 509, 32 L. ed. 20, it was said:

"Settlement upon the public lands in advance of the surveys is allowed to parties who in good faith intend, before the surveys are made and returned to the local land office, to apply for their purchase."

Railroad Co. v. Osborne, 160 U. S. 103, 16 Sup. Ct. 219, 41 Ed. 346, it was held that a settler upon public unsurveyed land, who had made improvements thereon with the intention of acquiring a title under the pre-emption laws as soon as the lands should be surveyed, had a "possessory right" such as was protected by the act of congress in granting a railroad company a right of way over the public lands, and in conferring upon a territorial legislature power to "provide for the manner in which private lands and possessory rights on the lands of the United States may be condemned."

The court said:

"It would not be easy to suppose that congress would, in authorizing railroad companies to traverse the public lands, thereby to give them a right to run the lines of their roads at pleasure, regardless of the rights of settlers."

Railroad Co. v. Ziegler, 167 U. S. 65, 17 Sup. Ct. 728, 42 L. ed. 79, that doctrine was reaffirmed. It is true, there is no statutory provision which in express terms permits or protects settlement upon unsurveyed public land. We think, however, in view of the foregoing expressions of the supreme court and the known recognition of the rights of such settlers against all except the United States, that such a settlement, while it confers no right which the government is bound to respect, is nevertheless a valid settlement, and made pursuant to law, and that it comes within the spirit and intent of the exception contained in the proclamation of the presi-

"We are inclined, also, to the view, and we so hold, not without some doubt, that Susan L. Holmes had a possessory right under the act of congress of January 3, 1881 (21 Stat. U. S. Comp. St. 1901, p. 1594), whereby it was provided:

"That all persons who shall have settled and made valuable permanent improvements upon any odd numbered section withdrawn within any railroad withdrawal in good faith and without the permission or license of the railroad company for the benefit of the same shall have been made, and with the intention of purchasing of said company the land so settled upon, which land so settled upon and improved may, for any reason, be restored to the public domain, and who, at the time of such restoration, may not be entitled to enter and acquire title to such land under the pre-emption, homestead, or other reclamation acts of the United States, shall be permitted,

Gulf, etc., Ry. Co. v. Steele

at any time within three months after such restoration, and under such rules and regulations as the commissioner of the general land office may prescribe, to purchase not to exceed one hundred and sixty acres in extent of the same by legal subdivisions, at the price of two dollars and fifty cents per acre, and to receive patents therefor."

According to the record, Susan L. Holmes settled upon and made valuable improvements upon the land in controversy. That it is a portion of an odd-numbered section is alleged in the complaint which is filed in this action. She entered with the permission and license of the railroad company, and with the expectation of purchasing. At that time the land was withdrawn from settlement under the public land laws. Can it be said to be within the purport of the proclamation of the president in devoting a large tract of land, including the land occupied by such a settler, to a public use, to defeat the protection to bona fide settlers which was intended to be afforded by the act? We hesitate to so construe it. The land is no less a part of the public domain after having been set aside for a timber reservation. By the proclamation the lands have been restored to the public domain, and, while they have not been so restored as to become subject to entry under the homestead laws, the claim of the railroad company has nevertheless been extinguished, and the withdrawal has been set aside. The lands have thereby been taken out of the category of withdrawn lands to which the act referred. It is true that Susan L. Holmes has not, within three months after such restoration, purchased the land, but it is not her fault that she has not done so. The land has not been surveyed, and she has had no opportunity to purchase. If the act gave her the right to purchase, we think her right is not precluded until the survey shall have been made, and that until that survey is made she has a possessory right sufficient to constitute a defense against this action of ejectment, even if she has not made a "valid settlement pursuant to law," so as to come within the exception to the proclamation.

The judgment will be reversed, and the cause remanded for further proceedings not inconsistent with the foregoing views.

GULF, C. & S. F. RY. CO. v. STEELE.

(*Court of Civil Appeals of Texas, May 26, 1902.*)

[69 S. W. Rep. 171.]

Water and Watercourses—Liability for Injury to Land Caused by Insufficient Culverts.*

A party whose crops are destroyed by water diverted onto his land by the construction of a railroad along and across a stream, and retained thereon by reason of insufficient culverts, has a right of action

*See generally, foot-note to *Kelly v. Pittsburgh, C., C. & St. L. Ry. Co. (Ind.)*, 2 R. R. R. 547, 25 Am. & Eng. R. Cas., N. S., 547.

Gulf, etc., Ry. Co. v. Steele

the company, and it is immaterial whether he shows a violation by the company of Rev. St. art. 4436, prescribing its duties as to ice waters, or article 4426, prohibiting unnecessary obstruction of usefulness of streams, etc.

Detention by Embankments—Sufficiency of Culverts—Expert Testimony—Harmless Error.

An action to recover damages to plaintiff's crops by reason of being held thereon by a railroad embankment, a witness, who, on direct examination, qualified as an expert, testified that he had examined the embankment and contents, and gave their dimensions, and stated that the culverts provided were sufficient for the depressions they were intended to drain, but that there were other depressions not provided with culverts. On cross-examination he was shown not to be qualified as an expert civil engineer: *held*, that the court's error in striking out his testimony, if error, was harmless, the facts which he had testified not requiring scientific knowledge.

Reversed from district court, Brazos county; J. C. Scott,

appellee, vs. Lawrence Steele against the Gulf, Colorado & Santa Fe Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. & R. C. Duff and J. W. Terry, for appellant.
 Tremus & Butler and Ed Scott, for appellee.

MR. JUSTICE L. J. This suit was brought by the appellee, Lawrence Steele, against the appellant, to recover the value of a crop of cotton, alleged to have been destroyed by the negligence of appellant in so constructing its roadbed and embankments as to cause water to overflow and stand thereon. A verdict by jury resulted in a verdict and judgment for appellee for \$3,300, from which the railway company has appealed.

In his pleadings appellee states his cause of action as follows:

"Third. That prior to the construction of said railroad by the defendant the said tract of land was owned and cultivated by the plaintiff, as aforesaid, was well drained by natural channels and low places and depressions thereon, and water from all sources whatsoever passed through said channels, depressions, and low places, and escaped from said tract without overflowing or injuring the crops growing thereon, and crops thereon were not liable to injury from flows of high water. Fourth. That the defendant carelessly and negligently constructed its line of roadbed across plaintiff's said land and other land near plaintiff's land, and carelessly and negligently threw up and built embankments, and constructed its roadbed several feet higher than the land adjoining thereto, and several feet higher than plaintiff's said land, and the defendant carelessly and negligently and unskillfully built and constructed its roadbed and embankments across and across the natural channels and depressions by which plaintiff's lands were drained of water as aforesaid, and carelessly and negligently filled up and obstructed the natural channels and depressions for the escape of the water from said tract, and carelessly and negligently and unskillfully failed to

provide and construct suitable and sufficient culverts, bridges, or other means of escape from said lands of such collections of water as might have been reasonably anticipated would collect on same, and as did in fact collect on same, as hereinafter alleged. Fifth. That during the spring of 1900, to wit, during the months of * * * of said year, Big creek, a stream situated above and north of the said roadbed of defendant, and upon which plaintiff's said land is situated, overflowed its banks in the low places thereon, and the waters from said creek passed into the low places, channels, and depressions in plaintiff's said land and other lands adjacent thereto, through which it passed down to said roadbed and embankment, when it was thereby stopped, dammed up, and forced back on and overflowed plaintiff's said land, and upon which plaintiff then had a crop of cotton standing and growing, and the water thus dammed up and held back on plaintiff's land as aforesaid overflowed, drowned out, and entirely destroyed four hundred and sixty acres of plaintiff's said crop of cotton, of which four hundred and sixty acres was in cotton; all of which was of the reasonable market value of \$10 per acre, to plaintiff's damage \$4,600. Plaintiff further alleges: That prior to the construction of said railroad by the defendant, Big creek, a local stream running near the Brazos river, and upon which plaintiff's said land was situated as aforesaid, was of sufficient size and capacity to hold all waters therein from local rains, etc. That water therefrom which overflowed the banks of said stream, except in low places, ran into said creek from adjacent lands, and the water thus escaping from said creek ran through such sluices and low places, and did not overflow the lands through which they ran, and crops on said lands were not overflowed or injured, and not liable to injury from water overflowing same. That the said defendant carelessly and negligently constructed its roadbed west of Allen farm, in Brazos county, Texas, and near to the Brazos river, and carelessly and negligently threw up and built an embankment and constructed its roadbed several feet higher than the lands adjacent thereto, and carelessly and negligently filled up and obstructed the natural channels and depressions in the said lands for the escape of water therefrom, and carelessly and negligently failed to provide and construct suitable and sufficient culverts, sluices, or other means for water to escape from and run off of the above said roadbed. That during the spring of 1900, and about the months of April and May of said year, the waters in the Brazos river overflowed the banks of said stream at low places therein above said railroad company's embankment, and were by said embankment dammed up and forced back over the country above said railroad, and were thereby forced into said Big creek, causing same to rise and overflow the lands of plaintiff, upon which plaintiff then had growing a crop of cotton, and four hundred and sixty acres of plaintiff's said crop were overflowed, drowned out.

destroyed, to plaintiff's damage \$4,600, as before alleged." Plaintiff answered by exceptions, general and special, by denial, and an averment that the flood or overflow of such a character as could not have been reasonably foreseen and provided against. Other special defenses were pleaded, but, in view of the points presented in the brief, need not be set out here.

Plaintiff was the owner of the land described in his petition, and in the spring of the year 1900 had growing thereon a crop of cotton. This land was situated near the Brazos river, and near Big creek, a tributary thereof. In the spring of the year named the Brazos river and Big creek overflowed their banks. Their waters spread out over adjacent lands, including plaintiff's, destroying the crops thereon, and damaging plaintiff in the amount found by the jury. Many years prior to the date named above the defendant had constructed its railway over and across the land of plaintiff and lands adjacent thereto. It ran immediately south of the land on which the crop was destroyed, the crop being between the road and Big creek. Proceeding past that point the road crossed the Brazos river. Plaintiff's lands and those adjacent to the bottom lands. The embankment of the railroad was higher than the lands, so that, unless suitable culverts and openings were placed wherever the lay of the land required, the embankment would hold in the depressions thereon such as came upon it, whether from overflow or from local rains.

It would also retard the flow of the flood waters of the Brazos river. Some of these depressions or natural drains ran in the direction of the channel of Big creek, others towards the Brazos river, and these latter are the ones which plaintiff claims were obstructed to his injury. The evidence was sufficient to sustain the finding that the openings in and through the railroad embankment were not sufficient in number and in size to drain the plaintiff's land of the overflow waters as it naturally drained itself before the construction of the road, and that the overflow waters from the Brazos river would otherwise have flowed off through the natural channels and depressions in the land were thus caused to flow over plaintiff's land, and to remain thereon, causing the injury complained of; and that the faulty construction of defendant's road as it approached the Brazos river adjacent to plaintiff's land caused the river to back its waters into Big creek, causing the overflow of the latter stream; and that the defendant was negligent in the respects complained of. Appellant contends, in its propositions under its first four assignments of error, that article 4436 of the Revised Statutes abrogated the common-law rule as to damage occasioned by the obstruction of the natural flow of surface water, and established a new rule in its stead; that the article in question applies only to surface waters, and, as the water occasioning the damage complained of was not of that character, but was overflow

water from large streams, the company cannot be held liable under the statute in question. On the same theory it is contended that the exceptions urged against the petition, and presenting the same questions, should have been sustained. It is contended, also, that the rights of plaintiff rest upon the article last mentioned and article 4426, and he can have no cause of action except for a breach of the duties imposed by one or both of said articles. The article in question is as follows: "In no case shall any railroad company construct any road bed without first constructing the necessary culverts or sluices, as the natural lay of the land may require, for the necessary drainage thereof." Article 4426 is as follows: "Such corporation shall have the right to construct its road across or along any stream, water course, street, highway or canal which the route of the railroad may intersect or touch, but such corporation shall restore such stream or water course to its former state or to such a state as not to unnecessarily impair its usefulness." It may be true, as contended by appellant, that article 4436 prescribes the duty of the railway company only with reference to surface water due to local rains, as contradistinguished from waters of overflowing streams. It seems to have been so held in *Railway Co. v. Helsley*, 62 Tex. 593, though the distinction was not called for in that case; and in many other Texas cases which might be cited the article has been applied to cases in which damages were asked against railway companies for so constructing their lines as to obstruct the waters of running streams in times of high water. However, it has been held that water resulting from an overflow in districts where large bodies of land are thereby covered will be treated as surface water, and the rights of persons affected thereby will be determined accordingly. 28 Am. & Eng. Enc. Law (Old Ed.) p. 965. But it occurs to us that the right of the plaintiff to recover in this case does not depend upon the article in question, nor, indeed, upon article 4426, quoted above. It will be observed that the article last named clothes railway companies with the power to construct their lines across streams, water courses, canals, and public roads and streets, imposing the condition that the usefulness of such streams or highways shall not be unnecessarily impaired. Hence a railway company has the right to bridge a navigable stream. To some extent this necessarily impairs the right of convenient navigation. But if the company constructs a draw to permit the passage of vessels, its usefulness is not unnecessarily impaired. So with a street crossing or a bridge over a canal. The article seems to us to have no reference to the flow of the water in a stream, but rather to the extent to which its use may be affected. Take the case at bar. The plaintiff's land did not lie on the Brazos river. The existence of that stream may have been of no possible use to plaintiff, but merely a source of apprehension and harm from the damage wrought by its

in time of flood. Now, if the company had so conducted its crossing as to obstruct the free flow of the waters, and thereby caused the stream to overflow and damage plaintiff's land, the usefulness of the stream cannot be said to have been affected. It is simply turned into an instrument of injury. In such a case the right of the injured party would be considered on a broader basis than the article quoted, for it seems to be held in all jurisdictions that one who obstructs the free flow of a running stream to another's hurt is responsible in damages therefor. *Railroad Co. v. Parker*, 50 Tex. 346; 28 Eng. Enc. Law (Old Ed.) pp. 955, 961, 963, 966, 968; *Waters*, §§ 256, 264, 548. To show that this article refers to the right of the public to the use of rivers, canals and highways, roads and streets, are mentioned in the same connection, and the same provision is made that their usefulness shall not be unnecessarily impaired. We have found no case in which article 4426 has been thus construed, the cases arising thereunder usually involving the necessary impairment of the usefulness of some public river or highway; and in cases involving damage from overflows caused by railway companies in constructing their lines across or along streams without providing sufficient outlets for such volumes of water as they might reasonably foresee. To provide against, article 4436, *supra*, has been uniformly construed. It is true, however, that the point here urged as to the distinction between surface water due to local rains and water brought down from above by the streams has not heretofore been presented. An inspection of the petition shows that plaintiff set up the facts upon which he relied for recovery; that among the allegations are found averments that the overflow was due to the negligent construction of the levee as it approached the river; that the embankments along plaintiff's lands and those adjoining were not provided with sufficient culverts and sluices, and the waters were thereby backed up and held upon his lands. With these allegations before us, we think it immaterial whether the petition brings the case strictly within the provisions of either of the articles mentioned. The court did not err in overruling the exceptions. Under the fifth assignment appellant complains of the refusal of the trial court to strike out the testimony of the witness Love. This witness, on direct examination, qualified himself as an expert, and testified that he had inspected the land in question and the culverts and sluices in the embankment along the river. He gave the width of the culverts found there, and testified that they were sufficient for the depressions drained by them, but he testified to the presence of other depressions not provided with culverts, and which were not drained by the culverts mentioned. In testifying to the depressions not provided with culverts, he expressed an opinion as to the width of the culvert which would have been necessary. On cross-examination he was shown not to be qualified as an expert

Johnson v. Richmond, F. & P. R. Co

civil engineer, and thereupon appellant requested the court to strike out his testimony. To the refusal to do this the assignment is addressed. Without regard to whether the witness was shown to be an expert, we think the action of the trial court, if error, was harmless. The witness did not say in his testimony, as cited in the brief, that the culverts found were insufficient for the depressions they were designed to drain. He stated, however, that there were other depressions not drained by these, and for which no culverts were provided. Such testimony might be supplied by any witness having knowledge of the facts, and did not involve matters of scientific knowledge. The assignment cannot be sustained.

The refusal of the trial court to give several requested charges is complained of. Most of these present the appellant's contention as to surface water, and the scope of the articles of the statute which we have already disposed of. We need not discuss them in detail. The substance of the others is fully given either in the main charge or in special charges given at the request of the parties.

Under the fourteenth and sixteenth assignments portions of the charge are assailed, the complaint being that the duty of railway companies to use reasonable care to provide against usual and expected floods is not accurately defined. The portions of the charge, standing alone, might prove misleading, but the charge as a whole fully protects the appellant, and, in the light of the entire charge, we do not think the jury could possibly have been misled. None of the other assignments require our notice.

Because no harmful error has been presented, the judgment is affirmed. Affirmed.

JOHNSON v. RICHMOND, F. & P. R. Co.

(*Supreme Court of Appeals of Virginia, Jan. 22, 1903.*)

[43 S. E. Rep. 193.]

Railroads—Certificates of Indebtedness—Payment—Conversion into Stock—Rights of Holders—Railroad's Duty to Notify.

Plaintiff was the owner of a railroad certificate which gave him an option to require payment in cash on maturity, or to convert the same into stock of the company at par. The time of payment and of the exercise of the rights was extended by an indorsement thereon to July 1, 1899. On June 29, 1899, the president of the corporation telephoned plaintiff's agent that the company desired to pay the certificate on the day it matured,—saying nothing as to plaintiff's option,—and the agent telegraphed plaintiff to mail the certificate; and plaintiff, without remembering the option, the exercise of which would have been very valuable, deposited the certificate in a bank for collection, without examining it: *held* that, the certificate having been paid by the company, it was not liable to plaintiff for failure to notify him of his option.

Appeal from law and equity court of city of Richmond.
Action by John R. Johnson against the Richmond, Freder-

Johnson v. Richmond, F. & P. R. Co

icksburg & Potomac Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

WHITTLE, J. The alleged grievance complained of in the original and amended bills in this case is that appellant, John R. Johnson, was misled, by a telegram from his partner, George L. Street, sent at the instance of E. T. D. Myers, president of the Richmond, Fredericksburg & Potomac Railroad Company, into collecting a certificate of debt of appellee for \$5,000, instead of converting it, as he had the privilege of doing by the provisions of the certificate, into stock of the company, which at that time was worth \$140 per share in open market.

The facts out of which the transaction arose are as follows: Appellant resided in the city of Philadelphia, but was a member of the firm of J. R. Johnson & Co., composed of himself and George L. Street, doing business near the city of Manchester, Va. On February 17, 1882, appellant purchased the certificate in question, each \$100 of which were by its terms convertible, at the pleasure of the holder, into one share of the capital stock of the company at any time previous to the 1st day of July, 1879. On the back of the certificate was printed the following:

"The payment of the principal of this certificate of debt is extended to the first day of July, 1899, with the continuance of all existing securities for the payment of the principal and interest, and all the rights, privileges, and advantages pertaining thereto, under resolution of the board of directors of May 17, 1879."

On June 29, 1899, Myers telephoned Street to have the certificate in the city of Richmond, Va., July 1, 1899, as the company wanted to pay it on that day, but said nothing of the privilege of exchanging it for stock. Street, acting in accordance with the telephone message, immediately sent the following telegram to the appellant:

"Mail to-day your Richmond, Fredericksburg and Potomac Railroad Company bond: are called in July first. Major Myers requests have here to-morrow sure, so they can pay the same."

That appellant had entire confidence in Myers, and, being taken by surprise by the telegram, acted hurriedly and without reflection; having no recollection or knowledge whatever of the privilege of exchanging the certificate for stock,—a privilege of which he would naturally have availed himself, as such exchange would have profited him nearly \$2,000.

The certificate was in appellant's box with the Guarantee Trust & Safe Deposit Company of Philadelphia. The message was sent to appellant at his place of business, in Wilmington, Del., and was received too late on the 29th for him to reach Philadelphia before the office of the trust company closed. On the morning of the 30th he did not go to Wilmington by an early train, as was his usual custom, but

Johnson v. Richmond, F. & P. R. Co

delayed his departure until a 10 o'clock train. The office of the trust company was never opened until half past 9 o'clock, so that he was greatly hurried, and, without time for reflection or examination, took the certificate from the vault, signed and had witnessed the blank power of attorney on its back, and deposited the certificate as cash, and a draft for the last installment of interest for collection by the trust company.

The certificate was forwarded for collection through the medium of a Lynchburg bank, and was presented at the office of the railroad company and paid July 5th.

On July 7th appellant, having learned of his privilege of exchanging the certificate for stock, tendered the cash received on the certificate, and demanded stock in lieu of it. The matter was referred to the board of directors, and the demand was refused. The relief prayed for is that the action of the railroad company in paying the certificate of debt in cash at its face value be set aside, and that the company be required to issue in lieu thereof the shares of stock called for by the certificate.

The case was heard on demurrer, which the trial court sustained, and dismissed the original and amended bills, with costs.

It is not perceived how a different conclusion could have been reached from appellant's own version of the facts. The bills do not charge actual fraud, either upon the company or its president, nor do they charge such facts as amount to legal fraud. As remarked, the certificate of indebtedness matured July 1, 1879, at which date the privilege of exchanging it for stock would have expired, but for the circumstance that the option was extended, by resolution of the board of directors, until July 1, 1899. There were no relations of confidence existing between the parties. Appellant, who was a man of large business affairs, in no way sought the advice of the company or its president; and the certificate of indebtedness, with extension of its privileges printed in red ink on the back of it, was in his possession, and afforded ready means of information as to his rights. The company and its president were justified in supposing that he was fully apprised of his rights, or would at least inform himself by reading the certificate and its indorsement. But however that may be, the means and sources of information were equally accessible to both parties; and the ignorance and self-deception of appellant were not brought about by the conduct of Myers, who employed neither art nor artifice to prevent investigation or stifle information, and rested under no obligation, legal or moral, to volunteer counsel.

In the practical administration of justice by the courts, they do not and cannot undertake to shield persons laboring under no disability from the consequences of their own indifference and disregard of ordinary business methods and precautions.

Kilpatrick v. Choctaw, O. & G. R. Co

Where a duty rests upon a party in possession of facts, by confidence reposed or otherwise, to communicate such facts, must do so truly and fairly. But it would be contrary to public policy to establish fiduciary relations, where none exist in reality, between debtor and creditor, and impose upon the debtor obligations which he never assumed, merely to protect the creditor against the consequences of his own carelessness. To do so would be to place a premium on negligence and to encourage carelessness.

The common law affords to every one reasonable protection against fraud in dealing, but it does not go to the extravagant length of giving indemnity against the consequences of carelessness or folly, or a careless indifference to the ordinary available means of information. It reconciles the claims of convenience with the duties of good faith to every extent compatible with the interest of commerce." 2 Kent, Comm. (Ed.) 483.

To so extend the doctrine as to grant the relief prayed for in this case would incumber and embarrass ordinary business transactions between debtor and creditor, and impose the unreasonable burden upon the former of advising the latter, although possessed of equal facilities for information, of his rights, or to incur the hazard of being held liable for his carelessness in the lapse of memory.

The proposition to remedy the supposed hardship of particular cases by the establishment of a doctrine which would lead to such mischievous consequences cannot be entertained. The questions involved in this case are dependent upon familiar principles, and a review of the authorities relied on seemed unnecessary.

The decree complained of is plainly right, and must be affirmed.

KILPATRICK *et al.* v. CHOCTAW, O. & G. R. Co.

(Circuit Court of Appeals, Eighth Circuit, February 21, 1903.)

[121 Fed. Rep. 11.]

Duties to Servant—Defective Appliances—Unblocked Railroad Frogs.* It is not negligence to use unblocked frogs in a railroad freightyard, whereby the feet of employees coupling cars are liable to be caught, it being known that unblocked frogs are generally in use in the same section of the country, and that it is doubtful whether they are not the better

judgment, Circuit Judge, dissenting.

Error to the United States Court of Appeals in the Hawaiian Territory.

For appellants: E. Rogers, W. O. Davis, and J. H. Garnett, for plaintiff in error.

For defendant: B. Stuart, for defendant in error.

See notes at end of case.

Kilpatrick v. Choctaw, O. & G. R. Co

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is an action for personal injuries which resulted in the death of R. E. Kilpatrick, at Shawnee, in the Territory of Oklahoma, on February 13, 1897. Minnie Kilpatrick, the plaintiff below and the plaintiff in error here, who was the wife of the deceased, sues for herself and as next friend for her minor children, Ethel Kilpatrick and Robbie Kilpatrick, basing her right to sue on sections 435 and 436 of the Laws of Oklahoma Territory, which provide, in substance, that, when the death of a person is caused by the wrongful act or omission of another the personal representatives of the deceased may maintain an action therefor against the wrongdoer if the deceased might have maintained an action had he lived; and that such action may also be brought by the widow, or, where there is no widow, by the next of kin, provided no personal representative has been appointed. It was charged in the complaint that R. E. Kilpatrick was in the employ of the Choctaw, Oklahoma & Gulf Railroad Company at the time of his death, acting in the capacity of a brakeman on one of its freight trains; that at the time and place of his death it became necessary for the deceased to go between two freight cars standing on the defendant's track, and to uncouple them while the train to which they were attached was moving slowly; that, by reason of the negligence of the defendant company, the coupling pins, coupling links, coupling chains, cranks, and means provided for coupling and uncoupling the two cars, had, through the defendant's negligence, been permitted to become defective, broken, and out of repair, so that the cars could not be uncoupled without going between the cars while they were in motion; that as he stepped in between the two cars for the purpose of uncoupling them, being at the time in the exercise of due care, his foot was caught and became wedged between what is known as the "guard rail" and the "main rail" at a point where the space between the main rail and the guard rail was only about two inches in width; and that, by reason of his foot being caught and so held, he was run over, and his leg and body were so crushed and mangled that he died within half an hour thereafter. It was further alleged in the complaint that the defendant company had caused a guard rail at the place in question to be so laid, alongside of the main rail, that there existed at each end of the guard rail an open and unblocked space about four inches in width; that this space gradually decreased in width from each end of the guard rail for about six inches until it reached a point where the space between the main rail and guard rail was not over two inches wide; that the laying of the guard rail in this manner, without blocking it, rendered the track at that point unsafe and dangerous, as the defendant company knew, or by the exercise of ordinary care ought to have known,

Kilpatrick v. Choctaw, O. & G. R. Co

prior to the accident in question; and that for years prior to the accident, as the defendant company well knew, there was in use a plain and simple device for preventing the feet of road employees from becoming wedged between the two rails, such device being a block or wedge of wood placed between the guard rail and the main rail at each end of the frog rail, which wedge or block, when inserted, will effectively prevent a person's foot from becoming wedged between two rails; but that, notwithstanding such knowledge on the part of the defendant company, it negligently failed and neglected to make use of such a device or insert such a block. The complaint alleged that the coupling appliances on the cars in question were broken and out of repair, yet in the course of the trial it was stipulated by the plaintiff's attorneys that the failure to block the frog in the defendant's track was the proximate cause of the injury complained of, that the plaintiff would rely for a recovery solely upon the negligence of the defendant company to block the frog, and that the plaintiff would not rely for a recovery upon the other ground stated in the complaint, that the coupling appliances were out of repair. At the conclusion of all of the testimony, the trial judge directed the jury to return a verdict in favor of the defendant company, which was accordingly done, and the judgment subsequently rendered in favor of the defendant was affirmed on appeal by the United States Court of Appeals for the Indian Territory. 64 S. W. 560.

The case appears to have been decided, both at nisi prius and on an appeal by the United States Court of Appeals in the Indian Territory, upon the ground that it was ruled by the decision of the Supreme Court in *Southern Pacific v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530, 38 Ed. 391; and in that view we feel constrained to concur. In the *Seley* Case the Supreme Court, after describing the method which is sometimes employed of blocking the frogs of switches by filling the angle between the guard rail and main rail with a piece of wood or iron, referred to the fact that the evidence in that case plainly showed that on other great railroad systems in the West the unblocked frog was generally used, and that there was evidence tending to show that the unblocked frog is the better one, as the blocked frog is liable to become broken and cause derailment of trains. It thereupon held that the following instruction contained a correct declaration of law applicable to the case, and should have been given:

The jury are instructed that if they find from the evidence that the railroad companies used both the blocked and the unblocked frog, and that it is questionable which is the safest and most suitable for the business of the railroads, then the use of the unblocked frog is not negligence, and the jury are instructed not to impute the same as negligence to the defendant, and they should find for the defendant."

Kilpatrick v. Choctaw, O. & G. R. Co

The court then referred to several cases (especially *Randall v. Baltimore & Ohio Railroad*, 109 U. S. 478, 482, 3 Sup. Ct. 322, 27 L. Ed. 1003, and *Washington & Georgetown Railroad v. McDade*, 135 U. S. 554, 570, 10 Sup. Ct. 1044, 34 L. Ed. 235) in which it had been held substantially that neither railroad corporations nor employers generally are bound to supply "the best and safest or newest" of appliances, but are justified in using such appliances and devices as are in common use, and are considered ordinarily safe and reasonably well adapted to the purposes to which they are applied, and concluded, in view of such decisions and the evidence in the case showing that unblocked frogs were in use on many railroads throughout the country, that it was "plain that the defendant was entitled, not merely to the instruction" aforesaid, "but that, upon the whole evidence, the prayer for a peremptory instruction in the defendant's favor ought to have been granted." This decision, therefore, as we construe it, clearly decides that so long as many railroads of the country use the unblocked frogs, believing such frogs to be ordinarily safe, and less liable to get out of order and occasion derailments than blocked frogs, negligence cannot be imputed to a railroad company simply because it uses unblocked frogs. According to the doctrine so enunciated, it seems that railroad companies are at liberty to determine for themselves, in the light of their experience, which form of frog is preferable, so long as both forms are in common use, and that it is not competent for a jury to hold a railroad company guilty of negligence because it adopts one form of frogs in preference to another.

Applying the doctrine enunciated in that case to the case in hand, the judgment below must be permitted to stand, since it is shown by the testimony, without substantial contradiction, that only about 25 per cent. of the railroads in the United States have adopted the practice of blocking their frogs, while the remaining roads, believing it to be the better or safer practice, leave their frogs unblocked. Counsel for the plaintiffs in error urged with great force that the question whether an unblocked frog is a dangerous contrivance, and more liable to occasion loss of life and limbs than blocked frogs, is in its nature and essence a question of fact to be determined by the testimony of railroad employees, who, in the discharge of their duties as trainmen, are daily brought in contact with both kinds of appliances, and who thus become familiar with the comparative risks which are encountered by the use of each. They further urged that as this is a question of fact it is within the legitimate province of a jury to determine it, and also within the province of a jury to hold a railroad company accountable for a want of ordinary care amounting to culpable negligence if it fails to block its frogs, provided the triors of the fact are satisfied by the evidence that unblocked frogs are so far dangerous and liable to entrap train-

Kilpatrick v. Choctaw, O. & G. R. Co

that they ought not to be used. We feel constrained to hold, however, that this view has not met with the approval of the Supreme Court, but is expressly overruled in the case we cited, the rule enunciated being, as above stated, that so long as both kinds of frogs are in use on railroads, and any roads prefer those that are unblocked, and it is questionable which is the safest or most suitable appliance for the business of railroads, a jury cannot impute negligence to a company which uses one of these appliances in preference to the other. It results from this authoritative statement of the law that the judgment below must be affirmed, and it is so ordered.

CALDWELL, Circuit Judge (dissenting). In *Narramore v. Cleveland, C., C. & St. L. Ry. Co.*, 96 Fed. 298, 300, 37 C. A. 499, 48 L. R. A. 68, Judge Taft, speaking for the Court of Appeals of the Sixth Circuit, referring to the Ohio statute which makes it obligatory on railroad companies to block their guard rails and frogs, says:

"The intention of the Legislature of Ohio was to protect the employees of railways from injury from a very frequent source of danger by compelling the railway companies to adopt a well-known safety device."

In *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. 464, 39 L. 464, the Supreme Court of the United States said:

"Occupations, however important, which cannot be conducted without necessary danger to life, body, or limb, should not be prosecuted at all without all reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. Indeed, we think it may be laid down as a legal principle that, in all occupations which are attended with great and unusual danger, there must be used all appliances readily attainable, known to science, for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence."

In *Union Pacific Railway Co. v. James*, 56 Fed. 1001, 1006, 10 C. A. 217, this court said:

"We think that it might properly have been left to the jury to determine whether the maintenance of an unblocked track at the time and place of the accident was an act of culpable negligence. * * *"

In this case the defendant did not itself treat the question as one of law. It did not demur to the complaint, but took issue on the question of fact as to whether its track in this ward was properly constructed, and introduced expert testimony on the subject. All the testimony of men having practical experience is that blocking is necessary. One of the witnesses called by the plaintiff testified as follows:

"I have been braking and switching on railroads for about 20 years. * * * I know why the M., K. & T. blocks its

Kilpatrick v. Choctaw, O. & G. R. Co

rails. Protection to the men is one thing, safety, because that open guard rail is just simply a dead trap a man is liable to step in at any time, because you will catch some cars you can't uncouple. When it is unblocked it is not safe for anybody at all. I would say it is dangerous. When it is blocked it is not dangerous, because then a man can't get his foot in there at all. The L. & N. Railroad is the Louisville & Nashville. That and the Illinois Central block their guard rails. I do not know whether the Rock Island block their guard rails or not. I never was over its road. I am a practical brakeman, working on the local right here, where I handle hundreds and thousands of cars every week, as far as that is concerned. My experience in coupling and uncoupling cars has been large. An unblocked guard rail is dangerous just simply because a man's foot will get right in there walking along uncoupling cars. The ball of the rail will prevent it from coming out. The rail is three inches at the top and at the bottom it is about six, and there is a hollow in there, and whenever your foot gets below that you can't pull it out. If that block is in there his foot can't get caught there. The top of the rail is called the ball, and the bottom is the web, and there is a hollow place between them."

Another witness, Otto Sullivan, testified:

"I know the M., K. & T. Company. It blocks its guard rails. After a guard rail is blocked at both ends, a man's foot cannot go in and get caught. * * * Where the guard rail is not blocked it is a dangerous contrivance. It is dangerous because you can run your foot up in there and cannot get it out. It is held there and stays."

Numerous other witnesses, having large experience as brakemen and switchmen and otherwise in the practical operation of trains, testified to the same facts.

Engineering experts treating the subject theoretically say they are not necessary. The defendant was careful not to call a single brakeman or switchman, whose practical experience and observation would have enabled him to testify to facts instead of theories. The language of the Supreme Court in the Seley Case has reference to the facts disclosed by the record in that case, and does not decide as matter of law that it is not necessary to block guard rails or frogs. In that case the conductor, who was killed, was clearly guilty of contributory negligence, and so the court decided, and whatever it said as to the railroad company not being under any legal obligation to block its frogs was not necessary to the decision of the case, and must be treated as the mere obiter dictum of the judge writing the opinion. Moreover, if the opinion is construed as holding that as matter of law a railroad company is not under obligation to its employees to block its guard rails, it must be held to be overruled by the doctrine of the later case of *Mather v. Rillston*, supra. See, as to this case, *Western Coal & Mining Co. v. Berberich*, 94 Fed. 327, 36 C. C. A. 364.

Kilpatrick v. Choctaw, O. & G. R. Co

is not at all likely that the judges of that court would attempt to determine the question either as engineering experts or from practical experience as brakemen and switch-

Judges not being qualified to speak either as engineering experts or from actual observation and practical experience, it is difficult to understand upon what principle they can declare that railroad companies are not required, for the protection of their employees, to block their guard rails and frogs, or resort to some equivalent or better device to protect their employees from the known and obvious dangers of open guard rails and frogs.

It is common knowledge that open guard rails and frogs are extremely dangerous to the lives and limbs of railroad employees, and, if the courts are going to take it upon themselves to declare as matter of law either that they should or should not be blocked, then the rule prescribed by the courts would require them to be blocked.

It is an impeachment of the intelligence and skill of railroad engineers and managers to say that they are not capable of devising any means of preventing or lessening the numerous accidents resulting to railroad brakemen and switchmen from the use of open guard rails and frogs, and our reason revolts and our humanity is shocked at the judicial declaration that railroad companies are not required to do anything in this direction, not even so much as to use, in the language of Mr. Taft, "a well-known safety device."

The question should be left to the jury, upon a consideration of all the evidence, to say whether the railroad company is guilty of culpable negligence in neglecting to provide, in the language of the Supreme Court, "such readily attainable appliances," which would lessen or prevent the danger. Juries, upon a consideration of the evidence, are much more capable of deciding this question than judges, and besides, it is a question of fact which belongs to the domain of juries to decide.

From the beginning, instead of leaving these questions to the jury, where they rightfully belong, judges had taken it upon themselves to decide that railroad companies were not required to do this thing or that thing for the safety of their employees or passengers, or were not required to operate their rails in this manner or that manner for a like purpose, there would to-day be small safety either for employees or passengers. It is mainly to the verdicts of juries we owe most of the improvements in appliances and methods of operating railroads which have lessened the dangers to their employees and passengers.

Whenever it is made to appear to a railroad company that it costs more to pay the damages assessed against it by the verdicts of juries for maintaining a dangerous condition of its track or appliances than it would cost to substitute safe ones in their place, the substitution is quickly made. But, as long as courts hold as matter of law that what the witnesses

Notes

in this case declare to be "simply a dead trap" may be maintained with impunity and without incurring any pecuniary liability, the death trap will remain and the slaughter go on. The decision of the majority of the court makes human life in this circuit a cheaper commodity than lumber. It is perfectly certain from the evidence in this case that the deceased brakeman would not have been killed had the guard rail been blocked.

Whether it was culpable negligence in the defendant not to block its guard rails at the place where this accident occurred was a question of fact to be submitted to the jury, and not one of law to be determined by this court.

NOTES.

UNBLOCKED FROGS AND GUARD RAILS—LIABILITY OF RAILROAD COMPANIES FOR INJURIES TO EMPLOYEES.

- I. In Absence of Statute.
- II. Decisions Limiting or Opposing Common-Law Rule.
- III. Statutory Requirements.
- IV. Assumption of Risk.
- V. Contributory Negligence.

I. IN ABSENCE OF STATUTE.

1. General Rule.

In the absence of any statutory requirement on the subject, the authorities nearly all agree that failure to block frogs and guard rails is not negligence in the abstract. And to warrant recovery on this ground for injury to an employee, plaintiff must prove that the unblocked frog or guard rail in question was not reasonably safe for employees to pass over in the discharge of their duties.

United States.—*Southern Pac. Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530.

Arkansas.—*St. Louis, etc., R. Co. v. Davis*, 54 Ark. 389, 26 Am. St. Rep. 48.

Illinois.—*Chicago, R. I. & P. R. Co. v. Lonergan*, 118 Ill. 41, 7 N. E. 55.

Indiana.—*Sheets v. Chicago & I. Coal Ry. Co.*, 139 Ind. 682, 39 N. E. 154.

Indian Territory.—*Kilpatrick v. Choctaw, etc., R. Co. (Ind. Terr.)*, 23 Am. & Eng. R. Cas., N. S., 244, 64 S. W. 560.

Michigan.—*Hewitt v. Railroad Co.*, 67 Mich. 61, 34 N. W. 659; *McGinnis v. Canada Southern Bridge Co.*, 49 Mich. 466, 13 N. W. 819.

Nebraska.—*Railway Co. v. Lewis*, 24 Neb. 848, 40 N. W. 401.

New York.—*Appel v. Buffalo, etc., R. Co.*, 111 N. Y. 550; *Spencer v. New York Cent., etc., R. Co.*, 67 Hun (N. Y.) 196, 22 N. Y. Supp. 100; *Ireland v. Gardner (Sup. Ct.)*, 7 N. Y. Supp. 609; *McNeil v. New York, etc., R. Co.*, 71 Hun (N. Y.) 24.

Texas.—*San Antonio, etc., R. Co. v. Gillum (Tex. Civ. App. 1895)*, 30 S. W. 697.

Virginia.—*Richmond & D. R. Co. v. Risdon*, 87 Va. 335, 12 S. E. 786, 48 Am. & Eng. R. Cas. 244.

Wisconsin.—*Holum v. Chicago, M. & St. P. Ry. Co.*, 80 Wis. 299, 50 N. W. 99.

2. Statements and Illustrations of General Rule.

In *Sheets v. Chicago & I. Coal Ry. Co.*, 139 Ind. 682, 39 N. E. 154, it is said in the opinion: "It is held generally that the operation of a railroad without blocking its frogs is not, as a matter of law, negligence. *Railway Co. v. Lewis*, 24 Neb. 848, 40 N. W. 401; *Hewitt v. Railroad Co.*, 67 Mich. 61, 34 N. W. 659."

Notes

Missouri Pac. Ry. Co. v. Lewis, 24 Neb. 848, 40 N. W. 401, it was held that the construction and operation of a railroad without blocking frogs and switches is not negligence per se, of which a court will take judicial notice merely upon proof of the fact of such construction and operation, and failure to block the frogs and switches.

The employer is not bound to make use of the newest mechanical appliances for the purpose of insuring the safety of his employees, especially where it does not appear that on the whole it would be advantageous to do so. So, a railway company is not bound to block its frogs, particularly where it does not appear that in doing so it would not entail greater expense than it would avert. So held in *McGinnis v. Canada Southern Ry. Co.*, 49 Mich. 466, 13 N. W. 819, 8 Am. & Eng. R. Cas. 135.

In an action for damages brought against a railroad company for injury sustained by its negligence, and the only negligence upon which the plaintiff bases his right of recovery against defendant, is that the switch at the junction in which plaintiff's feet were caught was unblocked; where it is apparent from the evidence that unblocked switches have been in use on the various railroads all over the country, and it is a fair inference that the blocking of switches is yet an experiment,—the failure to use a new device for blocking does not render the company liable for injury occasioned thereby. So held in *Chicago, Rock Island & Pacific R. Co. v. Londergan* (Ill.), 28 Am. R. Cas. 491.

It is not enough to prove that, in the opinion of witnesses, blocked switches are safer for the employee, as the law does not require the employer to furnish absolutely safe machinery, or the most approved pattern; the company is only required to furnish that which is reasonable and proper for the purpose for which it is constructed. So held in *Chicago, Rock Island & Pacific R. Co. v. Londergan*, supra. In this case it is said in the opinion: "The fact that a few of the railroads of the country have adopted the new device, or that the defendant has used it on a part of its road, is not enough to establish its negligence and establish negligence in every other road that adheres to the old system. The old system of constructing switches must be condemned, where it appears that unblocked switches are unfit for the purpose for which they are constructed. It is not enough to prove that, in the opinion of witnesses, blocked switches are safer for the employee, as the law does not require the employer to furnish absolutely safe machinery, or the most approved pattern; he is only required to furnish that which is reasonable and proper for the purpose for which it is constructed."

In *Patrick v. Choctaw, etc., R. Co.* (Ind. Terr.), 23 Am. & Eng. R. Cas. 244, 64 S. W. 560, it was held that where the sole issue in an action for an employee's death is whether or not the company's failure to block a frog was negligence, and the larger number of witnesses testify that the unblocked frog is not more dangerous than the blocked frog, and is most largely used by railroads, and some roads using the blocked frog have changed to the unblocked, the court may properly render a verdict for the company.

In *Platt v. New York Cent. & H. R. R. Co.*, 67 Hun 196, 22 N. Y. Supp. 100, it was held that where the plaintiff's intestate, a brakeman in defendant railroad company's employ, was killed by an engine by reason of his foot being caught in a switch at the track. He had been in defendant's employ for several years, and knew that the larger portion of the frogs on defendant's tracks were not provided with blocks; he had been employed around the frog at which the accident occurred for over an hour, and with slight vigilance could have seen that it was not blocked. It was held, that in the absence of evidence that blocks were in general use on defendant's tracks, or on those of other roads, the failure of defendant to provide a block for the frog at which the accident occurred was not negligence. So held in *Platt v. New York Cent. & H. R. R. Co.*, 67 Hun 196, 22 N. Y. Supp. 100. In this case, it is said in the opinion: "While a court might perhaps take judicial notice that frogs on a railroad constitute an element of danger to persons walking over them, it cannot, we think, assume that the mere operation of a railroad without blocking all the frogs on

Notes

its line constitutes negligence. Therefore, in the absence of proof that such blocking was necessary, or at least proper, or in general use upon other roads, neither a court nor a jury would be justified in finding that such an omission constituted negligence which would entitle an employee to recover for injuries sustained by having caught his foot in a frog. There is nothing in the evidence, or in the construction of a frog, which would justify a jury in finding that it was an unsafe or dangerous appliance, when properly located and properly used, or that it was not reasonably safe for the purpose for which it was designated."

In *Hamilton v. Rich Hill Coal Min. Co.*, 108 Mo. 364, 18 S. W. 977, it was held that whether or not a coal company operating a spur railroad and switching tracks at its coal mines was negligent in failing to block the rails is a question for the jury.

In *Richmond & D. R. Co. v. Risdon*, 87 Va. 335, 12 S. E. 786, 48 Am. & Eng. R. Cas. 244, it was held that it could not be said that a railroad company is guilty of negligence as to a brakeman employed in its switch yard in maintaining unblocked standard frogs at switch intersections in such yard.

In *Holum v. Chicago, M. & St. P. Ry. Co.*, 80 Wis. 299, 50 N. W. 99, it is said in the opinion: "Counsel for the plaintiff contends that it was negligence per se in the defendant to thus leave the frog unblocked and unguarded; and that such negligence made the defendant absolutely liable, regardless of the contributory negligence on the part of the deceased. Counsel cites no decision or authority for the existence of such a rule at common law. We are not aware that such a question has ever been presented to this court, notwithstanding the accidents which have happened by reason of the foot being thus caught in a frog.

3. Custom and Usage.

In *Southern Pac. Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530, reversing 23 Pac. 751, it is held that it is not negligence to use unblocked frogs in a railroad freight yard, whereby the feet of employees coupling cars are liable to be caught, it appearing that unblocked frogs are generally used in the same section of the country, and that it is doubtful whether they are not the better kind.

In an action for the death of a switchman, the negligence charged against the company was a failure to put the rails further apart, and a failure to block a switch. The evidence showed that the construction was reasonably safe, and the one in ordinary use. It was held that the company was not liable. *Chicago, B. & Q. R. Co. v. Smith*, 18 Ill. App. 119.

In an action for causing the death of a brakeman, the negligence charged against the company was a failure to block a frog, in which the brakeman caught his foot and was run over and killed. There was evidence that some of the frogs on the road were blocked, but none at the place where the accident occurred; and there was no evidence that the blocking of frogs was a general practice on railroads. The accident happened in the daytime, and the brakeman knew of the condition of the frog. It was held that a nonsuit should have been granted. *Spencer v. New York, C. & H. R. R. Co.*, 51 N. Y. S. R. 386, 67 Hun 196, 22 N. Y. Supp. 100.

A brakeman was killed by catching his foot between a guard rail and the main track. It appeared that the guard rail was the T-rail, which answered the purpose of the company equally well, and was the one in general use; but there was evidence that the U-rail was safer for employees. It was held that the company was not guilty of such negligence in using the kind of rail that it did, as to render it liable. *Smith v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 32.

4. During Construction.

A railroad company which is constructing new switches does not owe the duty to a brakeman of blocking a frog, which is a part of the new construction, during the progress of the work; it being impracticable to block it till the tracks are ballasted and the alignment of the rails of the frog is perfected. Giving him such notice and warning as will put

Notes

him on his guard against the dangers from use of the track while the work is in progress is enough. So held in *Hauss v. Lake Erie & W. R. Co.* (C. C. A.), 105 Fed. 733, 22 Am. & Eng. R. Cas., N. S., 864.

5. Injury to Arm.

Where plaintiff's arm was caught and crushed between the guard rail and the main rail, the failure of defendant to block the guard rail should not be submitted to the jury as a ground for recovery, since blocking is only intended to prevent feet from being caught. So held in *Rutledge v. Missouri Pac. Ry. Co.*, 110 Mo. 312, 19 S. W. 38.

6. Failure to Repair.

In *Hunt v. Kane* (C. C. A.), 100 Fed. 256, it was held that the rule that a railroad company is not guilty of negligence in failing to block the frogs in its switch yards, which renders it liable for an injury to a switchman working in such yards who has knowledge that no blocking is used, is not applicable in a case where a company undertakes to maintain blocking, but allows it to become defective, and a switchman is injured because of its defective condition.

In *Curtis v. Chicago & N. W. Ry. Co.* (Wis.), 70 N. W. 665, an action for the death of a switchman, caused by the insufficient blocking of a guard rail, whereby his foot was caught, it was held that the court properly refused to take the case from the jury, where there was evidence that defendant was guilty of negligence in respect to properly blocking the guard rail, and there was no ground on which it could be held, as a matter of law, that deceased assumed the risk, or was guilty of contributory negligence.

II. DECISIONS LIMITING OR OPPOSING COMMON-LAW RULE.

1. Evidence of Negligence.

In *Missouri Pac. R. Co. v. Baxter* (Neb.), 60 N. W. 1045, it is said in the opinion: "We have no doubt but that the failure of the railway company to block its guard rails is an evidence of negligence on its part; and, if this were a suit by a passenger of this railway company for injuries such passenger had sustained by reason of such default on the part of the railway company, it might be liable. But this is not the case before us. If this were a suit by one not a passenger and not an employee of the company, who had been injured by reason of the default of the railway company to block its guard rail, such failure of the railway company might be evidence of negligence on its part. But this is not the case before us. The question with which we have to deal is this: Assuming that the railway company was guilty of negligence in not blocking its guard rail, we must assume, because of the want of averments in the petition to the contrary, that Baxter actually knew at the time he entered the company's service, and while he was in its service that the guard rails were unblocked; that he continued in the service of the railway company without any promise on its part to block its guard rails; that he was not inexperienced; that he was not unacquainted with the condition of the guard rail where he was injured; and that, therefore, he assumed, by continuing in the service of the railway company, the risk of being injured by reason of these guard rails being unblocked."

In *Sherman v. Chicago, M. & St. P. Ry. Co.*, 34 Minn. 259, 25 N. W. 593, it is said in the opinion: "The evidence in this case is such as to sustain a finding that the defendant was negligent in not having protected the frog or space between the main rail and the guard rail, where the deceased was killed. Such places unprotected are places of very great danger, especially to men employed in coupling or uncoupling cars, and it is the duty of a railroad company to guard its employees against the danger, if there be reasonably practical means for doing so known to it, or which, in the use of proper diligence, intelligence, and care, may be known to it; and the evidence for the plaintiff clearly indicates devices which the jury might find to have been practicable, and reasonably adequate and inexpensive, and known, or which ought to have been known, to defendant, and which, as to this particular frog, it had omitted.

Notes

2. Negligence—Stations.

In *Seley v. Southern Pac. R. Co.*, 6 Utah 319, 23 Pac. 751, it is held that it is negligence to use, at a station where there are several tracks, and where the couplings are required to be made promptly, open instead of blocked frogs, whereby the feet of the employees making couplings are liable to be caught. In this case it is said in the opinion: "It appears from the evidence that blocked or cast-iron frogs are used in many tracks. In these the point of the space between the rails is filled with wood or other material, so that the foot will not be held. This block is a simple device, practicable and inexpensive, and prevents the danger. It is called a 'safety block.' There were six or seven tracks at Wells, and three frogs, and at such a place couplings are required to be made promptly, at all times of the day and night, and the exclusive attention is necessarily directed to the coupling. The individual, at such times, cannot act with deliberation, and his eye, as well as his attention, is necessarily drawn to the coupling. Open frogs, in which the foot is liable to be caught, and from which a release is difficult without more time than a man has when making a coupling, necessarily add to his hazards. The safety block has been in use for years past. It is a simple device for the protection of employees engaged in a very hazardous employment. It is no longer an experiment. It is said that the employer is not bound to employ the latest improvements in machinery; that he is only required to see that the instrumentalities he does use are safe and suitable. An old machine or device may have been considered safe and suitable, as compared with old machines or devices, but, as compared with newer and more perfect ones, it may not be considered safe or suitable; for the human mind is ever engaged with new inventions, and human ingenuity, with wider experience, additional skill, and with ceaseless energy, removes old impediments and dangers in perfecting the old, as well as by inventing the new. While a railway company is not required to experiment with novel inventions alleged to be safer and more suitable, yet, when experience has demonstrated that their use does remove hazard, and preserves the lives of their employees engaged in dangerous employments, prudence, as well as humanity, demands that such new agencies shall be used. Such companies have no right to continue to employ such dangerous and destructive agencies as wound and kill their employees, when safer and better ones are in use. We are of the opinion that the appellant was guilty of negligence in using the open frog."

3. Same—Terminal Points or Yards.

In *Richmond & D. R. R. Co. v. Risdon's Adm'r*, 87 Va. 335, 12 S. E. 786, Lewis, P., dissenting, said: "That the 'frogs' were dangerous is not disputed. But it is contended that they were of the standard pattern, and that that fact of itself repels the imputation of negligence. From this view I dissent. If a standard frog, unguarded and situated, as this one was, in a place where there are many tracks, and where cars are shifted at all hours of the day and night, is not reasonably safe, then the company, in allowing it to remain unguarded, was guilty of negligence, and the jury rightly so found. Nor upon this point are we left to inference. The expert evidence for the plaintiff is conclusive that the dangerous condition of the frogs could easily have been guarded against by the device of 'filling' them with cinders, which simple and inexpensive method renders them safe to those whose duties call them upon the track, and at the same time does not interfere with their ordinary use. The witness, Perry, who for a number of years was in the employ of the defendant company as roadmaster, testifies that at terminal points, or in yards where much shifting is done, the frogs ought always to be filled, as a protection to switchmen, and this is so well understood, he says, that the laws of some states expressly require it to be done. And why should they not be filled? Why should the servant be exposed to unnecessary risks that can so easily be guarded against?"

Notes

III. STATUTORY REQUIREMENTS.

1. In General.

In those jurisdictions where such statutes are in force, it is held that a railroad company is guilty of actionable negligence in permitting a frog or guard rail required by statute to be filled or blocked, to remain unblocked or unfilled, provided the company is chargeable with notice of such noncompliance with the statutory requirement. *Cincinnati, H. & D. R. Co. v. Van Horne*, 37 U. S. App. 262, 69 Fed. 139; *Grant v. Michigan Cent. R. Co.*, 83 Mich. 564, 48 Am. & Eng. R. Cas. 383; *Ashman v. Flint & P. M. R. Co.*, 90 Mich. 567, 53 Am. & Eng. R. Cas. 80, 51 N. W. 645; *Craig v. Lake Erie & W. R. Co.*, 35 Ohio L. 15; *Pittsburgh, etc., R. Co. v. Burroughs*, 6 Ohio N. P. 39, 9 Ohio Dec. 324; *Le May v. Canadian Pac. R. Co.*, 17 Ont. App. 293.

In *Ashman v. Flint & P. M. R. Co.*, 90 Mich. 567, 51 N. W. 645, 53 Am. & Eng. R. Cas. 80, it was held that a railroad company is guilty of actionable negligence in knowingly permitting a frog required by the statute to be filled or blocked, to remain unblocked or unfilled, or in permitting it so to remain for such a length of time as to raise a legal presumption of knowledge or neglect of duty on its part; and in either case the company is liable to an employee who, without fault on his part, catches his foot in an open frog, and is thereby injured.

In *Grant v. Michigan Cent. R. Co.*, 83 Mich. 564, 47 N. W. 837, 48 Am. & Eng. R. Cas. 383, it was held that the failure of a railroad company to comply with the provisions of the statute of Michigan requiring that frogs, guard rails, etc., be blocked will render it liable to an employee who is thereby injured, in a case where the law applies, if he is not himself guilty of negligence.

In *Ashman v. Flint & Pere Marquette R. Co.*, 90 Mich. 567, 53 Am. & Eng. R. Cas. 80, 51 N. W. 645, it was held that, under a statute requiring railroad companies to fill or block frogs in their tracks, so as to prevent the feet of employees from catching, it is the duty of a railroad company to keep its yard reasonably safe in this respect. The company cannot delegate this duty to any of its employees so as to relieve itself from the obligation, and the persons to whom this duty is intrusted stand in place of the company, and their negligence is its negligence.

Under Laws 1883 of Michigan, Pit. 191, it is the duty of a railroad company not only to employ men to perform the work of blocking its frogs, and furnish the necessary material for that purpose, but it must also see that the men so employed are not negligent in performing their work. *Ashman v. Flint & P. M. R. Co.*, 90 Mich. 567, 51 N. W. 645, 53 Am. & Eng. R. Cas. 80.

2. Application of Statute—Split Switches—Quære.

Whether Mich. Act No. 174, Laws of 1883, p. 191 (3 How. St. § 3397a), requiring railroad companies so to adjust, fill, or block the frogs, switches, and guard rails on their roads so as to prevent the feet of employees from being caught therein, applies to "split switches," so called, which were not in use at the time of the passage of said act, quære. *Grand v. Michigan C. R. Co.*, 83 Mich. 564, 47 N. W. 837, 48 Am. & Eng. R. Cas. 383.

3. Same—Receivership.

In *Atkyn v. Wabash Ry. Co.*, 41 Fed. (C. C.) 194, it is said in the opinion: "Now, the intervening petition avers that John Ward came to his death through the negligence of this railroad company, while in the hands of the receiver, operating it under the jurisdiction of that court which sent these issues to us, but nevertheless bound to comply with an act of the legislature of Ohio passed on the 23d day of March, 1888, which I shall now read to you: 'An act for the protection of railroad employees. Section 1. Be it enacted by the general assembly of the state of Ohio, that every railroad corporation operating a railroad, or part of a railroad, in this state, shall, before the first day of October, in the year 1888, adjust, fill, or block the frogs, switches,

Notes

and guard rails on its tracks, with the exception of guard rails on bridges, so as to prevent the feet of its employees from being caught therein. The work shall be done to the satisfaction of the railroad commissioner. Section 2. Any railroad corporation failing to comply with the provision of this act shall be punished by a fine of not less than one hundred dollars, nor more than one thousand dollars. Section 3. This act shall take effect on its passage.' Possibly, this act of the legislature of the state of Ohio is only a declaration of that which the law would require of a railroad company if we had no such act, because there is no question that a railroad company owes to its employees the duty of furnishing them that kind of machinery, and that kind of track, and that kind of tools with which their work is to be done, that shall be reasonably safe for them, in the exercise of their duty to the company. It is not a requirement of the common law that they shall do any specific and particular thing. It is a requirement that they shall do that which reasonable and prudent masters ought to do in the discharge of their duty to their servants, under the circumstances. In other words, the law of master and servant applies to railroad companies, and requires that they shall, in the tools and instruments they furnish to their laborers, see that they are reasonable appliances of safety and prudence. On the other hand, he who works for a railroad company knows he is engaged in a hazardous employment, and is presumed to know the ordinary risks of that employment, which he incurs. The obligation and the responsibility, as you see, are mutual on the part of each towards the other. The legislature of the state of Ohio, in the exercise of its authority, had the undoubted right to prescribe regulations for the conduct of railroads in the state of Ohio, and that it was the duty of this company to obey the statute there is no doubt. It does not mean that the railroad companies shall block their guard rails in such a manner as to destroy their efficiency. It does not mean that they shall protect the employees at the hazard of injuring the operation of the railroad, and destroying the usefulness of the track. It simply means that the railroad company shall block and fill them in such a way as will protect the feet of employees from being caught therein, and at the same time imposes no unnecessary or unreasonable impairment of the function of the particular guard rail or frog itself."

4. Same—Employers' Liability Act—Who Are Employees.

In *Atkyn v. Wabash R. Co.*, 41 Fed. 193, it was held that where two railway companies have an arrangement by which they receive cars over a delivery track at a certain point, a person employed by one of them to take the number of its cars and inspect the seals as trains are made up at such place by the other, is an employee of the latter within the meaning of the Ohio act of March 23, 1888, for the protection of railroad employees, which requires every railroad in the state "to adjust, fill, or block the frogs, switches and car rails on its track * * * so as to prevent the feet of its employees being caught therein."

5. Same—Injury to Employee of Another Company.

In *Turner v. Boston & M. R. Co.*, 158 Mass. 261, 13 N. E. 520, it was held that if an employee of a railroad corporation is injured by having his foot caught in a frog in the track of another railroad corporation, while engaged in delivering a car to the latter upon its tracks in the regular course of business between the two corporations, it is a question for the jury, in an action against the last-named corporation for the injury, whether the defendant was negligent in leaving the frogs unblocked, there being evidence that the defendant had assumed the duty of blocking all the frogs, and keeping them blocked, for the safety of its own employees, as required by Mass. St. of 1886, ch. 120.

6. Same.

A servant of a railroad company is a "person" within the meaning of 51 Vict. c. 29, § 239 (D), and as such is entitled to recover damages if injured by the negligence of his employers in omitting to comply

Notes

with the provisions of section 262, by packing frogs as therein directed. So held in *Le May v. Canadian Pac. R. Co.*, 17 Ont. App. 293, 44 Am. & Eng. R. Cas. 627, affirming 18 Ont. 314.

7. Same.

A failure to comply with the Ohio act of March 23, 1888, requiring railroad companies to block frogs, etc., does not give an injured employee a right of action against the company because his foot is caught in a rail, where it appears that the accident would have happened if the statute had been complied with. *Atkyn v. Wabash R. Co.*, 41 Fed. 193, 23 Ohio L. J. 151.

8. Assumption of Risk.

In *Grant v. Michigan Cent. R. Co.*, 83 Mich. 564, 47 N. W. 837, it is said: "Notwithstanding the statute (Pub. Acts, Mich. 1883, p. 191) requiring all railroad companies to fill or block the frogs, switches and guard rails, there can be no recovery for the death of a brakeman, who, while voluntarily attempting to uncouple moving cars, gets his foot caught in an unblocked 'split switch,' when it appears that he had been several years in the employ of the company, was familiar with the switches and track where the accident occurred, had been warned by the written rules of the company, which he had read, not to enter between the cars in motion to couple or uncouple them, and had signed an acknowledgment when he became brakeman that he knew the duties were dangerous, and that he had read the rules by which he would be governed."

9. Same—Noncompliance with Statute—Public Policy.

In *Narramore v. Cleveland, C., C. & St. L. Ry. Co.*, 96 Fed. 298, it is held that the purpose of the Ohio act of March 23, 1888 (85 Ohio Laws. p. 105), requiring railroad companies to block the frogs, switches, and guard rails on their tracks, under penalty of a fine, was to protect employees of such companies from a well-known danger of their service, the risk from which, from the nature of their employment, they were compelled to assume; and although an employee impliedly waives a compliance with the statute, and agrees to assume the risk from unblocked switches and guard rails, by continuing in the service without complaint, a court will not recognize or enforce such agreement. The imposition of a penalty for a violation of the statute does not exclude other means of enforcement; and to permit a company to avail itself of such an assumption of risk by its employees is, in effect, to enable it to nullify a penal statute, and is against public policy. The assumption of risk by the employee, however, which is a matter of contract, is not to be confused with contributory negligence.

10. Reasonable Time for Compliance with Statute.

In *Gillin v. Patten & S. R. Co. (Me.)*, 16 Am. & Eng. R. Cas., N. S., 508, it was held that St. 1889, c. 216, requiring each railroad company to fill or block the frogs and guard rails on its track before January 1, 1890, does not require a railroad company, organized and constructing its railroad after that date, to fill or block its frogs and guard rails before allowing trains to be operated over its tracks. Such company is entitled to a reasonable time for compliance with that statute.

IV. ASSUMPTION OF RISK.

1. General Rule.

It may be stated, as a general rule, that a person who enters the services of a railroad company and remains in it without complaint, after he is aware that the frogs and guard rails in use are unblocked, assumes the risk arising from such construction. *Southern Pac. Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530; *Narramore v. Cleveland, C., C. & St. L. Ry. Co.*, 96 Fed. 298; *St. Louis, I. M. & S. R. Co. v. Davis*, 55 Ark. 462, 18 S. W. 628, 54 Ark. 389, 15 S. W. 895; *Chicago, B. & Q. R. Co. v. Smith*, 18 Ill. App. 119; *Lake Shore & M. S. R. Co. v. McCormick*, 74 Ind. 440; *Sheets v. Chicago & I. Coal Ry. Co.*, 139 Ind. 682, 39 N. E. 154; *Ames v. Lake Shore & M. S. R. Co.*, 135 Ind. 363, 35 N. E. 117; *Burlington, C. R. & N. R. Co. v. Coates (Iowa)*, 15 Am. & Eng. R. Cas.

Notes

265; *Mayes v. Chicago, R. I. & P. R. Co.*, 63 Iowa 562, 14 N. W. 340, 19 N. W. 680; *Rush v. Missouri Pac. Ry. Co.*, 36 Kan. 129, 12 Pac. 583; *McGinnis v. Canada Southern Bridge Co.*, 49 Mich. 466, 13 N. W. 819, 8 Am. & Eng. R. Cas. 135; *Spencer v. New York, C. & H. R. R. Co.*, 67 Hun 196, 22 N. Y. Supp. 100; *Ireland v. Gardner*, 7 N. Y. Supp. 608; *Appel v. Buffalo, N. Y. & P. R. Co.*, 111 N. Y. 550, 19 N. E. 93.

2. Statements and Illustrations of General Rule.

In an action against a railroad company for the death of the manager of a switch engine in defendant's yard, where he had been employed for two years, caused by the absence of a block between the rails abutting on a "stub switch," the complaint alleged that the switch had not been blocked for five days before deceased was killed; that he was free from negligence, and "did not then know the switch was not blocked." It was held that the complaint was insufficient, in that it failed to show that deceased did not know of the absence of the block previous to the hour of his death, since, if he had such knowledge, he assumed the risk incident to such absence. *Ames v. Lake Shore & Michigan Southern Ry. Co.*, 135 Ind. 363, 35 N. E. 117.

In *Narramore v. Cleveland, C., C. & St. L. Ry. Co.*, 96 Fed. 298, it is held that in the absence of statutory provision, a switchman employed in the yards of a railroad company assumes the risk incident to unblocked switches and guard rails, where, in general, there are no blocks used in such yards, and the servant has been employed therein for such a length of time that in the exercise of ordinary observation he must have known such fact. In this case, it is said in the opinion: "He (the plaintiff) could only have been ignorant of the admitted policy of the defendant in respect to blocks through the grossest failure of the duty on his part in a matter that much concerned his personal safety and the proper operation of the road. In such a case the authorities leave no doubt that the servant assumes the risk of the absence of the blocks, and the employer cannot be charged with actionable negligence towards him. *Railway Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530; *Appel v. Railway Co.*, 111 N. Y. 550, 19 N. E. 93; *Railway Co. v. Risdon's Adm'r*, 587 Va. 335, 359, 12 S. E. 786; *Wood v. Locke*, 147 Mass. 604, 18 N. E. 578; *Railway Co. v. McCormick*, 74 Ind. 440; *Railway Co. v. Ray* (Ind. Sup.), 51 N. E. 920; *Rush v. Railway Co.*, 36 Kan. 129, 12 Pac. 582; *Mayes v. Railway Co.*, 63 Iowa 562, 14 N. W. 340, 19 N. W. 680; *Wilson v. Railway Co.*, 137 Minn. 326, 33 N. W. 908; *Railway Co. v. Baxter*, 42 Neb. 793, 60 N. W. 1044; *Railway Co. v. Davis*, 54 Ark. 389, 15 S. W. 895."

In *St. Louis, I. M. & S. Ry. Co. v. Davis*, 34 Ark. 389, 15 S. W. 895, it is held that when an experienced brakeman enters the service of a railroad knowing that its frogs are not blocked, he assumes the risks resulting therefrom, and whether the company would have promoted the safety of its servants by blocking the frogs, and whether the duty of reasonable care exacted this were questions which could not affect the result.

In *Sheets v. Chicago & I. Coal Ry. Co.*, 139 Ind. 682, 39 N. E. 154, it was held that where none of the frogs at any of the switches on a railroad are blocked, no recovery can be had by a brakeman, experienced on that road, for injuries suffered from having his foot caught in one of them.

In an action by a brakeman for an injury received while coupling cars, by his foot being caught in a dangerously constructed frog at a switch, the jury found especially that the switches and frogs of the road were in the same condition during all the time plaintiff was in the employ of defendant, and that they were of the same kind as those used on the principal railroads of the country; that plaintiff had full opportunity to acquire a knowledge of the condition of all the switches and frogs on the road; that he did not use any care to ascertain the condition of the frogs and switches at the place where the injury occurred; that while walking on the track behind a moving car his foot was caught in one of the frogs; that the printed rules of the company forbid brakemen to go between the cars in motion to couple them, and forbid coupling by hand in all cases where a stick could be used; that

Notes

in consideration of employment by the defendant, plaintiff agreed to obey said rules; that under the circumstances, plaintiff used proper care to avoid injury to himself. It was held that defendant was not liable. *Lake Shore & M. S. R. Co. v. McCormick*, 74 Ind. 440, 5 Am. & Eng. R. Cas. 474.

A railroad brakeman, a part of whose duty it was to couple cars upon tracks known by him to be unblocked and dangerous, while so engaged caught his foot in an unblocked guard rail, and was killed. His administratrix sued the railway company for damages, alleging that its failure to block the guard rails was negligence which caused her intestate's death. The petition did not allege that the deceased was inexperienced when he entered the employ of the railway company; that he was ignorant, at the time he entered the service of the company, that the guard rails of its main track were unblocked; that he did not know that the guard rail was unblocked at which he was killed; that he remained in the service of the company relying upon a promise made by it to block its guard rails; nor that guard rails blocked were less dangerous than those unblocked. It was held that the petition did not contain averments of facts which negated the presumption of law that the injury received by the deceased was one of the risks which he assumed by virtue of his employment, and therefore did not state a cause of action. *Missouri Pac. R. Co. v. Baxter* (Neb.), 60 N. W. 1044.

In *Clegg v. Grand Trunk R. Co.*, 10 Ontario Rep. 708, an action for damages under 44 Vic. ch. 22 (O.), by reason of the omission to pack a frog on the Midland Railroad which the defendants were operating, whereby decedent's foot was caught in the frog and he was killed by a train, it was held that the omission to state in the statement of claim, as required by subsec. 2 of sec. 8 of said Ontario Act, and to prove, that the defendants knew that the frog was not packed, or that the deceased did not know it, or that he had notified the defendants or any person superior to himself in the service of the defendants, or that such person was not aware thereof, would preclude any recovery.

Where a railway was constructed without blocking between main rails and guard rails, and a competent railroad man was employed to work in one of the company's yards as yard switchman, and in such yard there were many switches and about twenty guard rails, and the employee voluntarily and without complaint does switching in such yard every day for about two and one-half months, when he stepped between the main rail and the guard rail of one of the company's railway tracks, and because thereof receives injury, it was held that the condition of the railway tracks and the danger must have been known to the employee, and therefore that he assumed the risk; that he waived any negligence that might otherwise be imputable to the railway company; that, as between the railway company and himself, the railway company could not be charged with culpable negligence, for the reason that one party cannot be guilty of culpable negligence as towards another party unless the first party is guilty of some breach of duty as towards the other party; and that all these questions, as presented in this case, are questions of law for the court, and not questions of fact for the jury. *Rush v. Missouri Pac. Ry. Co.*, 36 Kan. 129, 12 Pac. 582.

In *Smith v. St. Louis, Kansas City & Northern R. Co.*, 69 Mo. 32, it was held that a brakeman who continues in the service of a railroad company with knowledge that the guard of a switch is made of a T-rail, cannot recover for injuries sustained in consequence of his foot being caught between the guard and the frog, notwithstanding it may appear that if the guard had been made of a different rail it would have been less dangerous.

A brakeman who has been more than a year in the employ of a railroad company assumes the risk incident to the fact that some of the guard rails in the company's switch yards are not blocked, so as to prevent an employee's foot from being caught between the guard rail and the main rail; and the company is not liable for his death, caused by failure to block such guard rails. *Appel v. Railroad Co.*, 111 N. Y. 550, 19 N. E. 93.

Notes

A switchman while uncoupling moving cars, caught his foot in a frog and was run over and killed. The evidence showed that some guard rails on the road were blocked, and some not. It was held that defendant was not liable for failure to block the frog; that the switchman assumed such risks of the employment. *McNeil v. New York, L. E. & W. R. Co.*, 54 N. Y. S. R. 201.

In *Ireland v. Gardner*, 7 N. Y. Supp. 608, it was held that where a car coupler has for some time been employed in a railroad yard, it is error to submit to the jury the question whether the danger of having his foot caught in an unblocked guard rail is so apparent and obvious that he is chargeable with notice of its existence, although he had been at work only three or four days in that part of the yard where the injury occurred.

In *Richmond & D. R. Co. v. Risdon's Adm'r*, 87 Va. 335, 12 S. E. 786, it was held that a railroad company is not liable for the death of an employee caused by his foot being caught in an open frog, if it is of the standard sort, though it is the only frog in the yard not blocked, if the employee has been working over it for a long time, and had an opportunity to become familiar with its character.

In *Mays v. Chicago, R. I. & P. R. Co.*, 63 Iowa 562, 19 N. W. 680, it is said in the opinion: "The intestate had been at work for six weeks over this track. He must be presumed to have known that the space between the rails was not blocked, and that the openings between the guard rails and in frogs are dangerous to brakemen while engaged in coupling and uncoupling cars. This is a fact which is as patent as that a hole in the track between the rails is dangerous."

A brakeman who has worked as sectionman and brakeman for two years on a railroad where the frogs and guard rails were not filled or blocked, must be presumed to appreciate the danger of getting his foot caught in such frogs and guard rails while stepping about and over them, and to have assumed the risk. *Gillin v. Patten & S. R. Co. (Me.)*, 16 Am. & Eng. R. Cas., N. S., 508.

8. Limitations of and Exceptions to General Rule.

It was not necessary that a freight conductor, killed by catching his foot in an open frog while making a coupling, should have given the company notice of danger from open frogs, nor did he assume the risk of danger therefrom by continuing in his employment after knowing that a safety block would have removed its perils. *Seley v. Southern Pac. R. Co.*, 6 Utah 319, 23 Pac. 751.

In *Huhn v. Missouri Pac. R. Co.*, 92 Mo. 440, 4 S. W. 937, 31 Am. & Eng. R. Cas. 221, it was held that an unblocked guard rail is not an appliance so dangerous as to threaten immediate injury to those who work about it, and the fact that a yard-master knew that the rail was not blocked, and continued to pursue his employment of cutting out cars on that track, will not defeat a recovery on the part of his representatives, when, at the time he got his foot caught and was run down, he was in the exercise of all due care and proper caution.

In *Hunt v. Kane (C. C. A.)*, 100 Fed. 256, it was held that an extra hand employed in railroad switch yards, who worked in different yards, where there were many switches, and in which men were continually employed in making repairs, cannot be charged, as matter of law, with knowledge of the defective condition of the blocking of a particular switch in one of such yards, which he was required to use in the nighttime, by reason of which defect he was injured, although it had existed for some time, and was obvious in the daytime.

V. CONTRIBUTORY NEGLIGENCE.

I. Common Law.

Leaving a frog in its tracks unguarded is not such negligence on the part of a railroad company as will, at common law, render it absolutely liable for injuries resulting therefrom, regardless of the contributory negligence of the person injured. *Holum v. Chicago, M. & St. P. R. Co.*, 80 Wis. 299, 50 N. W. 99.

Yazoo & M. V. R. Co. v. Adams

A brakeman, having occasion to work as brakeman on the trains of his employer while passing over another railroad, just constructed, cannot rightfully assume that the frogs and guard rails of the new railroad are filled or blocked, and hence dismiss all thought of them from his mind. *Gillin v. Patten & S. R. Co. (Me.)*, 16 Am. & Eng. R. Cas., N. S., 508.

2. Failure of Railroad to Comply with Statute.

Wis. Laws of 1889, ch. 123, requiring every railroad company to erect and maintain guards or blocks at every frog, and providing that the company shall be liable for all damages sustained by reason of its failure to do so, whether the person injured be an agent or servant of the company or not, and notwithstanding such failure may occur through the negligence of any other agent or servant thereof, does not take away the defense of contributory negligence. *Holum v. Chicago, M. & St. P. R. Co.*, 80 Wis. 299, 50 N. W. 99; *Lake Erie & W. Ry. Co. v. Craig*, 73 Fed. 642, 19 C. C. A. 631, 37 U. S. App. 654; *Grant v. Michigan Cent. R. Co.*, 83 Mich. 564, 47 N. W. 837, 11 L. R. A. 402.

In *Gillin v. Patten & S. R. Co. (Me.)*, 16 Am. & Eng. R. Cas., N. S., 508, it was held that for a brakeman, who has worked as sectionman and brakeman for two years on a railroad where the frogs and guard rails were not blocked to move about over frogs and switches while coupling and uncoupling cars, even in moving train without taking any thought of the frogs and guard rails, or as to where he may be stepping, is negligence on his part contributing to the catching his foot in them.

A. R. Y.

YAZOO & M. V. R. Co. *et al.* v. ADAMS, Revenue Agent.

(*Supreme Court of Mississippi, Nov. 18, 1902.*)

[32 So. Rep. 937.]

Taxation—Removal to Federal Court.

A bill seeking to subject railroad property to state taxes, and in which the cause of action is based solely on state laws, is not removable to the federal courts, though it may suggestively state defenses involving federal questions which may be interposed by the company.

Same—Exemptions—Jurisdictions—Res Adjudicata.

Const. 1890, § 112, authorizes the legislature to provide for a special mode of assessment of railroad property. Code 1892, § 3875, provides that, if any property is "claimed by a railroad company to be exempt," it shall be separately listed by the company in its schedule submitted to the railroad commissioners. Section 3876 provides that the commissioners, on the failure of a company to make the schedule, shall make it out from the best information obtainable. Section 3877 provides that the members of the commission, who are also made railroad assessors, shall assess all railroad property "liable to taxation." Section 3678 provides that the assessor need not be bound by a false or fraudulent schedule, but may make out a new one, on giving notice to the company, served and returned as a summons: *held*, that the board of railroad assessors has no jurisdiction to determine questions of exemption, so as to render them res adjudicata.

Jurisdiction.

Const. 1890, § 146, defines the jurisdiction of the supreme court as such jurisdiction "as properly belongs to a court of appeals." Code 1892, § 4350, provides that the supreme court may determine all issues of fact arising out of an appeal and necessary to its disposition. Section 4353 gives it power, in case of reversal, to render such judgment as should have been rendered below. In a certain action the cause was submitted and judgment rendered on the merits, but the judge based his judgment on certain legal principles, and especially declined to pass on other questions, on a determination of which the

Yazoo & M. V. R. Co. v. Adams

same judgment might have been based: *held*, that the supreme court might nevertheless affirm the judgment on these grounds.

Assignments of Error.

An appellee is not restricted to the examination of error contained in the assignment of errors.

Taxation—Exemption—Pleading.

Code 1892, § 540, provides that no replication to an answer is required in chancery. An answer to a bill which sought to have certain railroad property subjected to the payment of taxes set forth that the roads were constructed by companies having charters containing certain exemption privileges: *held*, that an issue was raised, without any replication, to which evidence was referable, showing what company constructed the road.

Same—Res Adjudicata—Stare Decisis.

Though an action to subject the property of a railroad to back taxes for certain years may involve some of the same legal questions, and be in regard to the same property, as a previously adjudicated litigation between the same parties in regard to taxes for other years, the principles involved are not *res adjudicata*, but only invite the application of *stare decisis*.

Taxation—Exemptions—Constitutional Law.

Under Const. 1869, art. 12, § 13, providing that the property of corporations for profit shall be subjected to taxation, the same as that of individuals, a section of a charter of a railroad company, afterwards incorporated into the charters of other railroad companies, was void, which granted to the company the right to appropriate the taxes on the road for 30 years to the payment of debts incurred in the construction thereof, unless 8 per cent. dividends were being earned on the capital stock. Laws 1870, pp. 268, 316, 326; Laws 1871, p. 237; Laws 1873, p. 562; Laws 1882, p. 1011; and Laws 1884, p. 936.

Same—Collection of Back Taxes.

Where railroad property had escaped its just taxation, owing to a mistake as to the constitutionality of certain provisions of its charter, and the legislature afterwards provided a method for the assessment and collection of the back taxes, the property, though in the hands of one who purchased after the default, was subject to such taxes, unless the state was estopped by the operation of the rule of property as it existed at the time of the transfer.

Same—Same—Exemptions—Constitutional Law—Estoppel.

Where railroad property alleged to have been constructed under provisions of a charter exempting it from taxation was acquired prior to any decision of the supreme court necessarily involving the constitutionality of the charter provision, no rule of property was in effect which could operate as an estoppel to prevent the state subjecting the property to the payment of back taxes under the claim that the charter exemptions were unconstitutional.

Same—Exemptions—Consolidation.

Two companies had charters authorizing the construction of railroads, part of which would have covered the same general territory, but only one of the charters contained a provision for tax exemption to aid in paying the debts incurred by the construction. Both charters eventually came into the hands of the same parties, and only one line was built, in the construction of which the accounts of the two companies were inextricably confused: *held*, that the road was not constructed under the charter granting the exemption, so as to give a new company, formed by the consolidation of the two, any claim for exemption from taxes under the charter.

Same—Same—Same.

Laws 1882, p. 1011, and Laws 1884, p. 936, amendatory thereto, providing for the consolidation of two railroad companies into one, each contained a provision whereby the new company might for 30 years, unless the earnings would pay 8 per cent. dividends on the capital

Yazoo & M. V. R. Co. v. Adams

stock, appropriate its taxes to debts to be incurred in the construction of the railroad: *held*, that no exemption from taxation was made as to the road already constructed at the time of the consolidation.

Same—Same—Burden of Proof.

One who claims exemption from taxation has the burden to show that all the conditions on which the exemption was based have been at all times fulfilled.

Same—Same—Consolidation.

Laws 1870, p. 268, is a provision in the charter of a certain railroad company whereby it was allowed to appropriate its taxes to the payment of debts to be incurred in the construction of its road. Laws 1875, p. 66, in relation to the collection of a privilege tax from railroads, provided that all other acts under which railroad taxes might be collected in a different way were thereby repealed. Laws 1878, p. 78, increasing the amount of the privilege tax, made a special exception of another road than the one in question. Code 1880, §§ 597–608, provided that all railroads shall be subject to taxation, except the very portions in process of construction. Laws 1882, p. 1011, authorizing the consolidation of the road in question with other roads, provided that the new company should have all the "rights, grants, and immunities now enjoyed by such companies": *held* that, the immunity from taxation having been repealed, no rights in that regard were acquired by the new company.

Same—Same.

Laws 1884, pp. 29–31, Laws 1888, p. 49, and Laws 1890, p. 13, recognizing the supposed exemption of certain railroads from taxation by previous charters, and declaring the legislative intent that general taxation laws should not interfere therewith, do not thereby create an exemption otherwise nonexistent.

Same—Same—Repeal of Statute.

Laws 1878, p. 233, included in the charter of a certain railroad company a permission to appropriate, under certain limitations, taxes for a period of 30 years to the payment of debts to be incurred in the construction of the road. By Code 1880, §§ 597–608, all railroads are made subject to taxation, except the very portions in process of construction: *held*, that the exemption was repealed.

Appeal from chancery court, Hinds county; H. C. Conn, Chancellor.

Bill by Wirt Adams, revenue agent, against the Yazoo & Mississippi Valley Railroad Company and another, to subject certain property to the payment of back taxes. From a judgment in favor of complainant, defendants appeal. Affirmed.

Mayes & Harris, for appellants.

Critz, Beckett & Kimbrough, J. A. P. Campbell, and Green & Green, for appellee.

CAYCE, Special Judge. This suit was brought by appellee against the railroad property formerly owned by the Louisville, New Orleans & Texas Railroad Company, including the Natchez, Jackson & Columbus Railroad Company, for the ad valorem taxes claimed to be due thereon for the years 1886 to 1891, inclusive, and to enforce a lien therefor on that part of the line of said railroad extending from the Louisiana state line, on the south, to the Tennessee state line, on the north, a distance of about 315 miles, and upon the branches of said road,—one known as the Tallahatchie Branch, about the distance of 39 miles, and a part of the branch known as the

Yazoo & M. V. R. Co. v. Adams

Riverside Division or Loop, a distance of about 86 miles. The suit is brought under the act of 1894 (Laws 1894, p. 29) authorizing the revenue agent to sue for and recover back taxes. It is a proceeding wholly in rem, no personal judgment being sought. The suit against that part of the line above mentioned was numbered originally No. 1,449. This suit includes a similar claim for ad valorem back taxes for same period on the property known as the Natchez, Jackson & Columbus Railroad; the last-named road having been purchased by the Louisville, New Orleans & Texas Railroad Company in the year 1890. This suit was numbered originally No. 1,681. The two suits were consolidated in the lower court, to facilitate trial; each party reserving the right to interpose any and all defenses or claims if no consolidation had occurred. Judgment was rendered in the lower court for appellee for the amount claimed, and the property mentioned subjected to the payment of said judgment. Appeal was taken therefrom to this court, and appellants assign errors as follows: That the court below erred: "(1) In not granting application to remove case No. 1,681 (original) to the federal court. (2) That the property was not liable to be assessed for back taxes, as claimed, because the ad valorem taxes for said years, pursuant to law, were authorized to be paid by a privilege tax in lieu thereof, rated at a specified sum per mile of said road, and that said privilege tax was paid, pursuant to law, by the appropriation of the amount of each year's taxes on said line of road to the debt incurred in the construction of said road, pursuant to the provisions of section 21 of the Mobile & Northwestern Railroad Company charter (Laws 1870, p. 268), which said section 21 was incorporated in the charters of the companies [railroad] constructing said road; said roads being afterwards consolidated into the Louisville, New Orleans & Texas Railroad Company, and said section 21 being also incorporated into the act of the legislature authorizing said consolidation; said railroads not having been able to pay out of their earnings the dividend of 8 per cent. as provided in said section 21. (3) That the Illinois Central Railroad Company was a bona fide purchaser of said property for a valuable consideration, without notice of any taxes being due or claimed upon said property. (4) That the state was estopped in this case from claiming said section 21, and the acts of the legislature amendatory thereof, to be in violation of the constitution of 1869 of Mississippi." Appellants also insist that this court has no power to examine and determine questions of fact appearing in the record, but which were not considered and acted upon by the lower court. To these defenses appellee interposes the following objections: "(1) That these defenses were interposed by appellants before the railroad assessors at the time of the assessment under which this suit was instituted was being considered by them, and was considered by said railroad assessors, and by them

Yazoo & M. V. R. Co. v. Adams

adjudged against appellants, and by reason thereof became res adjudicata; that the order of the railroad assessors making the assessment was conclusive, and not subject to collateral attack. (2) That the same defenses had been interposed in previous suits in the supreme court of this state between the parties hereto, and had been in said suits adjudged against appellants, and by reason thereof become and were res adjudicata of the legal questions involved, and, if not res adjudicata, were conclusive against appellants under the rule of stare decisis. (3) That section 21 of the Mobile & Northwestern Railroad Company, and the acts of the legislature amendatory thereof, had been repealed by subsequent acts of the legislature and by the Code of 1880, and that the attempted exemption or appropriation of taxes by said section 21 was in violation of the constitution of 1869, and void ab initio. (4) That the railroad was constructed by a railroad company whose charter contained no exemption or appropriation of taxes, and that the construction of the branch roads by the Louisville, New Orleans & Texas road did not entitle them to claim exemption of said branches from taxation. (5) That the roads had been able to pay out of their earnings a dividend of 8 per cent. upon their capital stock, over and above their proper debts and liabilities, and for that reason were not entitled to claim exemption from taxation."

In the scope of the investigation necessary for the proper comprehension and application of the legal principles involved, we are much indebted to counsel for the industry and ability and the thoroughness with which they have presented the various questions to us, leaving the court but little to do, save collate and apply the principles invited by the facts.

The portion of the railroad line upon which the taxes are claimed extends from the Louisiana state line, on the south, to the Tennessee state line, upon the north, passing through portions of the counties of Amite, Franklin, Jefferson, Claiborne, and Warren, south of Vicksburg, a distance of about 101 miles; thence northward, through portions of the counties of Warren, Issaquena, Sharkey, Washington, Bolivar, Coahoma, Tunica, and De Sota, a distance of about 214 miles; aggregating upon the main line a distance of 315 miles in Mississippi; and also upon a part of the Riverside Division, extending from Wilzinski to Coahoma station, on the north, and from Hampton to Rollingfork on the south,—an aggregate distance of about 86 miles on the Loop or Riverside Division, and also upon the Tallahatchie Branch, extending from Clarksdale to Minter City, a distance of about 39 miles. In March, 1895, the revenue agent filed notice with the railroad commissioners, who by the law are railroad assessors, that the property above described had escaped taxation by reason of not having been assessed for the years 1886 to 1901, inclusive, and named the Yazoo & Mississippi Valley Railroad Company and the Illinois Central Railroad Company as owners.

Yazoo & M. V. R. Co. v. Adams

In April, 1895, the revenue agent filed with said commissioners additional notice, with interrogatories for said owners to answer as follows: "(1) When the main line, Riverside Division, and Tallahatchie Branch were constructed. (2) The cost of construction, amount of donations, amount of stock, amount paid for same, and the earnings, gross and net; the nature and character of affidavits filed, and of the receipts obtained from the sheriffs." Order was made by the railroad commissioners, requiring the appellants to answer. Appellants answered by averring that the railroad assessors had no authority to assess the taxes for the years named; that the commutation law had been accepted for said years, and therefore ad valorem taxes were not necessary to be assessed, and hence the land had not escaped taxation. The objections of appellants to the making of assessments were overruled by the commissioners, and schedules of the property, as required by law, were ordered to be filed by appellants with the commissioners by the first Monday of August, 1895. Appellants declined to answer the interrogatories, and the matters were set for hearing on the first Monday of September, 1895. On the 27th of August, 1895, appellants filed a bill and obtained an injunction against the railroad commissioners and revenue agent to prevent the assessment of said property. On September 28, 1895, the injunction was dissolved. Appeal was taken to the supreme court, and on December 2, 1895, the decree dissolving the injunction was affirmed. Case No. 8,312, reported in 73 Miss. 648, 19 South. 91. On February 5, 1896, the railroad assessors made an order assessing said property. The assessment remained on file 30 days, open to objections. No objections being filed, the order making the assessment was confirmed by the assessors on March 17, 1896. The appellants appealed from the order making the assessments by the railroad commissioners to the circuit court of Hinds county, Miss., and this appeal was dismissed by the circuit court for lack of jurisdiction. No appeal from the action of the circuit court in dismissing said appeal was taken. On November 19, 1896, the revenue agent filed the bill herein, original No. 1,449. To this bill the Yazoo & Mississippi Valley Railroad Company filed two pleas. One of them (being the pendency of the appeal in the circuit court) was subsequently withdrawn, and not considered. One averred the provisions of sections 3875 to 3886, inclusive, of Code 1892, to be unconstitutional and void, and the act of 1894 authorizing assessments for back taxes, and suits to be instituted thereon, to be unconstitutional and void. The Illinois Central Railroad Company demurred, assigning as causes that the bill showed no liability on them, nor any reason for making them defendants; that the act of 1894 authorizing assessment of back taxes was unconstitutional and void, because in violation of section 14 and section 112 of the constitution of Mississippi (1890), and in violation of the fourteenth amendment of the

Yazoo & M. V. R. Co. v. Adams

constitution of the United States. The plea was holden insufficient, and the demurrer overruled. Appeal was taken to the supreme court, and the decree of the lower court affirmed. Reported in 77 Miss. 764, 25 South. 355. In 1898 the revenue agent gave notice to the railroad commissioners that the Natchez, Jackson & Columbus Railroad Company had escaped taxation for lack of assessment for the years 1886 to 1891, inclusive, and named the Yazoo & Mississippi Railroad Company and the Illinois Central Railroad Company as the owners. Notices were given to the alleged owners as required by law, and on August 1, 1898, assessment was made of the property of the Natchez, Jackson & Columbus Railroad Company; the assessment to remain on file for objections. No objections were filed, but on August 4, 1898, the Illinois Central Railroad Company filed a bill in, and obtained an injunction from, the United States circuit court, restraining the commissioners from certifying the assessment to the counties, and the revenue agent from suing on the assessment. On February 7, 1899, the restraining order was discharged, and an appeal taken to the United States circuit court of appeals, which appeal was dismissed for lack of jurisdiction on April 25, 1899. On April 26, 1899, the revenue agent filed his bill herein, numbered 1,681 originally, seeking to subject the property of the Natchez, Jackson & Columbus Railroad to the taxes under said assessment. On May 1, 1899, the United States circuit court dismissed the bill of the railroad company, and an appeal was taken therefrom to the United States supreme court. On January 7, 1901, the United States supreme court reversed the decree of the United States circuit court, and remanded the case. 21 Sup. Ct. 251, 45 L. Ed. 410. This reversal of the decree dismissing the bill occurred on a point of pleading, and did not touch the merits of the bill. On 29th of April, 1899, the defendants in the lower court (appellants) filed petition asking removal of cause numbered 1681 (original) to the federal court, and gave bond for such removal. On May 8, 1899, the court below refused to grant petition for removal, and defendants excepted. On May 8, 1899, by agreement, the two cases, numbered respectively 1,449 and 1,681, were consolidated; it being agreed that such consolidation was only to facilitate the trial and save costs; both parties reserving all rights of claim or defense applicable to either. At the January term, 1900, the consolidated cause was submitted for hearing on bills, answer, exhibits, proofs, pleadings and record, and decree rendered subjecting the property named in each suit to the taxes of 1886 to 1891, inclusive. From this decree, appeal was taken to this court.

The right to remove causes from the state to the federal court only exists where there is contained in the plaintiff's cause of action, as stated, a case arising under the constitution or laws of the United States. Otherwise the federal

court has no jurisdiction. It is of no avail that the statement of a case involving a federal question arises out of the pleadings of the defendant, or is stated suggestively by the complainant in his bill. There is no difference in the application of this restrictive condition, whether the jurisdiction be invoked originally in the federal court, or upon an application to remove from the state court. In the case of *State of Tennessee v. Bank of Commerce*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511, the court says: "In the first and second bills the only reference to the constitution or laws of the United States is the suggestion that the defendant will contend that the law of the state under which the plaintiffs claim is void because in contravention of the constitution of the United States, and by the settled law of this court, as appears from the decisions above cited, a suggestion by one party that the other will or may set up a claim under the constitution or laws of the United States does not make the case one arising under the constitution or those laws. The only right claimed by the plaintiffs is under the law of the state of Tennessee, and they assert no right whatever under the constitution and laws of the United States. Under the act of August 13, 1888, c. 866, the circuit court of the United States has no jurisdiction, either original or by removal from a state court, of a suit as one arising under the constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim." In the case at bar the complainant's cause of action is asserted solely under the laws of the state of Mississippi. After completing the statement of his claim under the laws of the state, the complainant suggestively states the defenses interposed by the defendants when the application to have the property assessed was pending before the railroad commissioners. Conceding that these defenses involved a federal question, yet they are not a part of the statement of complainant's claim. This claim was complete in statement, without reference to the defenses which had been or might be interposed by defendants. There was no error in overruling the application to remove.

The force and effect of the decision of the railroad commissioners in determining the liability of the property to taxation and assessing it is determinable in this collateral attack by the jurisdiction of the railroad commissioners, acting as railroad assessors. The office, duties, and powers of the railroad assessors are wholly legislative, and are found in sections 3875 to 3886, inclusive, of the Code of 1892. Railroad assessors is not an office established by the constitution, nor is it an inferior court, established under authority of section 172, Const. Miss. 1890; but it was created under and pursuant to section 112, Const. Miss. 1890, which section, after declaring general rules for assessment of property, provides: "But the legislature may provide for a special mode of valuation and assessment for railroads and railroad and other corporate prop-

erty. * * * But all such shall be assessed at its true value." Pursuant to this constitutional authorization to provide a "special mode for valuation and assessment of railroads and railroad and other corporate property," sections 3875 to 3886, inclusive, Code 1892, were enacted. Looking to these sections for the jurisdiction of the railroad assessors, it is found that the legislature kept within the constitutional limitations in conferring power upon them, and that power is to assess and value, and is found in sections 3877, 3878, supra. Section 3877 reads as follows: "The members of the railroad commission, are constituted state railroad assessors, and they shall upon the receipt or making and completion of the schedules, provided for in the last two sections, assess all railroads, telegraph, sleeping car and express company property liable to taxation in the state, affirming its true value, so that such property shall bear its just proportion of taxation, taking into consideration the value of the franchise, and the capital stock engaged in the business in this state; and the railroad assessors may adopt other and further rules, necessary and proper to ascertain the value of property to be assessed by them, including the amount of capital engaged in the business in this state." Section 3878 says: "If in any case the railroad assessors have reason to believe, that any railroad company, or person owning or operating a railroad, has rendered a false or fraudulent schedule, and that an assessment predicated thereon will relieve such company or person of a just share of taxation, they shall not, in making the assessment, be bound thereby, but they shall make out a proper schedule as if none had been rendered, first giving such person or company five days' notice to come forward at a time and place to be named, and show cause why such course should not be pursued. Such notice shall be served and returned as a summons from court." These sections are a part of the general revenue law, and confer upon the railroad assessors the duty and powers, as to railroad and other corporate property, that by the general law are conferred upon the tax assessors and boards of supervisors together as to all other species of property. The same duties are to be performed, the same results to be ascertained. In each case the property is to be assessed, and its true value affixed. It is urged by the appellee that the railroad assessors had jurisdiction to determine the liability of railroads to taxation, and, in the exercise of such power, to determine the existence and the constitutionality of any claim of exemption from taxation appearing in the schedules filed, or otherwise presented to them. This contention is based upon this language near the conclusion of section 3875, supra, viz.: "And if any of such property is claimed to be exempt from taxation, it shall be separately stated, and the law cited under which the claim is made." And upon this language in section 3877, supra, viz.: "That the railroad assessors shall upon the receipt, or making

Yazoo & M. V. R. Co. v. Adams

and completing of the schedules, provided for in the last two sections, assess all railroads * * * liable to taxation." Section 3875, supra, provides for filing of schedules, and specifically enumerates the various items of information required to appear therein; but it does not, in terms, purpose, or effect, purport to confer or define jurisdiction. The noncompliance of the railroad with the requirement of filing schedules in no way affects the power or duties of the railroad assessors. In section 3876, supra, this provision for such failure to comply exists: "In case of failure, neglect or refusal, the commissioners shall make out such schedule from the best information obtainable."

The determination of questions of exemption from taxation, involving the constitutional authorization of the legislature, and of the legislative acts thereunder, pertains to the highest and most important exercise of the judicial functions. The power to exercise these important duties must not rest upon inference. It must be presumed that the legislature would not have intended to confer this power upon the railroad assessors without expressing such intent in clear, unmistakable language; and it must also be presumed that the legislature, in enacting the statute under consideration, intended to enact a law within and to the extent only of the authority conferred upon them in that behalf by section 112 of the constitution of Mississippi, supra, which authority was: "to provide a special mode of valuation and assessment of railroads, * * * all such property to be assessed at its true value." There is nothing in this language of the constitution indicating any purpose to authorize the legislature to confer any jurisdiction upon the parties or party selected to perform this duty, except such as was necessary to assess and value a certain species of property in the same manner and to the same extent that the officers provided by the constitution, viz., tax assessors and boards of supervisors, should assess and value all other species of property. In both cases the same purposes were to be subserved. There is no special significance to be attached to the words "liable to taxation," in this connection. The same words, in the same revenue law, and referring to the duties of the tax assessor and to those of the boards of supervisors, are used and mean the same in each place. It is only a general term used to distinguish the property to be assessed, as separating it from other property not liable to taxation, whether exempt therefrom by general law or otherwise. The law determines what property is liable to assessment. Its liability under the law is not affected by the act of assessment. Section 3754, Code 1892, provides that the "assessors shall assess the rolls, and all personal property subject to taxation, and shall set down in the assessment rolls * * * each item of personal property liable to taxation." Sections 3772, 3773, Id., authorize the assessor to assess lands not returned or rendered to him, and the

value fixed, as in other cases. Section 3774, Id., provides how the land rolls shall be made up, and says, “* * * Land of the United States and other land exempt from taxation shall be set down in separate columns.” Section 3788, Id., says, “The boards of supervisors of each county shall hold a meeting at the court house on 1st Monday of August to hear objections to assessment and examine same, * * * and shall determine all exceptions thereto.” The manner of assessment of all property, and the powers and duties of all officers charged with the assessment and valuation of property, are one harmonious scheme, with no distinction as to the sphere of duty or extent of the powers of the officers in its performance. The railroad assessors, in making assessments and in hearing and determining objections thereto, are exercising the same duties, and their judgments in such case are entitled to the same consideration, and have the same degree of conclusiveness, which pertain to the judgments of boards of supervisors in the discharge of their duties of like nature. Their judgments are conclusive “regarding assessments only, as to irregularities, and matters of fact resting wholly in pais, but are not final as to questions of exemption, under either statutory or constitutional provisions.” See *Horne v. Green*, 52 Miss. 456; *City of Meridian v. Phillips*, 65 Miss. 364, 4 South. 119; *Same v. Ragsdale*, 67 Miss. 86, 6 South. 619; *Ball v. City of Meridian*, 67 Miss. 93, 6 South. 645. The board of railroad assessors did not have jurisdiction to determine the claim of exemption interposed, and therefore the facts which would be involved in the determination of such exemption (its existence, its being earned, discharged, or terminated) have not been concluded by their finding. Their judgment touching the claim of exemption is void because they were without jurisdiction, as regards it, and to that extent may be attacked collaterally. The court below erred in holding the judgment of the railroad assessors *res adjudicata* as to the exemption claimed. As to all other matters involved in the assessment and valuation of the property, the judgment of the railroad assessors was conclusive.

The decree of the lower court recites that certain legal questions (stating them specifically) entitle the appellee to the relief prayed, and as “to all other issues in the case, deeming them unnecessary and immaterial, declines to consider them.” Among the issues presented by the pleadings, and declined to be considered by the court below, are the issues of fact as to who built the road, under what charter it was constructed, and when constructed, and also whether or not the road could have paid a dividend of 8 per cent. on its capital stock out of its earnings remaining after payment of its debts and liabilities during the years for which the taxes are claimed. We are asked by the appellee to consider and determine those facts, and the evidence pertaining thereto which appears in the record, but was declined to be considered by the court

below, such declination appearing affirmatively in the decree of the lower court. Appellants object to such evidence being considered by this court, insisting that this court, having only appellate jurisdiction, cannot examine or determine matters of fact shown by the record, affirmatively, to have not been acted upon by the lower court; that such action by this court would be an exercise of original, not appellate, jurisdiction; that this court should restrict its revision to the judgment of the lower court, considered in connection with those matters alone shown by the record to have been the basis of the judgment.

The interesting and important question presented by this contention has not heretofore been considered by this court, in the exact aspect as now presented. It appears from the recitals of the decree of the lower court that the cause was heard upon "bills, answer, exhibits, proofs, pleadings, and record." The whole case was submitted for hearing, and was therefore subject to be considered. Ordinarily the presumption would attach that the case, as a whole, was considered, examined, and acted upon by the lower court, and would be clearly governed by the rules frequently applied by this court, holding that "the appeal brings up the whole case, and presents the question whether the decree is right, in whole or in part, upon the entire record"; but it is very ably and forcibly argued by counsel for appellants that as it affirmatively appears by the record in this case that the issues of fact, and the evidence taken and submitted on those issues, were not considered or acted upon by the lower court in rendering the decree, no presumption of action by the lower court can be taken, and therefore any consideration and action by this court upon such issues would be primary and original, and not appellate.

Section 146, Const. Miss. 1890, confers and defines the jurisdiction of this court, which is "such jurisdiction as properly belongs to a court of appeals." This language excludes the grant of original jurisdiction. "*Unius expressio est alterius exclusio*," except as the exercise of jurisdiction quasi original may properly be necessary to the effectual exercise of its appellate powers. In recognition of the probable necessity of the exercise of this implied addition to the power expressly given, the legislature enacted section 4350, Code 1892, which provides that "the supreme court may try and determine all issues of fact which may arise out of any appeal before it, and be necessary to the disposition thereof." This question, in its decision, involves both the power and the practice of this court. The power is conferred alone by the constitution. The practice may be regulated by legislative enactment, within the limits of the power. Where the judgment of the lower court rests solely upon the question of jurisdiction, and there has been no judgment upon the merits, then in such case the only matter presented for revision by this court

would be the action of the lower court upon the question of its power to try. There would not have been any trial of the cause upon its merits, either as to the law or the facts. The case of *McDonald v. Smalley*, 1 Pet. 620, 7 L. Ed. 287, referred to by counsel for appellants, is a type of this class of cases, as appears from the report of the case: "The court, being advised upon the subject, directed the counsel to argue the point of jurisdiction only, as no other than that had been decided in the court from which the appeal had been taken." An appellate court reviews and revises the judgment of the lower court. If that judgment be only upon the jurisdiction, then that is the only question to be reviewed. If the judgment of the lower court be upon the merits, or upon both the question of jurisdiction and of the merits, then that judgment, in its entirety, is to be reviewed and revised by the appellate court. In the case at bar it appears from the record that the cause was submitted and heard upon the "bills, answer, exhibits, pleading, evidence, and record," and the judgment of the lower court is that the property is liable to the payment of the taxes claimed, and subjects the property to their payment. It is this judgment that is before us for review. The whole record is before us, and its correctness is the question for our examination. We have no law or rule of practice requiring the trial judge to specify the reasons, nor to segregate the issues he deems material, in rendering his judgment. A judgment upon the merits is based upon the whole case as presented, and is and must be viewed as an entirety. A case may have any number of issues, but a final judgment disposes of the whole case, and of necessity includes in such disposition all issues therein. This legal result cannot be affected or avoided by the recitation in the judgment in the lower court that certain issues were deemed material and decisive, and that other issues were deemed by him to be immaterial and irrelevant, and therefore he did not consider or decide them. The issues presented questions of law and facts. The decree of the lower court would have been a valid and final determination of the matters in controversy, without a recital of the reasons influencing the court in reaching his conclusions in rendering it, or giving therein his opinion of either the law or the facts involved. Whether he reached his conclusions upon his view of the law or of the facts, one or both, was alike immaterial, and did not affect the finality or comprehensiveness of the decree. "*Utile per inutile non vitiatur.*" We think the power of this court to revise the judgment of the lower courts includes every matter comprehended by the scope of the judgment complained of, and that is the proper practice. If it is holden that this court can only review such issue or issues of law or fact as the court below considered and acted upon in rendering its judgment, then the fact of the consideration and action upon each issue involved in the pleadings, by the lower court, would be an issue before this court, nec-

essarily determinable before it could determine what portion of the record would be reviewable. It might be that the judgment of the lower court was upon an issue deemed by this court to be immaterial, and for that cause held to be erroneous; yet an examination of the whole record might disclose material issues, with evidence showing that the judgment of the lower court, if rendered upon those issues, would have been correct; yet, if this court is restricted in its review to those issues only held by the lower court to have been material, the case would have to be remanded, and the litigation uselessly and unnecessarily protracted. In *State v. Cannon*, 44 La. Ann. 738, 11 South. 88, the court announces on a rehearing the correct doctrine, in saying: "The court below decides a cause on whatever point it deems material, but it is the province of this court to revise its judgment, not the grounds upon which it was rendered. Its decision requires us to examine the case on all the grounds it presents, if that be necessary to a rightful determination of the case; for the error of the judge, a question for which relief is sought at our hands, may be his failure to take into consideration an objection on which his judgment is silent. Under the principle contended for, there might be as many appeals as points in the case, if he acted on only one at a time, and decided erroneously. It has been the uniform practice of this court, as it is the real intent of the statute, that the decision of the first judge on the merits brings up the whole case. The contrary doctrine would be productive of intolerable expense and delay." We are confirmed in the correctness of our conclusion in this practice by the terms of section 4353, Code 1892, which says: "The supreme court shall hear and determine all cases properly brought before it, * * * and in case the judgment, sentence, or decree of the court below be reversed, the supreme court shall render such judgment, sentence, or decree as the court below should have rendered, unless it be necessary in consequence of its decision," etc. On appeal the appellant is restricted to an examination of the errors contained in his assignment of errors. No such restriction rests upon the appellee; the distinction being "between a party seeking to reverse a judgment, and a party resisting the attempt."

It is urged by counsel for appellants that there is no issue in the pleadings to which the evidence as to what company constructed the road would be referable, in determining the claim of exemption. The gravamen of the bill is the construction of the road, its liability to taxation, its having escaped taxation for the years named, by reason of not being assessed, and its assessment by the railroad commissioners. The answer of defendants admits the construction of the road and its assessment by the railroad commissioners, but denies its liability to taxation, and avers that by reason of the road having been constructed by railroad companies having charters

containing exemptions, or the right to appropriate the taxes accruing on the property to debts incurred in its construction until the earnings of the road would enable them to pay a dividend of 8 per cent. on the capital stock, after paying its debts and liabilities the property was not liable to the taxes assessed; that the road had never been able to pay said dividend out of its earnings; and that the commutation or privilege tax authorized by law in lieu of the ad valorem taxes had been paid for the years named by the company, shown by affidavits filed with the sheriffs of the several counties in which the road was located, and obtaining their receipts therefor. The defenses are affirmative, and, to be effectual, must be established by proof. Matters of defense, averred in an answer, not responsive to the allegations of the bill, are at issue without replication. No replication to an answer is required in chancery. Section 540, Code 1892.

It is suggested that an examination of the evidence is unnecessary, unless this court should first decide that the chancellor erred either on the point of estoppel, or on the point of violation of the fourteenth amendment to the constitution of the United States. The fact of the construction of the road by the Louisville, New Orleans & Texas Railroad Company, or its constituent companies or company, having under its or their charters exemption or right of appropriation of taxes, is a fact necessary to be considered, preliminary to an application of the legal principles contended for by appellants. If the fact be that the road was constructed by a company or companies having no exemption or right of appropriation in their charters, then no claim of exemption could arise, nor estoppel be asserted.

The legal principles involved in this case are not res adjudicata by reason of any former adjudication of this court. While the parties are the same, and the subject-matter the same, yet the cause of action is wholly different. In the case at bar the cause of action is the taxes for the years 1886 to 1891, inclusive, and they are entirely separate and distinct from the taxes of other years. Some of the same legal questions involved here were presented and decided by this court in cases between the same parties, and invite the application of the principles of stare decisis, but are not res adjudicata. 77 Miss. 265-266, 24 South. 200, 317, 28 South. 956. The contention here rests mainly upon section 21 of the charter of the Mobile & Northern Railroad Company (Laws 1870, p. 268), incorporated into the charters of the Memphis & Vicksburg Railroad Company (Laws 1870, pp. 316-326), the Mississippi Valley & Ship Island Railroad Company (Laws 1871, p. 237, and Laws 1873, p. 562), the Natchez, Jackson & Columbus Railroad Company (Laws 1870, p. 327), the act authorizing consolidation of the Memphis & Vicksburg Railroad Company and the Mississippi Valley & Ship Island Railroad Company (Laws 1882, p. 1011), and the act amendatory

Yazoo & M. V. R. Co. v. Adams

thereof (Laws 1884, p. 936), and acts of the legislature affecting same, by express reference or necessary implication. Section 21, supra, granted to the various roads above named the right to appropriate the taxes annually accruing thereon to the debts incurred by them, prospectively, in the construction of the road, or for money borrowed by the company, upon lands or otherwise, to be used in constructing the road. This right of appropriation was to continue for 30 years, unless the earnings of the road (annual) would enable the road to pay a dividend on its capital stock of 8 per cent., after paying its debts and liabilities. This appropriation by the company was to be evidenced by an affidavit made by the president or cashier of the road, filed with the sheriff of the various counties traversed by the road, upon the filing of which affidavit the sheriff was to execute a receipt in full for said taxes for the year. Laws 1870, p. 268. If the legislature, in enacting section 21, supra, exceeded the authority granted them by the constitution of Mississippi, or were acting in contravention of the provisions of the constitution, then their act was void, and could not confer rights upon any one. This question was presented thoroughly, and ably discussed, exhaustively considered, and decided by this court, in the case of Railroad Co. v. Adams, reported in 77 Miss. 194, 24 South. 200, 317, 28 South. 956 et seq.; and it was there held that such attempt by the legislature to confer a special exemption upon a special person or corporation would be in violation of section 13, art. 12, of the constitution of Mississippi of 1869, and therefore void. A careful examination of the question there decided confirms us in the correctness of the conclusion then reached, and we adhere to and confirm the same. By the constitution, taxes are imposed upon all property alike, owned by either individuals or corporations, and special exemptions to the one or the other were forbidden by the organic law.

The distinguished counsel for appellant very ably and forcibly argues that even if the alleged exemption or appropriation of taxes made by said section 21 was void ab initio by reason of the constitution of Mississippi of 1869 being mandatory, or, if not so void, was repealed by subsequent statutes enacted by the legislature, yet the appellants being a new company, coming into existence in October, 1892, and making large investments in the property of the Louisville, New Orleans & Texas Railroad Company, which includes the Natchez, Jackson & Columbus Railroad property, at a time when the alleged exemptions or appropriations of taxes were recognized as valid by the legislative, executive, and judicial departments of the state, there being at the time of the purchase of said property by appellants no claim of taxes upon said property by the state, nor had been such claim or lien upon the property for taxes delinquent for past years, and that appellants were not the owners of the property during the

Yazoo & M. V. R. Co. v. Adams

time for which said taxes are said to be delinquent and accrued thereon, therefore, as to said claim for taxes, they are innocent purchasers for a valuable consideration, without notice of any claim for taxes thereon by the state; that they purchased said property, incurred liabilities, and acquired rights on the faith of the status then existing by reason of such recognition by the departments of the state, and expressly on the faith that there were no outstanding taxes resting on said property; and that the state was therefore now estopped from collecting taxes upon said property for said years. This contention presents an exceedingly interesting and important question,—important to the state and the citizen alike,—and it has received our careful consideration. The power of the legislature, within constitutional limits, to levy taxes for the support of the government, and to provide means for their collection, is limited only by the necessity of the occasion; and it is their duty, under constitutional direction, to see that all property of every person, natural and artificial, shall bear its just and equal proportion of the burdens of government. If any property liable under existing law to taxation has escaped taxation, it was the duty of the legislature to remedy the evil by providing means for its assessment and collection, else property that had been assessed and paid on would be bearing an unequal, and therefore an unjust, proportion of the public burden. No one can justly complain when his property is made to contribute its just and equal proportion, according to its value, toward the burden of government. Each person enjoys the privileges and receives the protection and the benefits resultant from the government, and the duty rests alike upon each to contribute in proportion to his ability to its maintenance. If property is liable to taxation, and has escaped bearing its part of the burden from any cause, it is the essence of justice that such property shall be made to contribute its proportion to the general fund necessary to the maintenance of the government. That property shall be liable in specie to the tax upon itself is eminently just and indispensable, and forms the basis of our system of taxation. The constitutional provisions that “all property shall be taxed in proportion to its value” (section 20, art. 12, Const. Miss. 1869, and section 13, art. 12, Id.) that “the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals,” were declarations of the public will, self-imposing, leaving to the legislature only the duty of providing the means for collection of that which the constitution had imposed. Except as may be authorized by the constitution, the legislature has no power to relieve the property of the burden of taxation thus imposed by the will the whole people, and any efforts on the part of the legislature to create exemptions or grant rights of appropriations of taxes contrary to the provisions of the constitution are void, and no rights can be predicated on such enactments, where special

exemptions to special persons or corporations are attempted. Unless the legislature provides the means for the assessment and collection of taxes, they remain uncollected, but such failure in no wise relieves the property from the burden imposed by the constitution. It still remains subject to the tax, and upon the discovery of such failure it is the duty of the legislature to remedy the omission by providing means for the assessment and collection of the tax so omitted. Its power to provide such means is coextensive with its duty. This power and its consequent duty are highly salutary and indispensable, and cannot be avoided in its exercise because in some instances the property has changed ownership, and for that reason individual hardship may result. The burden was upon the property, by the highest law of the land, and followed it into whosoever's hands it may go. See *Tallman v. City of Janesville*, 17 Wis. 76; *Cross v. City of Milwaukee*, 19 Wis. 509; *State v. Fullerton*, 143 Mo. 685, 44 S. W. 741; *Canal Co. v. Conner*, 50 Pa. 399; *Railroad Co. v. Dennis*, 116 U. S. 665, 6 Sup. Ct. 625, 29 L. Ed. 770; *Houston & T. Cent. R. Co. v. Texas*, 177 U. S. 66, 20 Sup. Ct. 545, 44 L. Ed. 673. Assessment of back taxes, where the property has changed owners, does not violate any constitutional right guaranteed by either the state or United States constitutions. See *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 526, 16 Sup. Ct. 83, 40 L. Ed. 247; *Weyerhaeuser v. Same*, 176 U. S. 550, 20 Sup. Ct. 485, 44 L. Ed. 583; *Railroad Co. v. Reynolds*, 183 U. S. 475, 22 Sup. Ct. 176, 46 L. Ed. 283; *United States Trust Co. v. New Mexico*, 183 U. S. 539, 22 Sup. Ct. 172, 46 L. Ed. 315, 14 Am. & Eng. R. Cas., N. S., 811. When the legislature, in the exercise of its constitutional powers, has provided for the assessment and collection of back taxes upon property, and has made no provision for excepting from its operation property the ownership of which has changed since the default occurred, this court cannot ingraft exceptions upon such statute. Courts can only decide what is the law, as declared by the constitution or enacted by the legislature. The application of the law cannot vary, however meritorious the particular case may appear. The property in controversy here is liable for the taxes for the years claimed, unless relieved therefrom by the operation of the rule of property as it existed at the time the appellants became owners of it,—so operating as to create an estoppel upon the state. A "rule of property" is a "settled legal principle governing the ownership and devolution of property." This principle can be settled only by the supreme court of the state, and its utterances, in cases pending before it involving the title to property, construing statutes or constitutional provisions, have the effect of establishing a rule of property to the extent only that the particular statute or constitutional provision was in that case involved, or necessarily considered and determined by the court in the case then pending before ; and such rule of property, when so established, becomes

and remains the settled legal principle governing the acquisition and title to property, to which construction is applicable, so long as such decision remains unreversed by the supreme court giving such construction. If such construction is given upon an issue directly involved in the case, or necessarily considered, and necessitates the application of the judicial mind to the precise question, then immediately the rule of property established thereby becomes the law for similar cases, and is upheld and continued in the future by the doctrine of stare decisis. The acquiring of the ownership of property is always accompanied with the vesting of rights under and pursuant to the then existing law as declared by the supreme court of the state. This law so declared remains a rule of property until that law shall be changed by the state supreme court overruling or modifying such prior decision, in which case the rule of property would be changed to correspond with the latest utterance of the supreme court upon the subject. This change in the rule of property would only affect transactions occurring subsequent to such change in the decision of the state supreme court. As to all transactions affecting the ownership or devolution of property, occurring prior to such change in the rule, they would be controlled by the rule of property existing at the time of their occurrence. All rights of property must be governed and protected by the laws existing, and as they existed, at the time of the vesting of the right. This principle, so manifestly in accordance with the plainest principles of justice, receives our fullest approval, and will be applied in all cases coming within its scope. It is binding, in proper cases, upon the state as upon the individual. The state has not one law for the citizen, and a different application of it to itself. It has received the sanction of the highest court of the land in many cases. In *Gelpcke v. City of Dubuque*, 1 Wall. 206, 17 L. Ed. 520, the supreme court of the United States say: "The sound and true rule is that if the contract, when made, was valid by the law of the state as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law. The same rule applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law." The constitutional barrier to legislation impairing the obligation of contracts applies also to decisions altering the law, as previously expounded, so as to affect the obligations of existing contracts made on the faith of the earlier adjudications. See, also, *Olcott v. Supervisors*, 16 Wall. 689, 21 L. Ed. 382; *Douglass v. Pike Co.*, 101 U. S. 677, 25 L. Ed. 968; *South. St. Const.* § 319.

We have carefully examined all the decisions of this court in which section 21 of the Mobile & Northwestern Railroad Company charter, *ubi supra*, was involved, and are confirmed

Yazoo & M. V. R. Co. v. Adams

in the correctness of the conclusion reached by this court in their examinations of them in the case of *Railroad Co. v. Adams*, 77 Miss. 194, 24 South. 200, 317, 28 South. 956, that in none of them, prior to that case, was the constitutionality of said section presented or decided.

The able counsel for appellant, in responding to the questions submitted or reargument at this term, viz.: "(a) Was the precise point whether the twenty-first section of the Mobile & Northwestern charter violated the constitution of 1869 ever raised by the pleadings, and expressly decided by this court, prior to the decision in *Railroad Co. v. Adams*, 77 Miss. 194, 24 South. 200, 317, 28 South. 956? (b) If not so expressly presented by the pleadings and expressly decided by this court, was there ever a decision by this court prior to *Railroad Co. v. Adams*, 77 Miss. 194, 24 South. 200, 317, 28 South. 956, which decision could not have been rendered without this court having held that said twenty-first section did not violate the constitution of 1869, and in which, therefore, the decision that said twenty-first section did not violate the constitution of 1869 was necessarily made?"—admits there was no decision expressly made, but insists that the question was necessarily involved both in the pleadings and decision of the following named cases, viz.: *Mississippi Mills v. Cook*, 56 Miss. 40; *McCulloch v. Stone*, 64 Miss. 378, 8 South. 236; *Railroad Co. v. Thomas*, 65 Miss. 553, 5 South. 108; *Railway Co. v. Taylor*, 68 Miss. 361, 8 South. 675. The principle settled by the *Mississippi Mills* Case is not applicable to the case at bar. That case decided nothing save that the general exemption granted by the act of 1873 was repealable, and was repealed by the act of 1877. The constitutionality of the grant of exemption involved therein, which was general, not special, was not argued or considered by the court, but seems to have been conceded; and the whole contention then hinged upon the repealability of the statute, not its constitutionality. See *Railroad Co. v. Adams*, 77 Miss. 194, 24 South. 200, 317, 28 South. 956. And in addition to that the act of 1873, amendatory of the act of 1872, under the provisions of which the *Mississippi Mills* claimed exemption, was not an act granting a special exemption to a special corporation, but only sought to extend the provisions of a general law to a corporation which, being in operation at the time the general law was passed, was at that time not within its provisions; but, the buildings and machinery of the *Mississippi Mills* having been destroyed by fire after the passage of the act of 1872, its subsequent building and operation brought it within the terms of the act of 1872, as well as its intention. *McCulloch v. Stone* was an action of mandamus to compel the auditor to make deed to lands held by the state for delinquent taxes. These lands were outlying lands owned by the *Memphis & Vicksburg Railroad Company*, which had been released to the company by the auditor because of the provisions of the act of 1884 (Laws 1884, p.

Yazoo & M. V. R. Co. v. Adams

29), without requiring the payment of the taxes. Incidentally the twenty-first section, *ubi supra*, was referred to, and the court held that it found nothing in the terms of the act which would include outlying lands in the exemption, and held the deed of the auditor, therefore, void. The constitutionality of section 21 was not necessary to be considered, and was not mentioned or decided by the court. *Railway Co. v. Thomas* involved only the construction of the terms of the charter as to when the exemption therein claimed would begin. The constitutionality of the exemption was not considered or decided. In *Railway Co. v. Taylor*, 68 Miss. 361, 8 South. 675, the point involved was the liability to taxation of a short spur track, 1½ miles in extent, and a steam digger, for the year 1887, under said section 21, and involved the construction of said section 21, *supra*. Some confusion exists in references therein made, the exception therein named being referred to as being contained in the charter of the Mississippi Valley & Ship Island Railroad. The charter of the Mississippi Valley & Ship Island Railroad, while owned by the projectors of the Louisville, New Orleans & Texas Railroad, did not enter into the consolidation of the various companies by which said road came into existence, but the said charter contained the identical section 21, *supra*, which is contained in the charter of the Memphis & Vicksburg Railroad Company, one of the constituent companies entering into said consolidation. The court held that the consolidated road was the recipient of said exemption or contract of appropriation by chapter 555, Acts 1882, but this case was not decided until January 26, 1891, and in it the constitutionality of the alleged contract of appropriation was not involved or decided, nor was the constitutionality of said act of exemption necessarily involved. In none of the cases, except the Taylor Case, were the terms of section 21, *supra*, necessarily involved in the rendering of the decision, because in each case it was the question of outlying lands, not included in the terms of the section involved. In the Taylor Case the section was involved, and its terms held to include the case presented, but its constitutionality was never involved or decided. The question of *stare decisis*, and its consequent effects, can only be invoked as to the questions directly involved and expressly decided, or which were necessarily considered and determined by the court, and without such consideration and determination the decision could not have been rendered. In none of the cases decided by this court prior to the decision of *Railroad Co. v. Adams*, 77 Miss. 194, 24 South. 200, 317, 28 South. 956, was the constitutionality of said section 21 drawn in question. It is well said by the supreme court of the United States in the case of *Boyd v. Alabama*, 94 U. S. 645, 24 L. Ed. 302: "Courts seldom undertake in any case to pass upon the validity of legislation where the question is not made by the parties. Their habit is to meet questions of that kind when they are raised, but not to antici-

state. We hold the doctrine to be sound and firmly established by the decisions of the supreme court of the United States, and enunciated by many eminent text-writers, that rights of property and the benefits of investments acquired by contract in reliance upon a statute as construed by the supreme court of the state, and which were valid contracts under the statute as thus interpreted when the contracts or investments were made, cannot be annulled or divested by subsequent decisions of the same court overruling the former decisions."

We have quoted this expression of the principle at length, that we might express our concurrence in it, and we have carefully re-examined the previous decision of this court, to ascertain if it could be applied in the case at bar. But as before stated, in no decision prior to *Railroad Co. v. Adams*, 77 Miss. 194, 24 South. 200, 317, 28 South. 956, was the constitutionality or the unconstitutionality of said section 21, *supra*, "interpreted or promulgated" by this court, nor in any of them was the construction of said section necessarily involved, until the *Taylor Case*, in 1891; and this case only interpreted the meaning of the section, not its constitutional validity. The decision of the *Taylor Case* occurred in 1891, subsequent to the acquisition of the property by the appellants, and could not, therefore, be the basis of any investment by them, nor in any sense become a rule of property for prior transactions. In such case no room exists for presumptions. Manifestly no rule of property existed which could operate as an estoppel against the state in this suit. *Railroad Co. v. Adams*, 77 Miss. 282, 24 South. 200, 317, 28 South. 956; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 304, 14 Sup. Ct. 592, 38 L. Ed. 450.

Are the appellants in an attitude authorizing them to invoke the principle of estoppel? Looking to the facts shown by the record, briefly stated, the following conclusions appear: That portion of the railroad designated as the "Main Line," extending from the Louisiana line (state), on the south, to the state line of Tennessee, on the north, was constructed by the owners of the charters of the *Memphis & Vicksburg Railroad Company* and the *New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company*. The same parties also owned the charter of the *Mississippi Valley & Ship Island Railroad Company*, but as the last-named company did not enter into the consolidation, and as appellants disclaim any right asserted by them in pleadings founded upon its charter, its consideration is thereby eliminated, and only the first two named charters will be considered. The property was acquired by the *Yazoo & Mississippi Valley Railroad Company* in October, 1892, by consolidation with the *Louisville, New Orleans & Texas Railroad Company*. The *Louisville, New Orleans & Texas Railroad Company* was formed on the 12th day of August, 1884, by the consolidation of the *Memphis &*

Vicksburg Railroad Company and the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company with other companies not connected with this investigation, they not being Mississippi companies. The Memphis & Vicksburg charter authorized the construction of a line of railroad from Vicksburg, in Warren county, Miss., northward to the Tennessee state line, and contained in its charter section 21, *ubi supra*, authorizing appropriation of taxes to debts incurred in its construction. The New Orleans, Baton Rouge, Vicksburg & Memphis charter authorized the construction of a line of railroad from the Louisiana state line, on the south, to the Tennessee state line, on the north, towards the cities of New Orleans, La., and Memphis, Tenn., respectively, but did not contain any authority to appropriate taxes to its debts. The formation of the Louisville, New Orleans & Texas Railroad Company occurred by consolidation as aforesaid on 12th of August, 1884; the main line being at that time about completed for the running of through trains from Memphis to New Orleans, the first train running through being in October, 1884. The consolidation resulting in the formation of the Louisville, New Orleans & Texas Railroad Company was under and pursuant to the act of the legislature (Laws 1882, p. 1011), and act amendatory thereof (Laws 1884, p. 936), both of which contained section 21, *ubi supra*. In the early part of the year 1882, R. T. Wilson & Co. became the owners of the charter of the Memphis & Vicksburg Company and in the summer of 1882 the same firm became the owners of the charter of the New Orleans, Baton Rouge, Vicksburg & Memphis Company, and the last company organized in August, 1882. In May, 1882, R. T. Wilson & Co. established an office in Vicksburg, Miss., and began the construction of the road. Shortly afterward Mr. C. F. Huntingdon became interested in the enterprise, and R. T. Wilson & Co. and C. F. Huntingdon organized the Financial Improvement Company. On December 20, 1882, the owners of the charters contracted with the Financial Improvement Company, in the name of the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company, to construct the line of road from the Louisiana state line, on the south, to the Tennessee state line, on the north, and on same day contracted in the name of the Memphis & Vicksburg Railroad Company with W. M. Johnson, a member of the firm of R. T. Wilson & Co., to construct a line of road from Vicksburg, Miss., north to the Tennessee state line. This contract was assigned on same day to the Mississippi Valley Construction Company, who subsequently assigned the same to the Financial Improvement Company. Practically, the line was constructed through the entire state of Mississippi by the Financial Improvement Company under its original contract for the entire line, and from Vicksburg north under its individual contract for that portion of the road, as well as assignee of the contract of W. M. Johnson for same portion

of road. No contract appears in the record for that portion of the line south from Vicksburg to the Louisiana state line, except one made by the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company; and, as this company had no charter provision authorizing the appropriation of taxes, manifestly, as to that part of the line, no basis for claim of the road having been constructed by a road claiming charter exemption could exist. The entire line seems to have been constructed as a single business enterprise, with Vicksburg as a central office. No intent appears to have existed in the minds of the owners of both charters to restrict the building of any portion of the line specially to either charter, but rather to build the whole as a unified line,—a continuous enterprise under the authority of both charters. The deeds to the right of way, accounts for construction for purchase of material, and all expenses connected therewith, are made out and paid in the name of either company indiscriminately, and so inextricably intermingled that it is an impossibility to locate any part of the line as having been constructed solely by either one of the companies; some of the deeds to right of way and some accounts being made in the name of the Louisville, New Orleans & Texas Railroad Company some time prior to that road coming into existence. The reason of this failure to have and keep separate accounts during the time the road was being constructed is shown by the testimony of R. T. Wilson, who was the president of the constituent companies at that time, and who was president of the New Orleans & Texas Railroad Company after its organization, who says: "It was the purpose of the parties to consolidate under the act of March 3, 1882, as soon as found practicable and expedient to do so. From the first, the enterprise was carried on as a single business enterprise,—a unified railroad—under inducements and solely in reliance upon the provisions of said act. The road was built under the charters of the Memphis & Vicksburg and the New Orleans, Baton Rouge, Vicksburg & Memphis Railroads, in Mississippi." Thus it appears that no portion of the road was built alone by the contract with and from the Memphis & Vicksburg Company, and therefore the provisions of section 21, *supra*, contained in that charter, cannot be considered as any basis of a claim for exemption thereunder.

The only basis remaining to be considered, upon which the appellants' claim for exemption can rest, is the act of March 3, 1882, and the act of 1884, *supra*, amendatory thereof, authorizing consolidation, and which contained section 21, *ubi supra*, applicable by its terms alone to the consolidated company when organized thereunder. The Louisville, New Orleans & Texas Railroad Company, until and as the result of the consolidation of its constituent companies, did not exist, at which time the constituent companies, as such, ceased to exist, and the new company came into existence. This con-

Yazoo & M. V. R. Co. v. Adams

solidation occurred when the main line was practically completed, and, as the alleged right of appropriation of taxes was prospective in its proposed effects, clearly it could not act retroactively, by applying to a road previously built. As to the branch lines extended by the Louisville, New Orleans & Texas Railroad Company after its organization, the right of appropriation of taxes claimed must fail for two reasons: (1) For lack of legislative authority under the constitution to make such grant; (2) the evidence does not show clearly the amount expended in their construction, nor that the earnings of the road was not sufficient at the time of their construction to have paid 8 per cent. dividend on the capital stock, as provided in the act relied on, on the occurrence of which ability to pay such dividend the right of appropriation ceased. The party pleading exemption from taxation has imposed upon him the burden of clearly showing his right to the immunity claimed,—not alone to its having existed, but also as to its continuation to the time for which the taxes are claimed to be due,—and if either of such acts may be fairly to remain in doubt, from the evidence, the claim must be denied. *Greenville Ice & Coal Co. v. City of Greenville*, 69 Miss. 91, 10 South. 574; *Desty, Tax'n*, p. 135.

In addition to preceding reasons given why the exemption claimed by reason of charter provisions of the constituent companies cannot avail appellants, an examination of the statutes passed subsequent to their enactment shows that such provisions were repealed prior to the acquisition of those charters by R. T. Wilson & Co., and prior to any expense being incurred thereunder. In 1875 (*Laws 1875*, p. 66) the legislature passed an act entitled "An act to regulate railroad taxation," section 1 of which provides "that every railroad company, whose line is in whole or in part in this state, shall pay on the 31st day of December, in each and every year, a privilege tax as follows." Section 2 provides for report of length of road by a proper officer, and a penalty for failure to make report. Section 3 provides for damages for failure to pay the tax, and provides means for collecting such delinquent tax. Section 4 provides "that all acts and parts of acts, under which taxes may be collected from railroad companies, otherwise than as provided in this act, are hereby repealed." In 1878 (*Laws 1878*, p. 87) the legislature passed an act entitled "An act supplementary and amendatory of" above act of 1875. This act used the same language quoted above in section 1 of the act amended, and increased the amount of the privilege tax per mile, and provided "that this act shall not apply to the West Feliciana Railroad." In 1880 the Code of 1880 was adopted, and by sections 597 to 608, inclusive, therein, each railroad company owning and operating a road in this state is required to pay taxes, with this proviso: "That no railroad company shall be subject to taxation, while the same is in process of construction, but if any part of any road shall

be finished, and used for profit, the part so finished shall be taxed, although the whole road may not be finished." In neither the act of 1875, 1878, nor 1880, are charters containing exemption from taxation specially mentioned, but the language used in each, by necessary implication, repeals such exemption provisions previously enacted. Repeals by implication are not favored, and only result where the language used in the repealing statute, considered in its usual and general meaning and acceptation, evinces a purpose of the legislature irreconcilable with the law as enacted by the law repealed. The purpose of the later act is a potent factor in determining the meaning of the language employed, and must be considered in reaching a right result. The entire law must be considered together, and force and effect given to all of its parts, considered as a whole. The statutes declaring each and every railroad in the state liable to taxation, and taxing them, are irreconcilable with the previous statutes exempting them from taxation, continuing in force, and necessarily operate as a repeal of the previous law in conflict with them. Thus prior to the enactment of the statute of 1882 (Laws 1882, p. 1011) authorizing the consolidation of the constituent companies, the immunity from taxation granted them by the provisions of their charters had been repealed; and it follows that the language of section 1 of said act of 1882, providing "that the company so formed by such consolidation should have, enjoy, and possess all the rights, grants and immunities now possessed by such companies," did not have the effect of granting or conveying any immunity from taxation, for that immunity was not then possessed by the constituent companies, having been previously lost by repeal. In 1884 (Laws 1884, pp. 29-31), sections 607, 608, Code 1880, were amended, and the amendment contained a proviso as follows: "That the provisions of this act shall not have the effect to tax any of the lands of the Memphis and Vicksburg Railroad Company, until the 1st day of February, 1886," and that the Natchez, Jackson & Columbus Railroad Company should pay a privilege tax of \$40 per mile "after the expiration of exemption as provided in its charter and acts amendatory thereof." In neither of the extracts above quoted was there any intent to create or confer exemptions, but they were legislative recognition of exemptions; but they were only legislative recognitions of exemptions supposed to exist, and expressive of the purpose of the act as to them, which purpose could only be of effect in event of such existence, in which event the language and intent concur that they were not to be affected thereby. In March, 1886 (Laws 1886, p. 23) the above-named act of 1884 was amended. Section 6 of the amendatory act provides "that the act entitled 'An act to amend section 607-608 of Code of 1880, in relation to privilege tax on railroads,' approved March 13th, 1884, be so amended, as to fix the amount of privilege tax, to be paid by the several

railroad companies, mentioned and referred to in said act, at sums twenty-five per centum greater respectively than the sums mentioned in said act, and hereafter said railroad companies shall pay privilege taxes respectively twenty-five per centum greater per mile, as fixed in said act." The effect and purpose of this amendatory act of 1886 was to increase the privilege tax 25 per cent. greater than provided in the act of which it was amendatory. No other provision of the act of 1884 was affected thereby. In 1888 (Laws 1888, p. 49) an act was passed providing for "the assessment and collection of past due and unpaid taxes on railroads which have escaped the payment thereof." Section 1 provides that "every railroad, which has failed to pay the taxes for which the same was liable, for any year for which it was so liable, such railroad not being exempt by law or its charters from taxation for said years, shall be assessed." The act of 1890 (Laws 1890, p. 13) manifests the same legislative purpose to refrain from interfering with exemption contained in railroad charters, as appears in the act of 1880. In none of them, quoted above, is there any language used indicating a purpose of the legislature to create, revive, or confer exemptions. In 1878 (Laws 1878, p. 233) an act entitled "An act supplemental to the acts of incorporation of certain railroad companies," approved August 8, 1870, was passed, amending the charter of the Natchez, Jackson & Columbus Railroad Company so as to include therein section 21, *ubi supra*, but this act was repealed by Code 1880, §§ 597-608, *supra*. As to the state, the Illinois Central Railroad Company does not occupy the attitude of an innocent purchaser for a valuable consideration, without notice, either in law or equity, because (1) the grant proposing exemption from taxation, contained in the charter of the Memphis & Vicksburg Railroad Company, had been repealed before any work was begun thereunder, and a similar grant to the Natchez, Jackson & Columbus Railroad had been repealed long before any interest therein had been acquired by the appellants, and the proposal of exemptions contained in the act of 1882 and the act of 1884, amendatory thereof, authorizing the consolidation of the companies therein named, was wholly prospective, and, even if it had been a valid grant, could not be claimed by a company coming into existence after the road was built; (2) the grant of exemption being forbidden by the constitution in such cases, and there not having been any decision of the state supreme court holding the grant valid, no rule of property affecting this property in controversy existed, out of which alone an equity could arise. Estoppel against the state could not occur under such circumstances. Rights which the legislature, by reason of constitutional inhibition, could not confer, cannot result from or be founded upon the invalid act. That which cannot be done directly cannot thus be accomplished indirectly. At the time the Yazoo & Mississippi Valley Railroad acquired the

People v. Knight

property in controversy, and at the time the Illinois Central Railroad Company became interested therein, the constitutionality of said section 21 was an open question, and the rule of caveat emptor applied in full force. In *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 691, 16 Sup. Ct. 719, 40 L. Ed. 849, the court says: "In reply to the argument that millions of dollars have been invested in the securities of the company upon the faith of what was supposed to be its admitted power, it is sufficient to say that, in making such investments, capitalists were bound to know the authority of the company under its charter, and to put the proper interpretation upon it, and that we are not at liberty to presume that investments were made upon the faith of powers that do not exist; and, if they were, the commonwealth is not bound to respect investments made under a misapprehension of the law." The property at that time was charged with the liability to the taxes, now claimed, and the fact that at that time the property had not been assessed for taxation in no wise relieved it of the burden and of the duty of paying them.

The judgment of the lower court is affirmed.

CALHOON, J., having been of counsel in the lower court, took no part in this decision.

PEOPLE *ex rel.* NEW YORK CENT. & H. R. R. CO. v. KNIGHT,
Comptroller.

(*Court of Appeals of New York, Jan. 13, 1903.*)

[65 N. E. Rep. 1102.]

Franchise Tax—Capital Stock.

Under Laws 1896, c. 908, §§ 182, 190, the franchise tax is based on actual, and not the par, value of the capital stock of a corporation employed within the state.

Same—Rolling Stock.

The value of the rolling stock of a domestic railroad corporation is capital employed within the state, unless such stock is used exclusively outside of the state.

Same—Taxable Capital.

Where a domestic railroad corporation purchases stock of foreign corporations by the issue of bonds, the stock, being pledged to a trust company in the state as security for the bonds, is no part of its taxable capital.

Same—Same.

The amount of anticipated dividends on stock of other corporations owned by a domestic railroad corporation, its bills receivable for expenditures on leased lines, and the value of coal and supplies owned by the corporation without the state, are no part of its taxable capital.

Same—Same.

Where a domestic railroad corporation owns the stock of a domestic transportation company which employs its capital outside of the state, such stock constitutes no part of the railroad company's taxable capital.

Appeal from supreme court, appellate division, Third department.

People v. Knight

Proceedings by the people, on the relations of the New York Central & Hudson River Railroad Company, against Erastus C. Knight, comptroller of the city of New York. From an order of the appellate division (77 N. Y. Supp. 401) modifying, and affirming as modified, an assessment of a franchise tax against the relator for the year ending October 31, 1900, both parties appeal. Modified.

Ira A. Place, for relator.

John C. Davies, Atty. Gen. (Henry B. Coman, of counsel), for defendant.

HAIGHT, J. I concur in the conclusions reached by O'Brien J., except as to that part thereof which holds that the item of \$15,230,186.06 is not taxable. The court below found that this item represented the rolling stock employed outside of the state, it "being such proportion of all of relator's rolling stock as the mileage thereof without the state bears to the entire mileage of said rolling stock." As I understand this finding, it is to the effect that the rolling stock of the relator is used in this state and outside of the state; that is, cars are loaded at some point in the state (as, for instance, in the city of New York), and run over the relator's road to some other point (say, the city of Buffalo). They then are transferred onto other roads, and are run to points outside of the state, where they are unloaded, and then reloaded and returned to this state. The entire mileage includes that traveled in this state, as well as that out of the state. This, with the distance traveled outside of the state, and the total value of the stock, furnishes the proportion upon which the computation is made.

The question is as to whether this stock is taxable under the statute. The relator is a domestic corporation. It owns the rolling stock. It is used upon its lines of railroad in this state. True, the cars are transferred onto other roads, and are run outside of the state, for the purpose of facilitating the transportation of persons and freight without change of cars or of breaking bulk; but the use of the cars outside of the state is but temporary, for they are returned as soon as reloaded, and are again used in the transportation of persons and property within this state. It seems to me, therefore, that, under a fair and reasonable construction of the statute, this item should have been included as capital employed within this state.

Under the findings of the court below, as we understand them, the average amount of the relator's capital stock during the year was \$108,750,000; the average price was \$129.8125; making the average cash value of the relator's capital stock for the year \$141,171,093.75. The entire amount of the relator's total assets was \$337,760,785.52, and the portion of such assets as used in this state \$205,029,380.45, to which sum should be added the relator's rolling stock, \$15,230,186.06; making

People v. Knight

the total assets used within the state \$220,259,566.51. The statement would thus be:

$$x : 141,171,093.75 :: 220,259,566.51 : 337,760,785.52.$$

Under this statement, $x = \$92,060,076.91$, the amount to be assessed at one and one-half mills, which amounts to \$138,090.11.

In view of the fact that there is no express finding by the comptroller that none of the relator's rolling stock was used exclusively outside of the state, I think it advisable that the proceedings should be remitted to the comptroller, to the end that further evidence may be taken upon that subject in case it should be claimed that some portion of the relator's rolling stock was used continuously outside of the state; and, if it should be found that such was the fact, the amount thereof should be deducted, and the order of the appellate division and that of the comptroller should be modified accordingly, without costs to either party.

O'BRIEN, J. This appeal presents a controversy between the relator and the state concerning the amount of the annual franchise tax for the year ending October 31, 1900. The statute prescribes that this tax must be computed upon the basis of the amount of the relator's capital stock employed within this state. The main contention of the learned counsel for the relator is that the computation should be made upon the stock so employed at its par, and not its actual, value, and hence the determination now here for review is erroneous, since the computation was made upon the latter principle. The language of section 182 of the tax law (Laws 1896, c. 908) would seem to support the relator's contention; but this court has recently held that this section must be read with section 190, and, when so read, the basis for the tax is the actual, and not the par, value of the stock. *People v. Roberts*, 168 N. Y. 14, 60 N. E. 1043. In the present case it would doubtless be to the advantage of the relator to have the tax based upon the par value of the stock, since that value is much less than the actual value, and the dividends are only 5 per cent.; but in case of a corporation that had paid even a smaller dividend, and whose stock was much below par, it would be decidedly to its disadvantage. By reading the two sections together, absurd and unequal results are avoided. The two sections are apparently conflicting. In such cases it is the duty of courts to reconcile contradictory or conflicting provisions when possible, and the case cited is a precise authority for the principle that the tax should be based upon the actual value. This permits the statute to operate in a way that is reasonable and just, while the other view would render it even more confusing than it now is. Courts cannot always follow logical reasons when dealing with a complicated statute, constructed without much method or system in the arrangement

People v. Knight

of its different parts, and lacking in clearness and precision of language.

Passing from this question of construction, there is nothing left of the controversy on either side, save the proper application of the rule, and the principles upon which the actual value of the relator's capital in this state is to be ascertained. With respect to this question it should be noted at the outset that the writ of certiorari was made returnable at the appellate division, and the issues were there tried and heard upon the relator's petition, the writ, and the return of the comptroller, including the papers attached thereto. The general and primary question that the court had before it for decision was one of fact, and that was the actual value of that part of the relator's capital employed within this state, and upon that question the learned court made findings upon which its general conclusion is based. In the main, we think these findings are correct. There is one item of property which the court found, as matter of fact, to be employed outside the state, which nevertheless it felt constrained, for some reason that does not distinctly appear, to include as part of the property or capital stock employed in this state. It may be that this is an inadvertence or oversight, but it will be referred to more fully hereafter. The learned court, in stating the account, excluded certain items of property which the learned attorney general contended, and still insists, should be included; and the ground upon which they were excluded from the calculation was that they either represented property employed outside the state, or did not in any legal sense constitute capital at all. A very brief reference to these items will show that the action of the court below was correct:

1. The relator held \$90,578,400 of the stock of the Lake Shore & Michigan Southern Railway Company, and \$18,900,825 in the Michigan Central Railroad Company. This stock was part of the relator's capital or general assets. Both companies are foreign corporations; the former being partly within and partly without the state, and the latter entirely without the state. This stock was purchased by the relator by the issue of bonds, and the stock was pledged to a trust company as collateral security for the payment of the bonds. The relator being the owner of these stocks, they constituted part of its capital; but that part of its capital was not employed within this state, and so this court has held. *People v. Campbell*, 138 N. Y. 543, 34 N. E. 370, 20 L. R. A. 453; *People v. Wemple*, 148 N. Y. 690, 43 N. E. 176. In the former case, Judge Earl, speaking for this court, said: "The stock which the relator took in companies organized outside of this state stood for so much of the relator's capital invested outside of the state. It took a portion of its capital, to wit, a portion of its patent rights, and employed it outside of the state to purchase those stocks. Its property in those corporations represented by its shares of stock was outside of this

People v. Knight

state, and was in no sense employed here. Those stocks had no situs here, and were not taxable here under any system of taxation which has ever existed in this state." In the case at bar the stock was purchased, not with patent rights, but with the bonds of the company sought to be taxed. The form of the consideration, however, can make no difference; and, so long as that part of the relator's capital represented by the purchase was employed outside of the state, it should not be included. Nor can it be important that the stock had, for convenience, been used as a security upon deposit as collateral for the bonds in a trust company located in this state.

2. The court below found that a certain portion of the relator's rolling stock (that is to say, its cars, both freight and passenger) was employed outside the state; the proportion being estimated on the mileage or wheelage basis at \$15,230,186.06. The court excluded this item from the calculation on the authority of *People v. Knight*, 75 App. Div. 164, 77 N. Y. Supp. 398. It was there held that the term "employed within this state," used in section 182, did not mean simply the legal situs of the property, and this principle was decided in other cases. *People v. Roberts*, 154 N. Y. 1, 47 N. E. 974; *People v. Roberts*, 8 App. Div. 201, 40 N. Y. Supp. 417, affirmed on opinion below in 151 N. Y. 619, 45 N. E. 1134. It is obvious that since the relator is a great interstate railroad, traversing the continent, a large proportion, or at least some, of its rolling stock must be always employed outside of the state. It may be that the situs of all the relator's property is in the state of its creation, but, as already remarked, the question is not where the situs is, but where the property is employed. It may be that various states through which the relator's railroad is operated impose taxes upon such part of its property as upon the basis adopted here is found to be employed in these states, respectively; so we think that the learned court below was correct in excluding this item from the estimate of the relator's property employed within this state. The relator is practically operating a continuous line of railroad from New York to Chicago and beyond. It not only owns nearly \$110,000,000 of the stock of the Western connecting roads, as shown by the record, but is operating these roads as Western connections either under leases or traffic agreements. It is practically the owner of these roads, just as it is the owner of the West Shore, in this state. The operations of the Central do not stop at Buffalo, but extend beyond, and through Canada and various Western states. It owns these Western roads by practically as good a title as it owns the West Shore in this state, and hence, as already observed, it is operating a continuous line of railroad from the Atlantic Seaboard through various states of the West. The part of the line beyond the limits of this state is longer than that part from New York to Buffalo, and the local and through traffic is immense. Therefore, to contend that all

People v. Knight

the rolling stock of the relator is "employed in this state" would seem to me to be an indefensible proposition. Certainly some of it must necessarily be employed in other states. It cannot all be employed at the Eastern end of the line. If so, then the part of the rolling stock employed outside and inside of this state is a question of fact, and the court below has found that a designated part of the rolling stock is employed without the state. This court has no power to interfere with that result unless it can say that there is absolutely no evidence in support of the finding. It cannot say that, for the plain reason that, as appears from the record, there was evidence on that subject, and no one claims otherwise. It has the power to say that, granting to the full extent the fact found as to the employment of part of the rolling stock out of this state, yet, as matter of law, since the relator is a domestic corporation, and the situs of all its personal property is here, all the rolling stock is employed in this state. But such a decision would seem to me to be not only plainly wrong in principle, but sharply opposed to many decisions of this court, some of which are cited above. The stock of the Western railroads, amounting to nearly \$110,000,000, and the coal and other personal property that we have just held is not employed in the state, are owned and held here in just the same sense as the rolling stock; and why this property is employed outside the state, and all the rolling stock within the state, is not made very clear to me, and therefore I am in favor of accepting the finding of the trial court that a certain and designated part of the cars and engines of the relator are employed outside of the state.

3. The learned court below found that three other items of the relator's property, amounting in the aggregate to \$1,236,871.17, was not capital at all, or at least was not employed in this state. This general item was made up of the sum of \$965,217.97 for "anticipated dividends" on stock of other corporations which the relator owned. The dividends had not been declared, and were therefore a mere incident to the stock. It seems to be conceded by both parties that this item was properly excluded. The second item embraced in the general amount above stated was \$171,653.20 for bills receivable. This sum appears to have been made up of expenditures by the relator on leased lines. No direct return is expected for these expenditures, and the relator holds no obligation for reimbursement, although carried on the books as "bills receivable," and so the court below properly held that this item constituted no part of the relator's property within this state for the purposes of the franchise tax. The third item entering into the general sum above stated was \$100,000 for coal and supplies without the state. It is hardly conceivable that all the coal which the relator uses in the operation of its railroad can be said to be employed within this state, and so this item was properly found to be property

People v. Knight

not employed in this state. There was no error in the decision of the court below excluding these three items from the calculation.

4. The relator owned \$2,597.400 of the capital stock of the Merchants' Dispatch Transportation Company, a domestic corporation engaged in the transportation business. Eighty-nine per cent. of that amount, or \$2,311,686, represented business of that company outside the state; and, although these facts are found by the learned court below, it included the latter amount in its valuation of the relator's property employed within this state. Since the relator's holdings in this company were employed outside the state, we think they should not be included in the calculation, under the authorities cited above. It is very difficult to see how a distinction was made between those items and the other items referred to which the learned court below excluded. It seems to have been assumed that, since this stock was that of a domestic corporation, it constituted a part of the relator's property employed in this state; but, as already observed, the legal situs of the property does not determine the question, and, since the learned court below found that the transportation company that issued the stock employed the capital represented thereby outside the state, it is difficult to understand how the relator, by the mere fact of its ownership of the stock, could employ the capital represented by it in this state. With respect to this item, we think that the decision of the learned court below should be corrected by the proper modification.

By a process of calculation which is not questioned here by either party, except as to the matters above referred to, the learned court below found, as stated in the opinion, that the amount of the relator's capital employed within this state, upon which the tax should be computed, was \$90,151,825.98; but since that amount was the result of an error in including a portion of the stock of the transportation company employed without the state, namely, the sum of \$2,311.686, the calculation and estimate should be corrected upon the principles adopted as to the other items, and this process, which seems to have been finally adopted by the court below in the official report of the case, will give the following result: The percentage of its entire capital employed within the state during the year was .60702, or over 60 per cent. The average amount of its entire capital stock at par was \$108,750,000, and the average share price was \$129.8125; making the average value for the average amount of stock \$141,171,093.75, and the amount upon which the tax of one and one-half mills should be computed \$85,694,383.18, and the amount of the tax \$128,541.57. There is a material discrepancy between the amount upon which the tax is to be computed as stated in the opinion of the learned court below and that stated in the findings. In the former, as already observed, the amount stated as the basis of the tax is \$90,151,825.98, and the tax

Saar v. Chicago, etc., Ry. Co

\$136,227.73, while the actual finding of the court is that the amount upon which the tax should have been and should be computed is \$86,659,287.62, and the tax should have been and should be \$129,988.93. The discrepancy may no doubt be accounted for by assuming that the court below, in making up the judgment, did not follow the opinion. However that may be, it will be seen that the result expressed in the findings below makes the tax somewhat larger than the result at which we have arrived. The opinion of the court below, as found in the record, differs materially from that contained in the official report of the case. 75 App. Div. 169, 77 N. Y. Supp. 401. In the latter the case seems to be decided upon the principles herein stated, the slight differences in results being due to an error in the figures.

The order of the appellate division should be modified accordingly, with costs to the relator in this court.

PARKER, C. J., and BARTLETT, MARTIN, and CULLEN, JJ., concur with HAIGHT, J. O'BRIEN, J., reads for modification of order. VANN, J., absent.

Ordered accordingly.

SAAR v. CHICAGO, B. & K. C. Ry. Co.

(Supreme Court of Iowa, Jan. 20, 1903.)

[93 N. W. Rep. 66.]

Railroads—Killing Stock—Defective Gate—Findings.

A special finding in an action against a railroad for killing stock, alleged to have escaped onto the track by reason of a defective gate, that the jury did not know how the gate became opened at the time of the accident, is not necessarily inconsistent with a general verdict for plaintiff, it having been specially found that the gate, as to its fastenings, was not sufficient or in good repair, at the time of the accident, and it not being necessary to determine specifically how it came open, the material question being whether it was open on account of defective construction.

Appeal from district court, Van Buren county; T. M. Fee, Judge.

Action to recover damages for the killing of plaintiff's cow on defendant's right of way, it being alleged that the animal escaped from plaintiff's premises upon said right of way by reason of a defective gate at a private crossing. Verdict for plaintiff for \$250, but on defendant's motion, based on a special finding, the court set aside the general verdict and rendered judgment for defendant for costs, from which plaintiff appeals. Reversed.

J. P. Starr, for appellant.

H. H. Trimble and Wherry & Walker, for appellee.

McCLAIN, J. To entitle plaintiff to recover, it was necessary under the issues for him to show that the gate was defective, and also that, by reason of its defective condition, the plaintiff's cow got upon the defendant's right of way.

Chicago, etc., Ry. Co. v. Huggins

There was a special finding of the jury that, as to its fastening, the gate was not sufficient, nor in good condition and repair, at the time of the accident. But in response to the interrogatory, "How did the gate become opened at the time of the accident?" the answer of the jury was, "Don't know."

The record of the court's ruling, in the defendant's motion to set aside the verdict and render judgment for defendant, shows that the action of the court sustaining the motion was based on the answer to the interrogatory last above referred to. We think this ruling was erroneous. It was not necessary for the jury to determine specifically how the gate became open, the material question being whether it was open on account of defective construction. Suppose the fastening of the gate to have been totally insufficient, so that by any one of a variety of causes, none of them due to the intervention of human agency, the gate might have been open; it would not do to say that the jury must specifically find through which one of these causes and in what particular manner it had become open at the time plaintiff's cow passed through. The answer to the interrogatory, therefore, was not such as to be necessarily inconsistent with a general verdict for plaintiff.

It is argued for the appellee that the general verdict might have been set aside because inconsistent with other of the special findings, and others are referred to in the motion; but the court based its ruling specifically on the one above quoted, and, furthermore, the others which are specified in the motion are not such as would sustain a judgment for defendant, notwithstanding the general verdict. It is not necessary to set out the other findings, as they are not relied on for appellee in argument.

Counsel for appellee insist further that, without regard to the special findings, the general verdict may have been set aside because wholly unsupported by the evidence; but the motion presented no such ground for setting aside the general verdict, nor did the court rule on any such ground. It is clear from the record that the only question presented and ruled on after the verdict was the right of defendant to have judgment on this one special finding.

The judgment is therefore reversed.

CHICAGO, R. I. & P. RY. CO. v. HUGGINS.

(*Court of Appeals of Indian Territory, Sept. 25, 1902.*)

[69 S. W. Rep. 845.]

Railroads—Negligence—Killing Stock—Evidence.

Where, in an action against a railroad company for killing plaintiff's cattle on the track, the evidence for plaintiff simply showed that the cattle were found dead on the track, and that for defendant showed that the engineer was keeping a close watch on a dark night while the train was running at 40 miles an hour, and that the cattle were discovered on the track 200 feet away, that under such circum-

Chicago, etc., Ry. Co. v. Huggins

stances it was dangerous to attempt to stop the train, that the natural result would be to throw it from the track, it was error not to direct a judgment for defendant.

Appeal from the United States court for the Southern district of the Indian Territory; before Justice Hosea Townsend, February 24, 1899.

Action by J. L. Huggins against the Chicago, Rock Island & Pacific Railway Company to recover for cattle killed by defendant's train. From a judgment for plaintiff, defendant appeals. Reversed.

The plaintiff below (appellee here) began suit against the Chicago, Rock Island & Pacific Railway Company, appellant, before H. M. Wolverton, United States commissioner at Ryan, Ind. T., on July 3, 1896, for killing two three year old steers by a train near Addington, Ind. T., and claimed damages in the sum of \$60. Summons was issued against the defendant, and served June 27, 1898, and the cause was heard in the commissioner's court on the 19th of July of the same year. The plaintiff, Huggins, filed a complaint claiming damages to the amount of \$60 against defendant for the killing of two steers through the negligent operation of defendant's train. Before proceeding to trial the defendant filed a motion in the commissioner's court to have the plaintiff make his complaint more specific. The plaintiff amended, averring that the killing of the steers was occasioned by negligence on the part of the defendant in the operation of its train. The defendant answered, and admitted the value of the cattle and the killing, but denied that there was any negligence on the part of the defendant or its agents. The case was tried before a jury, and resulted in a verdict in favor of the plaintiff for \$60 damages. An appeal was taken by the railway company to the United States court for the Southern district of the Indian Territory at Ryan, and on the 24th of February, 1899, the case was called for trial; whereupon the defendant company filed the following motion: "Comes now said defendant and moves the court to require plaintiff to file in the above-entitled cause a complaint stating therein what wrongful or negligent or otherwise acts it is claimed the defendant was guilty of in the alleged killing of the steers in question, and that plaintiff be required to make his claim more definite and certain by alleging in said complaint what said alleged negligent, wrongful, or otherwise acts of the defendant consisted of; and, if negligence in the operation of the defendant's trains, or any of them, is claimed, then that plaintiff be required to give the number of the train, the number of the engine, the direction in which the same was running, the hour of the day which it is claimed said alleged damages occurred,—for the reason that, without said allegations, averments, and information, defendant is unable, and will be unable, to prepare its defense to said action." Thereupon the plaintiff, through his attorney, stated that he would comply with said motion by an oral

Chicago, etc., Ry. Co. v. Huggins

statement, and thereupon proceeded to make the following statement, to wit: "That said steers were killed by the negligence of the railway company; that there was a straight track there for some distance, and that the engineer saw the cattle, or had opportunity to see them, in time to have slackened his speed, or to have stopped his train, and prevented killing them. Furthermore, that he saw the steers in time to give them signal,—blow his whistle or ring his bell,—to have scared them off the track, but he made no effort whatever to prevent the killing." And thereupon the defendant made the following admission: "That the two steers were killed at the time and place alleged, but denies that it was through any negligence of the company or any of its employees; that the steers got upon the track in the nighttime; that the train was running at a speed of forty miles per hour, and when the cattle were observed on the track it was too late to avoid striking them. They were stricken under those circumstances, and without any fault upon the part of the defendant company or its agents." Upon the trial of the cause the plaintiff produced but one witness, Mr. Addington, who testified that he knew nothing about the suit, only that the two steers were supposed to be killed by the train; that they were laying on the right of way of the railroad near the track; that he saw them just after they were dragged off; that it was along the first days of July, 1896; that he saw hair and blood on the end of the rail; that he only examined the cattle sufficient to see the brand upon them, and that they belonged to J. L. Huggins, and were worth \$28 or \$30 apiece; that the track was level and straight something over a quarter of a mile north and a half to three-quarters of a mile south, and supposed that cattle could be seen on the track at night with the headlight of an engine about two telegraph poles, and that the telegraph poles are something near 200 feet apart; and that he knew nothing about the killing of the animals, as he was asleep. This was all of the testimony offered by the plaintiff in the case. The defendant then introduced N. H. Brooks, who testified: "I am an engineer for the Rock Island Railroad Company, and was the engineer upon the passenger train which struck the cattle in question, and had four coaches. The cattle were struck at 12:35 a. m., while the train was running at a speed of forty miles per hour. When the cattle were struck, I was sitting on the engine seat looking ahead. They were about two hundred feet away, standing on the track, when I first saw them. It was a dark night. The headlight on the engine was in good working order, and was such as is usually used by railway companies, being a standard headlight. I have had in the neighborhood of fifteen years' experience as an engineer. Q. How long had you been watching down the track at the time when you saw them? A. Well, I really was continually watching, you might say. Q. How far can an engineer ordinarily see creatures of that kind on the track in

Chicago, etc., Ry. Co. v. Huggins

the night when the engine is going at a speed of forty miles an hour and the headlight is burning brightly? A. Just about two hundred feet you can tell what they are,—distinguish an animal. When I first saw them, I did nothing. In going at that speed on such a track with such a train the train could be stopped in about eight hundred feet. Q. Have you calculated the time it takes, going at the rate of forty miles an hour, to cover two hundred feet? A. Yes, sir; it takes three seconds and a half. Q. Now what is the effect, or what is ordinarily the result, of a train moving at a speed of from thirty to forty miles an hour that strikes an animal standing on the track that way? Does it throw it off? A. Yes, sir; it throws it off. Q. Now, if you had succeeded in reducing the speed to ten or fifteen miles an hour, what would have been the probable effect on the train? A. Well, there have been accidents of that kind that resulted in ditching the train. Q. What is ordinarily the usual results of reducing the speed of the train to such a speed as that,—say ten or fifteen miles an hour,—and striking animals on the track? A. Well, it is not safe to do it. Q. You may tell the jury why it is not safe. A. In striking an animal slow that way you simply strike them hard enough to roll them up on the pilot, and when they get up there they roll back on the track immediately in front of the engine, and the engine will go over them, and result in throwing the wheels off the track. Q. Have you had experience of that kind? A. Yes, sir. Q. How many times? A. Three wrecks on the Rock Island inside of the last four years. Q. Is it regarded as safe to slow up your engine, in pulling a passenger train, when it is apparent that you will be unable to stop it before reaching an animal on the track? A. No, sir; it is not. Q. You say that, it would have been impossible, at the time that those animals became visible, to have stopped the train, and avoided striking them hard enough to kill them? A. Yes, sir; it would have been. The telegraph poles along the Rock Island track are one hundred and fifty feet apart.” On cross-examination by attorney for plaintiff, Huggins, the witness, was asked: “Q. Were you keeping a lookout that night constantly,—the night those steers were killed? A. Yes, sir.” No other witnesses were examined. Upon the conclusion of the testimony the defendant’s attorney submitted to the court a written instruction, as follows: “You are instructed that the plaintiff has failed to prove that the cattle described in his complaint were killed through any negligence of the defendant, and your verdict should be for the defendant.” The court refused to give this instruction, and the defendant, by its counsel, excepted. The court instructed the jury, and counsel for defendant excepted to the giving of each and every of the instructions so given. There was a verdict for the plaintiff, and damages at \$56. On the 25th of February, 1899, there was a motion by defendant for a new trial upon the following grounds: “First, That

Chicago, etc., Ry. Co. v. Huggins

the verdict is contrary to the law, and is not supported by the evidence. Second. Error of the law occurring at the trial, and excepted to by the defendant, to wit, the refusal of the court to instruct the jury to return a verdict for the defendant, and the giving of the following instructions to the jury [setting out all of the instructions given by the court].” The motion for a new trial was heard and overruled, exception taken, and judgment was given on verdict. An appeal was prayed and granted, and 60 days given in which to file a bill of exceptions, which was filed within the time.

M. A. Low, W. F. Evans, and C. O. Blake, for appellant.
Dunn & Jones, for appellee.

RAYMOND, J. (after stating the facts). In order that plaintiff may recover in this kind of an action, there must not only be proof of the killing of the stock, but that the killing resulted from the lack of ordinary care on the part of the servants of the railway company. If there is no negligence, there is no liability. Proof of the killing of the stock is not sufficient. The plaintiff must go further. He must aver and prove negligence on the part of the railroad company. “The burden of proof is on him who complains of negligence.” Pol. Torts, p. 545. “Negligence in the management and running of a train is not made out by proof of the killing of stock by it.” Railroad Co. v. Patchin, 16 Ill. 198, 61 Am. Dec. 65; Railroad Co. v. Morthland, 30 Ill. 451; Railroad v. Utley, 38 Ill. 410; Railroad Co. v. Whalen, 42 Ill. 396; Railway Co. v. Barrie, 55 Ill. 226; Railroad Co. v. Lynch, 67 Ill. 149. “The omission to ring a bell or sound a whistle does not render a railroad company liable for an injury to animals, unless it is made to appear that such signal would have prevented the injury.” Railroad Co. v. Phelps, 29 Ill. 447; Railway Co. v. Jones, 76 Ill. 311. “The weight of authority is to the effect that a plaintiff who is seeking to recover for animals injured on a railway track must not only show the omission of signals, but must show that such omission was the cause of the injury.” Elliott, R. R. § 1206. In the case of Holman v. Railroad Co., 62 Mo. 562, the supreme court of Missouri held that, when it is alleged that the stock was killed by a train of cars at a point where the law requires signals to be given, the testimony must show or tend to show that the failure to give the statutory signals caused the accident; and that, where the only proof in such a case was that the animal was killed at a public crossing by a train, and that no signals were given as required by law, it is the duty of a court to direct a verdict for the defendant. In Railroad Co. v. Phelps, 29 Ill. 447, the court said: “The statute requires railroad companies to ring a bell or sound a whistle at all road crossings, and on default they are made liable to a penalty of fifty dollars and for all damages sustained by reason of such neglect. No witness could state that this injury resulted in consequence of a failure

Chicago, etc., Ry. Co. *v.* Huggins

to ring the bell or sound the whistle. The injury did not occur at a road or street crossing, and it must be inferred that a failure to ring the bell or sound the whistle at the street crossing, did not produce the injury, unless by doing so it would have prevented the animal from attempting to cross the road as it did. And, as one of the witnesses stated, no person could tell what a horse would have done if the bell had been rung or the whistle had been sounded. We think there was a total failure of evidence to prove, or evidence that even tended to prove, that the injury was the result of the failure." In *Railroad Co. v. Linn*, 67 Ill. 109, the point decided is stated in the syllabus as follows: "While the statute imposes a penalty on a railroad company for a mere omission to comply with its requirements, more is required to create a liability for injury to person or property. In the latter case, when no other negligence is proved, the injury must be by reason of the neglect to ring a bell or sound a whistle, and the proof must show that it was the probable result of the omission." In course of the opinion the court said: "The statute imposes a penalty upon corporations for the mere omission to comply with its requirements; but more is required to create a liability for injury to persons or property. In the latter case the injury must be by reason of the negligence. The proof must show that it was the probable result of the omission. In this case it is not a reasonable presumption that the mare was killed in consequence of the neglect to ring the bell or sound the whistle. There is not even a strong suspicion created." In *Vallance v. Railroad Co.* (C. C.) 55 Fed. 364, the court said: "The only evidence tending to show that the failure to ring the bell or sound the whistle contributed to the injury was such as could reasonably be inferred from the presence of the child at or near the crossing with injuries of the character described. In order to entitle the plaintiff to recover upon this ground, the jury were instructed that they must find from the situation that the omission to ring the bell or sound the whistle contributed to the injury. There was no evidence that the child was precocious, or that it had been warned that a railway whistle or bell was a signal of danger. Therefore, upon the conceded facts on this branch of the case, the finding of the material and necessary fact that the failure to whistle or ring the bell contributed to the injury in any way is against the weight of the evidence, and an inference or deduction so unreasonable as to compel the conclusion that the jury were controlled by prejudice." "It is a matter of common knowledge that the Indian Territory is a grazing country, where cattle in great numbers run at large. The owners of cattle are not bound to fence them up, and the railroad company is not bound to fence them out." *Railroad Co. v. Washington*, 1 C. C. A. 286, 49 Fed. 347. "Where a domestic animal running at large by the sufferance of the owner gets upon a railroad track at the crossing of a highway

Chicago, etc., Ry. Co. v. Huggins

where the company is not required to fence, and is killed by a passing train, the company will not, in general, be liable, unless its servants, after they discovered the animal, might, by the exercise of proper care and prudence, have prevented the injury." *Railway Co. v. Barlow*, 71 Ill. 640. "Where stock are killed or injured within a city, town, or village in Illinois where a railroad is not required to fence, there can be no recovery had by the owner without the averment in declaration and proof that the servants of the company were guilty of negligence in running its trains." *Railroad Co. v. Barton*, 80 Ill. 72. "Where a railway company is under no statutory liability for injury to stock by its trains by reason of its road not having been fenced, the only ground of liability will be that the injury might have been avoided by the exercise of ordinary care and prudence, and that its servants in charge failed to exercise such care and prudence." *Railroad Co. v. Spencer*, 76 Ill. 192. "A railway company is never authorized to diminish the speed of its trains in order to avoid injury to cattle on the track, if, by so doing, it augments the danger to passengers." *Wood*, R. R. p. 1851. "In the absence of statutory enactments regulating the speed of railway trains, railway companies may run their trains at any rate of speed which may best suit their convenience. They are not bound to run at a slower rate of speed because animals may get upon the track and may receive injuries by reason of such high rate of speed. Railway companies being engaged in the business of conveying passengers and property, and that business being regarded of the highest importance, the speed of trains may be regulated with that end in view. The slight private interest which may exist because of danger of injury to animals straying upon the track must give way to the greater interests which exist in favor of the public. No rate of speed is negligence per se. * * * Where animals are discovered upon the track, the engineer is ordinarily bound to exercise some degree of care to prevent injuring them, if such care can be exercised consistent with the safety of the train or its passengers. If danger would likely result to the train or its passengers from an effort to stop or slacken the speed of the train, there is no obligation to stop or slacken the speed; for the safety of the train and its passengers is of the highest importance, and takes precedence over the safety of animals on the track; and an engineer will be justified in increasing the speed of his train, so as to throw animals away from the track, where such a course will secure the greatest safety for the train and the property and passengers being carried thereon. * * * And where it appears that an effort to slacken the speed would not avoid the collision with the animals, the company is excused from making the effort." 3 Elliott, R. R. p. 1850, § 1204.

If there is no proof of negligence, the court should instruct the jury to find for the defendant. We are of opinion that

Pennsylvania Co. v. Reidy

there is no proof of negligence upon the part of the railroad company. In fact, the testimony of the engineer in charge of the train negatives the charge of negligence, and the plaintiff offers no evidence to support his contention that the stock was killed through the negligence of the defendant company. The court is of the opinion that the peremptory instruction asked for by the defendant in the court below should have been given.

Reversed and remanded.

PENNSYLVANIA CO. v. REIDY.

(*Supreme Court of Illinois, June 19, 1902.*)

[64 N. E. Rep. 698.]

Accident at Crossing—Contributory Negligence—Question for Jury.

A train was unloading passengers at a point where a street intersected its tracks, which lay in another street, as did also the tracks of another railroad. Plaintiff, alighting from the train, started easterly toward the tracks of the latter railroad along the intersecting street. To the north, between the tracks, stood a switchman's shanty, and there were persons about it obstructing plaintiff's view in that direction. The gates across the intersecting street were down. Plaintiff, while crossing the tracks, was struck by a train coming from the north, and injured: *held*, that the question whether plaintiff was in the exercise of due care was for the jury.

Same—Negligence—Question for Jury.

The engineer of the train that ran into plaintiff testified that he knew the other train was due to stop at the crossing; that he saw it stop, and saw plaintiff approach the tracks, but did not slacken speed: *held*, that the question of the defendant's negligence was for the jury.

Same—Same—Evidence—Rules.

A railroad train had stopped at a platform placed in a street for the use of passengers on alighting from trains, and plaintiff, after leaving the platform, started across the tracks of another company and was struck by a train. In an action for the injuries there was admitted in evidence a rule of defendant to the effect that a train, approaching a station where a passenger train is receiving passengers, should be stopped before reaching the passenger train: *held*, that the error, if any, in admitting the rule, was cured by an instruction to the effect that the rule had no application to trains or tracks other than those of defendant.

Same—Same—Instructions.

A railroad train had stopped at a platform placed in a street for the use of passengers on alighting from trains, and plaintiff, after leaving the platform, started across the tracks of another company and was struck by a train. The engineer of the train that struck plaintiff testified that he knew the other train had stopped, and that he saw passengers alighting: *held* not error to refuse to charge that, if the jury believed that at and before the injury it was customary for suburban passenger trains to avoid stopping at a station at a time when a through passenger train was about to pass, then the engineer of defendant's train had a right to believe the trains in question would be governed by such custom, as the instruction ignored the testimony of the engineer.

Appeal from appellate court, First district.

Action by Thomas A. Reidy against the Pennsylvania Com-

Pennsylvania Co. v. Reidy

pany. From a judgment of the appellate court (99 Ill. App. 477) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Geo. Willard, for appellant.

Seth F. Crews and Ralph Crews, for appellee.

BOGGS, J. On the 8th day of February, 1892,—now more than 10 years ago,—the appellee was run upon and struck by an engine which was drawing one of appellant's passenger trains southward on and along Stewart avenue, in the city of Chicago. He brought this an action on the case to recover damages because of the injuries so sustained. The case has been twice tried in the circuit court of Cook county. The appellee prevailed on both hearings. A judgment in his favor in the sum of \$12,000, entered on the first hearing, was reversed by the appellate court for errors in matter of procedure. Upon a second hearing judgment was awarded the appellee in the sum of \$10,000. This is an appeal from the judgment of the appellate court for the First district affirming the last-mentioned judgment of the circuit court of Cook county.

The errors assigned render necessary some reference to the facts. At the time the appellee was injured the appellant company maintained two railroad tracks in Stewart avenue, in the city of Chicago, located near each other, on the easterly side of the avenue. The Western Indiana Railroad Company maintained two tracks on the westerly side of said Stewart avenue. The Chicago & Eastern Illinois Railroad Company operated its passenger trains on the more easterly track of said Western Indiana Railroad Company, in said avenue. Thirty-First street runs east and west, and intersects Stewart avenue at right angles. In the center of the avenue, at the crossing of said Thirty-First street, there was a space of about 20 feet between the more easterly track of the Western Indiana Railroad Company and the more westerly track of the appellant company. At the south side of Thirty-First street, and immediately adjoining the easterly track of the Western Indiana Railroad Company, a small and narrow platform had been erected for the use of passengers in entering or alighting from the trains passing along the avenue on that track. The platform was about 9 feet long, 2½ feet wide, and about 15 inches high. It could only accommodate the passengers who were attempting to enter or alight from the rear end of one car and the forward end of another. At the hour of 20 minutes after 5 o'clock on the evening of February 8, 1892, a passenger train of the Chicago & Eastern Illinois Railroad Company, which was northward bound on the easterly of the tracks maintained by the Western Indiana Railroad Company on said Stewart avenue, stopped at the crossing of Thirty-First street. The appellee was a passenger on the train, and alighted at or near the south line of Thirty-First street, and at once proceeded to pass eastwardly along

Pennsylvania Co. v. Reidy

the south side of Thirty-First street, across the tracks of the appellant company in the avenue. A passenger train of the appellant company was then approaching the crossing from the north on the westerly of appellant's tracks in Stewart avenue, and the engine drawing said train ran upon and struck appellee as he was crossing the track on which it was moving. He received serious injuries, making necessary the amputation of his left leg.

It is contended the court should have directed a peremptory verdict for the appellant on two grounds: First, that the evidence did not tend to show the appellee was in the exercise of ordinary care for his own safety; and, second, that the evidence did not tend to show the servants of the appellant company in charge of the engine and train were guilty of any act of negligence which contributed to the injury. We think both of these contentions were properly regarded by the trial judge as questions of fact for the determination of the jury. The appellee, together with other passengers, alighted from the train in a narrow space in the avenue, with railroad tracks on either side. He was going to his home, one block east of Stewart avenue, and it was necessary he should cross over the tracks of appellant railway in the avenue. Moreover, the train on which he had arrived stood across Thirty-First street, thus closing the passageway to the westward. He testified that he looked to the north and the south, but did not see the train. It was "at sundown," or "at dusk," as stated by some of the witnesses. At the north side of Thirty-First street, in the space in Stewart avenue not occupied by the railroad tracks, and between the tracks, stood a switchman's house, or "shanty," and several persons were standing in the same space, and thus to some extent his view of the approaching train was obstructed. Under the circumstances he might, without any imputation of negligence, govern his actions to some extent in reliance upon the supposition that a train would not be driven at a high rate of speed along the appellant's tracks in the avenue and across Thirty-First street at a time when the Chicago & Eastern Illinois Railroad Company was unloading passengers from the coaches of its train into the narrow space in the avenue between the two sets of tracks. It was not reasonably to be apprehended by him that the railroad companies so occupying a public street with their tracks and trains, and using the space at a street crossing for the purpose of receiving and discharging passengers, would operate their trains along the streets and across that street intersection, where passengers were alighting from a train, without due regard for the safety of the persons so known to be in the narrow space at the street intersection. The fact the gates were down at the street crossing had little, if any, weight in determining the propriety of the action of the appellee. If he had known the gates were closed, he would most probably have supposed they had been shut down to

Pennsylvania Co. v. Reidy

warn others on the street of the coming in of the train on which he was a passenger. That the gates were shut conveyed no warning to him. The trial court correctly refused to declare, as matter of law, that under the circumstances the appellee should be declared guilty of failure to exercise ordinary care for his own safety. The evidence also made it the duty of the court to submit to the jury, as a question of fact, whether the servants of the appellant company in charge of its train were guilty of negligence. The engineer who was controlling the locomotive drawing the appellant's train testified that he knew that the passenger train of the Chicago & Eastern Illinois Railroad Company was due to stop at the crossing of Thirty-First street at the time in question; that he saw that train approaching the crossing; that he afterwards saw passengers getting off of the Eastern Illinois train into the space in the avenue between the tracks; and the evidence showed that without slackening the speed of his train he drove his engine and train over the crossing at a speed of from 15 to 30 miles per hour, without any regard to the fact that passengers on the train of the Chicago & Eastern Illinois Railroad Company had been discharged from a train of that company into the narrow space in the avenue, between the track on which his train was moving and the track where stood the train from which the appellee had alighted. He knew that passengers were in that space, and that the Chicago & Eastern Illinois train stood across the street and obstructed their passage to the westward, and that the only exit for such passengers was eastward across the track on which his train was moving. The law required the exercise of ordinary care on the part of the company, and ordinary care is that degree of care which is commensurate with the hazards of the situation. 2 Thomp. Neg. § 1846. The engineer admitted that he saw the appellee approaching the track on which his train was moving, that he realized appellee was in danger or would at once become endangered by his train, and that he did not then apply the brake or shut off the steam, but stepped to the other side of the cab to see if appellee was hit, and then came back and applied the brake. The evidence tended to disclose the want of ordinary care on the part of the engineer for the safety of the appellee.

It is complained the court permitted the appellee to introduce in evidence rule No. 114 adopted by the appellant company. The rule is as follows: "A train approaching a station where a passenger train is receiving or discharging passengers must be stopped before reaching the passenger train." The ground of objection to the introduction of the rule is that it was only intended to be applicable to the appellant's road. The error of admitting this rule in evidence, if any error there was, as to which we announce no decision, was obviated by instructions Nos. 9 and 10 given to the jury at the request of the appellant company. These instructions are, in substance,

Pennsylvania Co. v. Reidy

that the rule had no application to the cause, and was not understood by the officers, agents, and employees of the company to refer to any other trains or tracks than those of the appellant company. Excluding the rule from consideration, the circumstances and the situation authorized the application of the principle or design of the rule to the case. The lines of the two railroad companies were laid in the same public avenue. Their tracks were so placed in the avenue as to leave but a narrow strip of the avenue, or space, between the tracks. The Chicago & Eastern Illinois Railroad Company and the Grand Trunk road availed of this space at the intersection of Thirty-First street as a place for receiving and discharging passengers to and from their trains, and this was well known to the appellant company. That persons who had alighted from trains in this space would, or at least might, be endangered by the running of appellant's trains at a high rate of speed on its tracks across the street intersection was apparent to the servants of the appellant. The avenue retained its character as a public highway. The appellant company, though authorized to lay its tracks on the avenue and propel its trains on such tracks, had actual knowledge that the avenue was also occupied by the tracks of other railway companies, and that such other companies were using a portion of the avenue as a place for receiving and discharging passengers, and such knowledge charged it with the duty of operating its trains with due regard for the safety of those who, by reason of being passengers on the trains of the other companies, were brought into such proximity to its tracks as to make the moving of its trains on its tracks dangerous to such persons. Speaking of the duty imposed by law upon railway companies in like state of case, it is well remarked in 2 Thomp. Neg. § 1726: "At such places the railway company is bound to anticipate the presence of persons on its track, and to keep a reasonable lookout for them, to give signals, * * * and to moderate the rate of speed of its trains, so as to enable them to escape injury." In *Railroad Co. v. Kelly*, 182 Ill. 267, 54 N. E. 979, it was said in the opinion of the appellate court, which was there adopted as the opinion of this court (page 269, 182 Ill., and page 980, 54 N. E.): "The running of a freight train at a high rate of speed past a station where a passenger train is receiving and discharging passengers is so plainly negligent as not to require comment. It is equally negligent to so run a freight train just as the passenger train is pulling into the station, and more especially when the track upon which the freight train is moving is between the depot and the track on which the passenger train is moving." The principle thus announced is applicable, we think, to the case in hand. It is clear, in view of this, and also in view of the instructions given by the court, before referred to, that the judgment should not be reversed because of admission in evidence of rule No. 114.

Pennsylvania Co. v. Reidy

There was no error of reversible character in the giving or refusing of instructions. There is no force in the objection that instruction A given in behalf of appellee assumes that the appellant company was guilty of negligence. The instruction, in the first paragraph thereof, does no more than to state, as by way of explanation of the issues, that it is alleged in the declaration, as a ground of a right to recover damages, that the defendant was negligent, etc. The design of the second clause or paragraph of the instruction is to advise the jury as to the elements necessary to be established by the testimony to warrant a recovery, the third of which is that it shall be shown by a preponderance of the evidence that the plaintiff was injured as the direct and proximate result of the negligence of the appellant company. There is in no part of the instruction any assumption of fact that would invade the province of the jury to determine from the proofs whether the company was guilty of negligence.

The other complaint against this instruction, and also against instruction B given in the same behalf, that the duty of the appellee to use due care may have been understood by the jury to be limited to the immediate time and place of the injury, is groundless. There is nothing in the phraseology or structure of the instructions to indicate that the law required no more of the appellee than that he should have used due care to avoid injury after reaching the point of immediate peril. That, if his negligence or want of ordinary care brought about his perilous situation, he could not recover, could not have been misunderstood by the jury.

Instruction No. 15, refused, was but a repetition of instruction No. 2, which was given.

Instruction No. 6, given at the request of the appellant company, contained all asked to be given by instruction No. 16, which was refused.

Instruction No. 17, refused, erroneously asked the court to direct the jury to return a verdict for appellant, if they should find a fact which was merely evidentiary, and not ultimate, to have been established by the evidence. The court, in instruction No. 13 given at the request of appellant, advised them that the fact referred to in instruction No. 17, if proven, would authorize a verdict for the appellant. Neither of the instructions should have been given. The appellant profited by the error of the court in giving one of them, and cannot be heard to complain that the court refused to reiterate it.

It was not error to refuse to give instruction No. 18 asked by appellant. It was as follows: "If the jury believe, from the evidence, that at and before the time of the injury in question it was customary for suburban passenger trains to avoid stopping at a station to load or unload passengers at a time when a through passenger train was about to pass such station, then Engineer King, of defendant's said train, had a right to believe that the Eastern Illinois train in question

Alabama Midland Ry. Co. v. Stevens

would be governed by such custom until he had notice to the contrary." The engineer admitted, when testifying as a witness, that before his train arrived at Thirty-First street he knew the train of the Chicago & Eastern Illinois Railroad Company had stopped at the street intersection, and saw passengers alighting from the train of that company in the space between the tracks. The instruction entirely ignores this testimony.

There was no objection made, at the time, to remarks of counsel for appellee in his closing address to the jury. No complaint based upon alleged improprieties in that address can now be urged. We have, however, in view of the frequency of complaints of this character, examined the record with reference to this objection, and find it to be wholly untenable. The judgment must be, and is, affirmed.

Judgment affirmed.

SOUTHERN RY. CO. v. HILL.

(*Supreme Court of Georgia, Oct. 30, 1902.*)

[42 S. E. Rep. 728.]

Railroads—Killing Stock—Presumptions.*

The killing of the live stock by the train of the plaintiff in error being admitted and the presumption being against the company, this court is not prepared to say, in the light of the entire testimony, the verdict of the jury, and its approval by the presiding judge, that this presumption was so clearly overcome as to require the reversal of the judgment of the court below, overruling the motion for a new trial based on the general grounds.

(Syllabus by the Court.)

Error from superior court, Gordon county; W. M. Henry, Judge.

Action by J. W. Hill, Jr., against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Shumate & Maddox and Harkins & Dodd, for plaintiff in error.

Starr & Erwin, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, P. J., absent on account of sickness.

ALABAMA MIDLAND RY. CO. v. STEVENS.

STEVENS v. ALABAMA MIDLAND RY. CO.

(*Supreme Court of Georgia, Dec. 12, 1902.*)

[43 S. E. Rep. 46.]

Certiorari—Bond.

Civ. Code, § 4639, which declares that, before a writ of certiorari shall issue, the party applying for the same, his agent or attorney,

*As to the presumption of negligence arising from mere proof of injury to stock on track, see foot-note appended to *Felton v. Anderson* (Ky.), 4 R. R. R. 114, 27 Am. & Eng. R. Cas., N. S., 114.

Kinyon v. Chicago, etc., Ry. Co

shall give bond and good security, means that the bond shall be given by the party himself, or by his agent, either general or special, who is authorized to represent the party in that particular case, or by an attorney whose employment includes services in that case, or who is authorized by the party to give the bond.

Same—Same—Authority of Agent.

Hence, where a railroad company is dissatisfied with a verdict in an inferior court, and applies for a writ of certiorari, the chief clerk in a local freight depot, temporarily acting as station agent in the absence of the regular agent, who is forbidden by the by-laws of the corporation to make any contract binding the company, and such clerk having no authority, general or special, to sign the name of the company to the bond, and knowing nothing about the trial of the case, is not such an agent as is contemplated by the above section of the Code; and, where the bond given was executed by him in the name of the company, the certiorari was void. *Hamilton v. Insurance Co.*, 33 S. E. 705, 107 Ga. 728.

Same—Same—Ratification of Act of Agent.

As the certiorari was void on account of the failure to give a valid bond, there could be no ratification of the act of the agent, so as to give life to the void proceeding, or to affect the rights of the other party, which had attached before ratification. *Graham v. Williams*, 40 S. E. 790, 114 Ga. 716.

Writ of Error—Dismissal.

Inasmuch as the judgment refusing to dismiss the certiorari, complained of in the cross-bill of exceptions, must be reversed, the subsequent hearing was nugatory, and a writ of error to the overruling of the certiorari will be dismissed.

(Syllabus by the Court.)

Error from superior court, Decatur county; W. N. Spence, Judge.

Action by J. A. Stevens, by his next friend, against the Alabama Midland Railway Company. Judgment for plaintiff before a justice, and defendant brings certiorari. The certiorari was overruled, and defendant brings error, and plaintiff assigns cross-error. Reversed on cross-error, and writ of error dismissed.

Hawes & Hawes, for plaintiff in error.

A. G. Powell and A. H. Russell, for defendant in error.

SIMMONS, C. J. Judgment on cross-bill of exceptions reversed. Main bill of exceptions dismissed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

KINYON v. CHICAGO & N. W. RY. CO.

(*Supreme Court of Iowa, Oct. 29, 1902.*)

[92 N. W. Rep. 40.]

Injuries to Stock at Crossing—Negligence—Pleading—Signals—Speed.

Where, in an action against a railway company for killing cattle at a crossing, the petition alleged that defendant was negligent in failing to reasonably signal for the crossing, and that the view of approaching trains was obstructed by a curve of the road, and banks surmounted by brush, and further obstructed by cars standing near the crossing, and that the train was operated at a high rate of speed,

Kinyon v. Chicago, etc., Ry. Co

and the evidence tended to support such allegations, it was error to withdraw from the jury all questions of defendant's negligence save the alleged failure to reasonably signal for the crossing.

Crossings—Signals—Common-Law Duty.*

A statute requiring a train to sound the whistle of the engine at least 60 rods before a crossing is reached does not abrogate the common-law duty requiring the giving of the signal at a greater distance if, by reason of the speed of the train or the dangers of the crossing, reasonable caution demands it.

Same—Same—Pleading.

A contention that plaintiff's petition in an action for killing cattle in a collision at a crossing is not broad enough for the application of the doctrine that the common-law duty rests on a company to signal the approach of trains at a reasonable distance from a crossing, instead of limiting the company's duty to statutory signaling 60 rods from the crossing, is without merit, where the petition alleges that defendant negligently failed to give the statutory signal, and also failed to signal in reasonable time to give necessary warning of the train's approach.

Same—Speed—Evidence—Error—Waiver.

The error in excluding evidence of the speed of a train approaching a crossing, and in refusing instructions on the question of speed, on a trial of an action for killing cattle at a crossing, was not waived by the statement of plaintiff's counsel that it was negligence for the company to operate its train at a high rate of speed at a dangerous crossing without sounding the whistle a sufficient length of time to warn people of the train's approach, though, in response to a question of the court, he also stated that the statute fixed the matter of giving signals, without any question of speed.

Same—Same.

Though the mere fact of running a train at a great speed over a crossing raises no presumption of negligence, a company is obliged to operate its trains with reference to the peculiar conditions rendering a crossing dangerous to travelers on the highway.

Instructions.

Though instructions requested by counsel are not so framed as to justify the court in literally giving them, yet, if they contain pertinent legal principles not covered by the charge, the court must embody them in proper words.

Same—Signals.

Where plaintiff alleged that defendant was negligent in failing to signal the train's approach at least 60 rods from the crossing, an instruction that, if plaintiff heard the approaching train when it was 60 rods or more from the crossing, then the failure to give the signal did not cause the accident, was erroneous, as stating, as a matter of law, that there was no negligence on defendant's, or that there was contributory negligence on plaintiff's, part.

Same—Same.

A contention that as defendant's evidence showed that the whistle was sounded at the 60-rod limit, and plaintiff claimed not to have heard it, to have given the signal at a greater distance would have been useless, and therefore defendant could not be charged with negligence

*As to whether statutory provision regulating the giving of signals at railroad crossings is the sole measure of the railroad's duties in this respect, see *Tessmer v. New York, etc., R. Co.* (Conn.), 15 Am. & Eng. R. Cas., N. S., 164, and notes, 173 et seq.; *Downing v. Morgan's L. & T. Ry. & S. S. Co.* (La.), 20 Am. & Eng. R. Cas., N. S., 412, and foot-note; *English v. Southern Pac. Co.* (Utah), 4 Am. & Eng. R. Cas., N. S., 63; *Missouri Pac. Ry. Co. v. Moffatt* (Kan.), 3 Am. & Eng. R. Cas., N. S., 488; *Coulter v. Great Northern Ry. Co.* (N. Dak.), 4 Am. & Eng. R. Cas., N. S., 336.

Kinyon v. Chicago, etc., Ry. Co

in failing to give the signal at the greater distance, cannot be sustained, for the court cannot assume that defendant's testimony is true, and plaintiff's evidence that no whistle was sounded is false.

Same—Contributory Negligence—Instructions.

An instruction that there was some testimony showing that plaintiff did not stop the cattle before going upon the crossing, until he could ascertain whether a train was approaching, was erroneous, as it was the province of the jury to find what was established by the evidence.

Same—Same—Same.

An instruction that, if ordinary care and caution required that plaintiff stop the cattle to investigate whether a train was approaching, then a failure to do so would constitute negligence, and he could not recover, was erroneous, for failing to require the jury to further find that such negligence contributed to the injury.

Instructions.

An objection to an instruction that it was given in writing, while the remainder of the charge was typewritten, is without merit.

Appeal from district court, Harrison county; O. D. Wheeler, Judge.

The opinion states the case. Reversed.

C. O. Kellogg, for appellant.

Hubbard, Dawley & Wheeler and Thomas Arthur, for appellee.

WEAVER, J. The plaintiff, being the owner of 39 steers, was driving them along the public highway and over a crossing of the defendant's railway track. Before the passage was entirely accomplished, a train moving at a high rate of speed approached the crossing, and a collision occurred, in which 6 of the steers were killed. The plaintiff alleges that this loss of his property was occasioned by the negligence of the railway company in the following particulars: That the whistle of the engine was not sounded as required by law; that the whistle was not sounded at all on approaching the crossing until within less than 60 rods of the crossing; that the view of approaching trains at the crossing was obstructed by a curve of the road through high banks, surmounted by brush and weeds; that the train was running at a dangerously high rate of speed, which was not slackened until within 30 or 40 rods of the crossing; that at the same time defendant had negligently allowed several cars to stand near the crossing on the side of the main track from which plaintiff was approaching, thus further obstructing the view in the direction of the approaching train; and that by reason of the negligence so charged, and without contributory negligence on his part, his property was injured and destroyed; and he asked a verdict for damages. The defendant denies all the allegations of the petition. There were a verdict and a judgment for the defendant, and plaintiff appeals.

Upon the trial the ownership of the cattle by plaintiff was conceded, as also that they were killed by collision with defendant's engine at the time and place charged; the only contest remaining being upon the question of defendant's alleged negligence in respect to such accident, and plaintiff's

Kinyon v. Chicago, etc., Ry. Co

want of contributory negligence. The plaintiff's evidence tended to show that, with the aid of one Jones, he was taking the herd along a highway running near and parallel to the defendant's right of way, and on approaching another road, which crossed the railway at right angles, Jones rode his horse to the front, and turned the cattle in the direction of the railway crossing, while plaintiff followed behind them; that the cattle were moving in a bunch of about 50 feet in length along the path; that Jones went to the railway crossing and looked and listened for approaching trains, and, discovering none, allowed the cattle to cross the track, but before the passage was effected the collision occurred. There was, to say the least, some evidence tending to sustain each of the allegations of negligence set out in the petition. Most of it is denied by defendant's witnesses, but the truth of the dispute was in each instance a matter for the jury.

At the conclusion of the testimony the plaintiff requested the court to instruct the jury as follows: "(1) You are instructed that a traveler about to approach a railroad, intending to cross at a public crossing, has a right to presume that the whistle of an engine will be sounded, as required by statute, at least sixty rods before arriving at the crossing. So, if you find that in this case the plaintiff and the man Jones looked and listened before crossing the track at the time of the accident, they had a right to rely upon the fact that the whistle would be blown, and they were not obliged to continue looking and listening for the approach of a train. (2) You are instructed that the testimony in the case shows that the crossing at the place where the accident occurred was a dangerous one, and it was the duty of the engineer in charge of the train which collided with the cattle to have sounded the steam whistle of the engine in sufficient time to have warned plaintiff, approaching the crossing, so that the accident could have been avoided by the use of ordinary care on the part of the plaintiff. (3) You are instructed that the statutes of the state require that the whistle of each locomotive engine must be sounded at least twice, sharply, at least sixty rods before arriving at a public highway crossing over the railroad at grade; but at a dangerous crossing, such as the one in controversy, if the train should be running at a high rate of speed, whistle should be sounded at a greater distance, if it is necessary to do so in order to warn travelers about to cross the track at said crossing." These requests were refused. In the instructions given upon its own motion, the court, in effect, withdrew from the consideration of the jury all allegations of negligence, except the one based upon the alleged failure of the defendant to sound the warning signal at least 60 rods from the crossing. Of these instructions, it is necessary to set out only the following: "(2) It is claimed by the plaintiff that the defendant's agents and employees were negligent in failing to sound

Kinyon v. Chicago, etc., Ry. Co

the necessary warning by whistle when approaching the crossing in question, and that by reason of such failure the cattle in suit were run upon and killed. This is the only particular wherein plaintiff claims that the defendant was negligent, and will be the only one considered by you in your determination of the case." "(4) It must appear from the evidence that the defendant, in operating the train in question, was negligent in failing to sound the whistle as required by law in approaching said crossing. This is the matter wherein plaintiff claims defendant was negligent. The statutes of this state, among other things, provide: 'A bell and a steam whistle shall be placed on each locomotive engine operated on any railway, which whistle shall be twice sharply sounded at least sixty rods before a road crossing is reached,' etc., 'and the company shall be liable for all damages which shall be sustained by any person by reason of such neglect.' If it appears from the evidence, by the greater weight thereof, that at the time the accident in question, in which plaintiff's said cattle were killed, the employees of defendant in charge of the engine hauling said train failed to twice sharply sound the whistle on said engine at least sixty rods before reaching said crossing, such failure on the part of such employees would be sufficient to constitute negligence in the operation of said train on the approach of said crossing. But unless it appears from the evidence, under the rules above given, that said employees of the defendant did fail to sharply sound said whistle twice at least sixty rods before reaching said crossing, then the plaintiff cannot recover. Whether said employees did sound said whistle, at least sixty rods before approaching said crossing, twice, sharply, as above required, is a question of fact to be determined by you from all the testimony before you throwing light thereon. This is one of the main questions of fact to be decided by you, and should be the first one decided by you when you begin the consideration of the case." "(8) If you find from the evidence that plaintiff or said Jones heard the approaching train when it was sixty rods or more north of said crossing, then the failure to sound the whistle, if any such there was, did not cause or contribute to such accident, and you should find for the defendant. (8½) There is some testimony before you showing that the plaintiff did not stop said cattle, or cause the same to be stopped, until he could ascertain whether or not a train was approaching. He is required to use ordinary care and caution,—such care and caution as an ordinarily prudent man would use under like circumstances,—and, if such care and caution would require that he stop said cattle to investigate, then a failure to do so would constitute negligence upon his part, and he cannot recover. But unless ordinary care and caution, under the facts of this case, would require that he take such step, and stop said cattle for such purpose, he would not be negligent in failing to do so."

Kinyon v. Chicago, etc., Ry. Co

1. There was error in withdrawing from the jury all question of defendant's negligence, other than the alleged failure of the trainmen to signal for the crossing. The negligence charged in the petition is not predicated alone upon the naked failure to sound the whistle at least 60 rods from the crossing, but upon that fact taken in connection with the high rate of speed at which the train is claimed to have approached, and the obstructions by which the view of the track in the direction of the train was limited or obscured. Plaintiff was entitled to go to the jury upon every fact alleged in his petition and denied by the answer, so far, at least, as evidence had been produced tending to sustain them; and, as we have already said, there was testimony proper to be considered upon each of the several allegations of negligence. It is very possible that proof of any one of the matters charged would not have been sufficient to justify a finding of negligence against the defendant, and yet, when considered together, they may be ample to sustain such a verdict. For instance, it is a settled doctrine in this state that the movement of a train at a very high rate of speed is not in itself negligence (*McKonkey v. Railroad Co.*, 40 Iowa, 205; *Cohoon v. Railway Co.*, 90 Iowa, 174, 57 N. W. 727); but it has never been held that a high rate of speed may not, under some circumstances, become negligence. In *Artz v. Railroad Co.*, 44 Iowa, 285, discussing the effect of an instruction that "the rate of speed, though not regulated by law, may be considered with other facts tending to establish negligence," we said: "While a railway is not restricted by law to any rate of speed, unusual speed at crossings or at other places where men or brutes may be exposed to danger from passing trains may be considered, in connection with other matters,—as the failure to give signals of the approach of the train, and the like,—to determine the want of care on part of those operating it. This rule has always been recognized in this state." It would be difficult to conceive a case coming more clearly within this rule than the one sought to be proved by the plaintiff in the present instance. He alleges and offers evidence to show that the train was running very rapidly, and that the place was one of more than ordinary danger, by reason of the curve in the track, the high banks, the cars upon the side track, and the failure to give proper signals of the approach of the train. All these matters, then, were material in determining whether there was any want of reasonable care by the defendant, as charged, and should have been submitted to the jury with appropriate instructions.

2. The tenor and effect of the instructions given were to impress upon the jury the thought that, if the whistle of the engine was sounded 60 rods from the crossing, the defendant had discharged its whole duty. This idea was expressly or impliedly repeated in various forms throughout the charge. There are a few cases which tend to sustain the doctrine

Kinyon v. Chicago, etc., Ry. Co

announced by the learned trial court in this respect (*Beisiegel v. Railroad Co.*, 40 N. Y. 9; *Grippin v. Same*, Id. 34); but, as we shall endeavor to show, it is not in accordance with the weight of authority. Even when there is no statutory regulation, a railway company may be chargeable with negligence for failing to give reasonable warning before running its train over a public crossing. *Shear. & R. Neg.* § 484; *Artz v. Railroad Co.*, 34 Iowa, 158; *Railroad Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Tolman v. Railroad Co.*, 98 N. Y. 198, 50 Am. Rep. 649, 23 Am. & Eng. R. Cas. 313; *Loucks v. Railway Co.*, 31 Minn. 526, 18 N. W. 651; *Guggenheim v. Railroad Co.*, 57 Mich. 488, 24 N. W. 827; *Thompson v. Railroad Co.*, 110 N. Y. 636, 17 N. E. 690, 1 Am. & Eng. R. Cas., N. S., 264; *Harty v. Railroad Co.*, 42 N. Y. 468. And in such cases the place where and the distance at which reasonable care requires the warning to be given must, of necessity, depend upon circumstances. It is a matter of common observation that railway crossings are not all equally dangerous; varying, as they do, from the intersection of straight tracks upon the open prairie, with unobstructed view for miles in every direction, to the crossing of sharply curved tracks in deep cuts, where an extended view is impossible. It is obvious that, taking one extreme, it is hardly possible for a traveler upon the highway to collide with a passing train without gross negligence upon his own part, while in the other case he may quite readily be run down and injured when in the exercise of all reasonable care for his own safety. The general common-law rule that care, to be reasonable, must be proportioned to the danger to be avoided, applies here, as in other cases of alleged negligence; and that rule affects not only the traveler who ventures upon the crossing, but the railway company which operates its trains over the track. Turning to the statute, we find the provision to be that the whistle of the engine shall be sounded "at least sixty rods before a crossing is reached." The effect of this is to indicate the kind of warning which must be given, and the minimum limit within which the duty must be performed, but does not abrogate the common-law obligation which would require a warning at a greater distance if by reason of the speed of the train, or the peculiar dangers of the crossing, some earlier signal is dictated by reasonable caution. 1 Ror. R. R. 529; *Railroad Co. v. Hague*, 54 Kan. 284, 38 Pac. 257, 45 Am. St. Rep. 278; *Richardson v. Railroad Co.*, 45 N. Y. 846; *Eaton v. Railroad Co.*, 129 Mass. 364, 2 Am. & Eng. R. Cas. 183; *Barry v. Railroad Co.*, 92 N. Y. 289, 44 Am. Rep. 377; *Bradley v. Railroad Co.*, 2 Cush. 539; *English v. Southern Pac. Co.*, 13 Utah, 407, 45 Pac. 47, 35 L. R. A. 155, 57 Am. St. Rep. 772. In other words, the warning must be timely, and timeliness depends upon the facts and circumstances of each case. *Eskridge's Ex'rs v. Railway Co.* (Ky.) 12 S. W. 580, 42 Am. & Eng. R. Cas. 176; *Railroad Co. v.*

Kinyon v. Chicago, etc., Ry. Co

Stinger, 78 Pa. 219. In the case of *Hart v. Railroad Co.*, 56 Iowa, 170, 7 N. W. 9, 9 N. W. 116, 41 Am. Rep. 93, we said the doctrine that "mere compliance with statutory requirements will not absolve the railroad corporations from any duties which they were under before, or excuse them from taking other reasonable precautionary measures when their trains are crossing or about to cross a highway, is well settled. In case of collision, it is for the jury to say whether such measures have been adopted, and whether, under the circumstances of the case, the railroad company has used reasonable care to prevent it." This precedent is authoritative, and commends itself to our judgment as announcing a just and salutary rule of law, in the light of which the restriction placed by the trial court upon the right of plaintiff to recover must be regarded as error. Appellee's contention that plaintiff's petition is not broad enough to call for an application of this principle of law is not well founded. The allegation made in this respect is that the plaintiff received no "notice or warning of the approach of the train at said time and place until said engine was almost to the crossing; * * * that defendant carelessly failed and neglected to sound the whistle of said engine as required by section 2072 of the Code of Iowa, and did not sound the whistle at all in approaching said crossing at said time until within less than sixty rods," etc. It is again alleged that "the said cattle were so killed or injured by reason of the carelessness of defendant in not giving or causing to be given to plaintiff or to said Jones sufficient warning of the approach of said engine and train as aforesaid in time so that plaintiff or said Jones, or both of them, by the use of ordinary care and diligence, could have driven said cattle from the crossing before its arrival, and in time to avoid the said accident, and by reason of the carelessness and negligence of the defendant in not sounding the whistle of said engine as required by law," etc. This is not, as counsel seem to think, a simple charge that the engineer failed to sound the whistle 60 rods from the crossing, but it goes farther, and charges a negligent failure to sound it in reasonable time to give the necessary notice or warning of the approach of the train.

3. Appellee justifies the refusal of the court to admit evidence as to the speed of the train, and to instruct the jury upon the question of speed, as related to the charge of negligence, on the principle we have already recognized,—that no rate of speed is in itself negligence, and because it is said such claim was waived on the trial. This latter idea is based on the fact that when plaintiff offered to prove the speed of the train, and objection was made thereto, the following colloquy occurred between court and counsel: "By the Court: Wherein do you claim it is material, Mr. Kellogg? By Mr. Kellogg, Attorney for Plaintiff: We allege here that it was negligence for the railway company to operate its train

Kinyon v. Chicago, etc., Ry. Co

at a high rate of speed at a place where they knew it was dangerous, without sounding or causing to be sounded the whistle of the engine before arriving at the crossing a sufficient length of time to warn people who were approaching there to get out of danger. This is the object of this,—that it was incumbent upon them to sound the whistle. Court: The statute fixes that, without any question of speed, doesn't it? Kellogg: I think it does." This, it is said, is a concession that the rate of speed is immaterial, so long as the whistle is sounded 60 rods from the crossing. We do not so construe it. Counsel for plaintiff stated with clearness his claim that, where the company knows that a crossing is dangerous, it is negligent to operate its train over such crossing at a high rate of speed without giving reasonably sufficient warning to persons traveling the highway, and, in pursuance of that claim, offered one or more instructions asking that the jury be so charged. It is unnecessary to repeat the proposition as to the absence of any presumption of negligence from the mere fact of the great speed at which a train is operated. The reasonableness of that rule is apparent. The great purpose to be subserved by railroads is promptness, speed, and dispatch in carrying passengers and freight; and under ordinary circumstances, in the open country, there is no duty resting upon the companies to slacken the pace of their trains at crossings. To hold otherwise, so long, at least, as grade crossings are the rule instead of the exception, would be to neutralize and to a great extent destroy the advantages derived from modern facilities for transportation. But the right thus conceded is not without its attendant obligations, and if by reason of natural or artificial obstructions to the view of the traveler upon the highway, or of the course of the track around curves or through high embankments, the crossing is of peculiar or extraordinary danger, the operation of the railway must be conducted with reference to that fact. *Artz v. Railroad Co.*, 44 Iowa, 285; *Hart v. Same*, 56 Iowa, 172, 7 N. W. 9, 9 N. W. 116, 41 Am. Rep. 93; *Courson v. Railway Co.*, 71 Iowa, 29, 32 N. W. 8; *Freeman v. Railway Co.*, 74 Mich. 86, 41 N. W. 872, 3 L. R. A. 594; *Railroad Co. v. Brandtmaier*, 113 Pa. 610, 6 Atl. 238; *Czech v. Railway Co.*, 68 Minn. 38, 70 N. W. 791, 38 L. R. A. 302, 64 Am. St. Rep. 452; *Ellis v. Railroad Co.*, 138 Pa. 506, 21 Atl. 140, 21 Am. St. Rep. 914; *Childs v. Railroad Co.*, 150 Pa. 73, 24 Atl. 341; *Railroad Co. v. Dillon*, 123 Ill. 570, 15 N. E. 181, 5 Am. St. Rep. 559; *Shaber v. Railway Co.*, 28 Minn. 103, 9 N. W. 575. In *Railroad Co. v. Barnett*, 59 Pa. 259, 98 Am. Dec. 346, the court says: "It is clearly the duty of a railroad company, as it is of a natural person, to exercise its rights with a considerate and prudent regard for the rights and safety of others; and, for injuries occasioned by negligence, both are responsible. Nor is it any excuse or justification that the act occasioning the injury was in itself lawful, or that it was done in the exercise of a

Kinyon v. Chicago, etc., Ry. Co

lawful right, if the injury arose from the negligent manner in which the injury was done." This language was quoted approvingly by us in *Hart v. Railroad Co.*, supra. Bearing in the same direction is the language of the supreme court of the United States: "The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may under different surroundings and circumstances be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and say whether the conduct of the parties in that case was such as would be expected of reasonably prudent men under a similar state of affairs." *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. In the *Childs Case*, above cited, the Pennsylvania court says: "The movement of trains must be regulated by railroad companies in the exercise of business discretion, and upon consideration of the competition they have to encounter, and the necessities of modern business. We do not think a jury may fix the maximum rate of speed at which a train may be moved in the open country, or that a high rate of speed is negligence per se. But while railroad companies may move their trains at such rate of speed as the character of their machinery may make practicable, they must not forget that increased speed for the train means increased danger to those who must cross the tracks, and that increased care on their part to guard against accidents becomes a duty." The soundness of the principle announced by these authorities is beyond question, and the failure of the trial court to observe it in instructing the jury could not have been otherwise than prejudicial to the plaintiff. As a rule, instructions offered by counsel are not so framed that the court is justified in giving them literally as asked, but, if the main thought sought to be expressed contains a pertinent legal principle which is not already fully covered by other instructions given, the court should embody it in proper words in its own charge. Thus it may be said of the instructions asked by plaintiff in the present case that they are perhaps objectionable in form, and assume certain controverted facts as established, but they did present a phase of the law in harmony with the conclusions we have herein announced, which should have had recognition by this court. For like reasons, there was error in the eighth instruction, whereby the jury were told that, if plaintiff heard the train when it was 60 rods from the crossing, there could be no recovery. The mere fact that he may have heard the train when 60 rods away will not of itself justify the court in saying, as a matter of law, that there was no negligence on the defendant's part, or that there was contributory negli-

Kinyon v. Chicago, etc., Ry. Co

gence on the plaintiff's part; but the jury should have been permitted to consider it in connection with and in the light of all the other circumstances alleged in the pleadings and shown by the testimony. In determining questions of negligence and contributory negligence, the jury must "consider all the facts and circumstances bearing upon the question, and not select one particular prominent fact or circumstance as controlling the case, to the exclusion of all others." *Railroad Co. v. Ives*, supra; *Cooper v. Railway Co.*, 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482; *Railroad Co. v. Kane*, 69 Md. 11, 13 Atl. 387, 9 Am. St. Rep. 387.

4. The appellee argues that as defendant's evidence shows the whistle was sounded at the 60-rod limit, and plaintiff and his witnesses claim not to have heard it, then to have given the signal at a further distance from the crossing would have been useless; for, if not heard at the lesser distance, it would not have been any more effectual at the greater. This requires us to assume that the defendant's witnesses are right, and the plaintiff's witnesses are wrong, which we cannot do. The plaintiff and several other witnesses swear positively that the whistle was not sounded until the cattle alarm was given within 30 or 40 rods of the crossing, and, although the trainmen and others who ought to know testify to the contrary, it remains a question for the jury to determine. *Railroad Co. v. Lane*, 33 Kan. 702, 7 Pac. 587; *Roberts v. Railway Co.*, 35 Wis. 679; *Hughes v. Railway Co.*, 88 Iowa, 404, 55 N. W. 470; *Moore v. Railroad Co.*, 102 Iowa, 599, 71 N. W. 569.

5. The instruction marked "8½" is objectionable in so far as it states to the jury that there is "evidence showing plaintiff did not stop the cattle" before going upon the crossing, as it was the exclusive province of the jury to find what was shown or established by such evidence. It is also defective in its statement that, if reasonable care required that he stop the herd at that point, "then a failure to do so would constitute negligence upon plaintiff's part, and he cannot recover." In order to defeat plaintiff's right to recover on the ground of his own negligence in this or any other respect, the jury should further find that such negligence in some manner or degree contributed to the injury of which he complains. That essential element being omitted from the instruction—inadvertently, no doubt—makes the proposition there stated misleading. The further objection made by appellant that this instruction was given to the jury in writing, while the remainder of charge was printed upon a typewriter, we think without merit. It is a matter of every day occurrence in the trial courts that, after instructions have been put in form upon the typewriter, errors and omissions are discovered, and proper corrections are made in writing with pencil or pen; and it requires considerable ingenuity to discover any

Wall v. Norfolk & W. R. Co

prejudice arising from it, unless it be to the patience of the jury in deciphering the manuscript additions.

Other questions argued are more or less directly governed by the conclusions we have announced, and need not be further considered.

The judgment of the district court is reversed.

WALL v. NORFOLK & W. R. CO. *et al.*

(*Supreme Court of Appeals of West Virginia, March 21, 1903.*)

[44 S. E. Rep. 294.]

Attachment—Railroad Property.

Under section 8 of article 11 of the state Constitution, rolling stock and all other movable property of a railroad company or corporation are subject to process of attachment where the attachment is applicable, as well as to ordinary execution.

Same—Garnishment.

The right under attachment of the garnisher as to the garnishee does not by garnishment rise higher than the right of the principal defendant as to the garnishee. When the right of such defendant is subject to a right of the garnishee under a contract between them, the right of the garnisher is likewise subject to the right of the garnishee.

Same—Cars in Possession of Another Company under Contract.

One railroad company has an agreement with another by which loaded cars of the one are to be received at connecting points by the other, and hauled over its line to the destination of load of the car, and then be reloaded with other freight by the receiving company on its line, and carried over its line, and returned loaded to the railroad of the owner of the cars; the receiving company compensating the owning company for such use of the cars. Such cars cannot be seized under an attachment against the company owning the cars, so as to defeat the rights under such arrangement or contract of the company receiving and entitled to so use the cars, and a garnishment of the receiving company cannot affect its rights under such arrangements by reason of its possession of such car.

Same—Same—Garnishment—Interstate Commerce.

A railroad car sent loaded with freight from another state into this state, and to be returned loaded to the former state in the transaction of interstate commerce, cannot be levied upon under an attachment in this state; nor will another railroad company having such cars in its possession in the process of carrying on interstate commerce be liable to garnishment by reason of its possession received from another company, against which an attachment was issued. This is because of the commerce clause of the national Constitution and the interstate commerce act of Congress.

(Syllabus by the Court.)

Appeal from Circuit Court, Jefferson County; E. Boyd Faulkner, Judge.

Bill by C. F. Wall against the Pennsylvania Railroad Company and others. Decree for plaintiff, and defendants appeal. Reversed.

Marshall McCormick, Cleon Moore, and Jos. I. Doran, for appellants.

J. M. Mason, Sr., and John W. Daniel, for appellee.

Wall v. Norfolk & W. R. Co

BRANNON, J. C. F. Wall brought an attachment in equity against the Pennsylvania Railroad Company in the circuit court of Jefferson county to recover damages for some cattle killed and others injured while being carried over the line of the defendant in the state of Pennsylvania, and sued out an attachment and levied the same on a freight car of said company found at Shepherdstown, in Jefferson county—the car being in the possession of the Norfolk & Western Railway Company—and served the attachment also on the latter company, as a garnishee, on account of its having the car in its possession. The Pennsylvania Railroad Company is a foreign corporation. That company did not appear in the suit; but the Norfolk & Western company filed an answer, which stands as taken for true and uncontroverted as to its statement of facts. That answer, after stating that both railroad companies are common carriers of goods by railroad, states: “That at the time of the issue and service of the writs of attachment herein upon the garnishee, and ever since that time, an arrangement and understanding existed between the defendant and garnishee companies, according to the universal custom in such cases among railroad lines throughout the United States in the management of their freight business, by which, instead of unloading and transferring their freight from the cars of one company to the cars of another at a point of connection, each company receives the loaded cars of the other from and throughout connecting lines or direct, hauls them to the place of destination on its own line, and, after discharging the freight, under the implied agreement to return them, as soon as and when practicable, in the due course of business, reloaded with freight, to some point on or near or reached by the line of the company owning them. That under the arrangement and understanding existing as aforesaid, the Norfolk & Western Railway Company, the garnishee, had the right to use in its business the cars aforesaid; the cars owned by it while on the lines of the Pennsylvania Railroad Company being similarly in current and constant use of the Pennsylvania Railroad at all times, and each company paying the other by wheelage or mileage of such cars. The method aforesaid of receiving and returning railroad cars of other lines by railroads facilitates traffic, and is a great accommodation to the shipping public, and has become a part of the general system of freight transportation throughout the United States. That it would be practically impossible for the garnishee to carry on its business with arrangements and understanding of this character with other lines, and that the garnishee, under the arrangements and understanding aforesaid, is entitled to hold and use as aforesaid the cars for said business free and discharged of, and without interference from, attachment or garnishment proceedings herein, and that the maintenance of such proceedings would nullify the rights of the garnishee

Wall v. Norfolk & W. R. Co

with the defendant under the arrangement and understanding aforesaid, and interfere seriously with the proper movement of traffic and accommodation of the shipping public." The car levied upon had been loaded beyond Hagerstown, Md., with sacks of patent plaster, consigned to Shepherdstown, and when levied upon was standing upon a side track, loaded with plaster, to be delivered in said town, according to said bill, and, according to the answer, was being unloaded when the garnishee was served with the attachment. The case resulted in a decision by the circuit court holding the attachment and garnishment valid, and a decree was rendered against the Norfolk & Western Railway Company for \$432.25 on account of its liability by reason of its possession of said car, and that company has appealed to this court.

The question is raised, is this car subject to attachment? Upon the question whether the property of a quasi public corporation, essential to its operation, is so liable, there is much conflict of authority, as will appear from the authorities cited. *Brady v. Johnson* (Md.) 26 Atl. 49, 20 L. R. A. 737; *Gooch v. McGee*, 35 Am. Rep. 558; *Ammant v. New, etc., Co.*, 15 Am. Dec. 593, note 595. All admit that the property of a purely private corporation, not serving the general public, though ever so essential to its use, is liable to execution; but, as to those corporations created to carry on business valuable to the public, such as a railroad corporation, which is a common carrier, this conflict of cases exists. On the one side, it is said that such a corporation would be disabled from performing its public duties if its property essential in so doing could be seized and sold away from it, and thus the public would suffer great harm. On the other side, to exempt so much property cripples the power of the law to enforce payment of debts, and exempts from its scope a great mass of property. If we say that such property is not wholly free from subjection to debt, for the reason that it may be reached by sequestration of earnings or by the sale of the whole property, the reply is that the ordinary and ready remedy by execution upon judgment is abortive, and that relief is practically denied to small debts. Between these adverse interests the courts have greatly conflicted. All the cases say that, unless statute authorizes, the franchise itself cannot be sold under execution; and the major part of legal authority says, also, that property of such corporations essential to the exercise of such franchise is also not subject to execution. In *Gue v. Tide Water Canal Co.*, 24 How. 257, 16 L. Ed. 635, the United States Supreme Court held that a corporate franchise to take tolls on a canal cannot be sold under *fieri facias*, unless authorized by a statute of the state granting the incorporation, and also that the lands or works essential to the enjoyment of the franchise cannot be separated from it and sold under a *fi. fa.*, so as to destroy or impair the value of the franchise. So in *East Alabama Co. v. Doe*, 114

Wall v. Norfolk & W. R. Co

U. S. 340, 5 Sup. Ct. 869, 29 L. Ed. 136, it was held that a railroad right of way could not be sold to any one not owning the franchise, under an execution. Elliott on Railroads, vol. 2, § 520, says: "The franchise of a railroad company, and corporate property essential to the enjoyment to the franchise, are not subject to sale on execution unless the Legislature authorizes or assents to the transfer. But locomotives, cars, and other personal property held by the corporation, if not in actual use in the operation of the road, are held by some authorities to be subject to sale on execution; and there seems to be no reason why property of a railroad corporation, not essential to the enjoyment of its franchise, should not be subjected to the payment of its debts." Amid the conflict, I have concluded that the law is properly stated in 11 Am. & Eng. Ency. L. (2d Ed.) 620, as follows: "In the case of corporations, such as railroad or bridge companies, which, though not strictly public corporations, are created to serve public purposes, and are charged with public duty, such property as is necessary to enable them to discharge their duties to the public and effectuate the objects of their incorporation is not, according to the weight of authority, apart from statutory provision, subject to execution at law. But the property of a quasi public corporation, not necessary or not used for the purposes which called the corporation into being, is not exempt from seizure or sale under execution." There are some cases which, while admitting that a franchise or things indispensable to its use cannot be levied on under execution, yet hold that rolling stock is liable to execution. *Louisville Co. v. Boney*, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435. It thus seems that the franchise itself and everything pertaining to it, essential to its operation, are exempt from execution, and thus the matter turns upon the question whether railroad rolling stock is so essential. I do not think that that question is tested by whether the property is indispensable in the use of the franchise, but that, as put by the case of *Brady v. Johnson*, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737, if it is of a nature to be of practical use in the operation of the franchise. Rolling stock is essential, next to the track or right of way—in fact, equally with them. True, rolling stock taken can be replaced, but often this is beyond the ability of the company, and we can easily imagine cases where seizure of rolling stock would stop the performance of public duties. So I think the common law exempts such rolling stock from execution. The convention which framed our Constitution must have been of this opinion when it inserted in article 11, § 8, the provision: "The rolling stock and all other movable property belonging to any railroad company or corporation in this state, shall be considered personal property and shall be liable to execution and sale in the same manner as the personal property of individuals." It is argued that this section can have no application to foreign corporations, but only to those chartered by

Wall v. Norfolk & W. R. Co

this state. It is a principle that no state can, and therefore no state is presumed to intend to, legislate as to persons or things outside of its territory, and I would be inclined to concur—did at first concur—in that view; but that would establish a difference between the property of home and foreign corporations, found within the territory of the state. And in this connection we must remember that it is a proposition disputed by no one that “a state having property of a non-resident within its territory may appropriate it to satisfy demands of her citizens.” *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. So I do not see but that the state Constitution would make all rolling stock of a railroad company, whether foreign or domestic, liable to execution when found within the state. If that provision of our Constitution had no application to property owned by a foreign corporation, then this car would not be leviable, but I think the Constitution applies to it.

It is said that this provision of the Constitution does not apply, for the reason that it makes rolling stock liable to execution only, and not to attachment, as execution is only the end of the law, issuing only upon a judgment, whereas an attachment goes at the opening of the suit, and is only a means to compel the appearance of the defendant. Such was the object of the ancient process of foreign attachment, according to the custom of London; but the modern doctrine is that attachment is not for the purpose of bringing the defendant into court, and that its object is to give the plaintiff execution against the thing attached—to seize it, and create a lien upon it conditional upon the rendition of judgment. In this state, upon judgment, the order is not for another execution, but for sale under the attachment. 3 Am. & Eng. Ency. L. 187; 4 Cyc. 395; 1 Shinn on Attachment, § 2. I do not think that it was the intention of the convention to make railroad rolling stock liable to ultimate execution, and deny its liability to attachment, as attachment would often be the only process available for prompt seizure to answer ultimate judgment. The object of the section was to do away with the law exempting rolling stock and other movable properties of railroad and other corporations, and not to discriminate between writs of process.

Is the Norfolk & Western Company liable as garnishee, under the circumstances of the case? It had possession of this car under the circumstances stated in the answer. We must look at the character of this possession. The garnishee held the car under “an arrangement and understanding between the defendant and the garnishee companies, according to the universal custom in such cases among railroad lines throughout the United States in the management of their freight business, by which, instead of unloading and transferring their freight from the cars of one company to the cars of another at a point of connection, each company receives

Wall v. Norfolk & W. R. Co

the loaded cars of the other, from and throughout connecting lines or direct, hauls them to the place of destination on its own line, and, after discharging the freight, under the implied agreement to return them as and when practical, in due course of business, reloaded with freight, to some point on or near, or reached by, the line of the company owning them." Here is a contract between the two companies, vesting the Norfolk & Western Company with a valuable right, which it could carry into effect by reason of its possession of the car, but could not if it was seized and taken from it. The Pennsylvania Company had got the load of plaster from some point on its line, carried it in this car to Hagerstown, where its line connected with the line of the Norfolk & Western, and the latter took up the car and hauled it to Shepherdstown; and, in consideration of so doing, it had the important right of loading that car, after discharge of the plaster from it, with freight at some point on its own line, hauling it over its own line, earning compensation thereby, and turning it over to the Pennsylvania Company for further transportation. The answer says it paid wheelage for this right. It is needless to endeavor to impress the fact that the use of a car to a railroad company to carry on its business is a valuable use. In short, the garnishee company had a subsistent contract for the possession and use of this car, and it had executed that contract, so far as was to its disadvantage, by haulage to the place to which the plaster was consigned, but had not yet enjoyed that part of the contract most beneficial to it, by loading it with freight on some part of its line, and earning compensation for its carriage. It had the right to keep the car until it returned it loaded to the Pennsylvania Company at Hagerstown, and it could not be levied upon and taken from it to defeat this right because of principles of law that are beyond all question. What is such law? Drake on Attachm. § 462, states that law as follows: "It is an invariable rule that under no circumstances shall a garnishee, by the operation of the proceedings against him, be placed in any worse condition than he would be if the defendant's claim against him were enforced by the defendant himself." "A plaintiff by garnishment cannot place himself in a superior position, as regards a recovery, than is occupied by the principal defendant. The garnishee's liability is measured by his responsibility and relation to the defendant. He can be charged only in consistency with the subject of his contract with the defendant." 2 Shinn on Attachm. § 516. In *Mill v. Steel Co.*, 152 U. S. 619, 14 Sup. Ct. 717, 38 L. Ed. 565, we find the court saying: "The proposition here laid down is in harmony with the generally recognized principle that the rights of the garnisher do not rise above or extend beyond those of his debtor." "The service of the garnishment neither changed nor interrupted the contractual relations existing between the Chicago Company and the St. Louis Company. The right and equities existing and to arise out of those contractual re-

Wall v. Norfolk & W. R. Co

lations, were in no way terminated or defeated by that service." *B. & O. R. Co. v. McCullough*, 12 Grat. 595, is pointed authority; also *Neill & Ellingham v. Rogers*, 41 W. Va. 37, 23 S. E. 702. Therefore we hold that the Norfolk & Western Company could not incur liability by the possession of that car. Liability could only arise from possession of it. It did not owe the Pennsylvania company anything. It had the right to use that car, regardless of the levy on it, and carry it to Hagerstown and return it to the Pennsylvania Company, under its contract with that company. It will not do to say that it could be liable by reason of the ultimate right of the Pennsylvania Company to have possession of the car, because the right of the Norfolk & Western would be defeated by the subjection of the car to the attachment—its right to carry the car back to Hagerstown. It would be impracticable, under the circumstances, to subject such reversion. In fact, the court took no steps to ascertain the value of the reversion, as its order shows that it ascertained the value of the car as it stood at Hagerstown, without reference to any idea of reversion, and, finding it greater than the demand, gave a personal judgment against the garnishee.

The case of *M. C. R. Co. v. C. & M. R. Co.*, 1 Ill. App. 399, is very pointed in this case to sustain our decision. Loomis brought suit against a railroad company, and garnished another, having in its possession cars of the debtor company, just as in this case. It was held that "a railroad company is not liable to garnishment for cars received of a connecting line under running arrangements existing between them, such as are usually adopted by connecting lines throughout the country, whereby, instead of unloading and transferring their freight from the cars of one company to the cars of the other at the points of connection, each received from the other the cars loaded with freight, and hauled them to the place of destination on its own line of road, and, after discharging the freight, returned the cars as soon as practicable in due course of business." But it is said that the answer of the company does not set up a contract as actually existing, but relies simply on a universal custom among railroad companies as to such traffic arrangement. This contention cannot be sustained in the face of the fact that the answer affirmatively avers that "an arrangement and understanding existed between the defendant and garnishee companies." Those words plainly import a perfect contract, because by the agreement and understanding of the parties there is a union of minds upon a specific thing. What if the answer does say that such agreement was according to the universal custom in such cases among railroad lines? That does not destroy the statement that there was an agreement and understanding between the parties to a certain effect. The averment as to custom is surplusage, merely stating that the contract conformed to such custom. Therefore we hold that, by reason of the contractual

Wall v. Norfolk & W. R. Co

relation between the two companies, the car was not attachable; the garnishee was not subject to garnishment and liability. It is argued that there was no contract such as would forbid the Pennsylvania Company from taking the car from the Norfolk & Western Company at any time. There was that contract. It forbade the Pennsylvania Company from taking the car from the Norfolk & Western Company. The latter company had the right to do as it did under the contract; that is, take the car to Luray and load it with freight, and haul it to the end of its line, and there deliver it to the Cumberland Valley Railroad, to be carried over that road and delivered to its owner.

It may be thought that if the attachment created a lien on the car, conceding the right of the Norfolk & Western, under said contract to carry the car back to Hagerstown, yet the attachment lien still clung to the car; and, it giving Wall a right superior to the right of the Pennsylvania Company, it was the duty of the Norfolk & Western to carry the car back to Jefferson County, to be made amenable to the attachment. It is an accepted principle of law that the laws and process of one state have no force outside of that state, and to say that the lien of the attachment clung to the car in its physical absence from the state would seem to violate that principal of law. This lien exists only under the attachment law and process, and is not a contractual lien. It passes no title. Where there is a mortgage or other conveyance passing the title to movable property, doubtless that title can be asserted in another state so as to recover the property there. So, likely, will a contractual lien avail there. How far this doctrine goes, is not well settled. Even such mortgages or liens passing title have been held subordinate to rights acquired in the state to which the property is removed by third persons. *Hervey v. Locomotive Works*, 93 U. S. 664, 23 L. Ed. 1003; *Walworth v. Harris*, 129 U. S. 355, 9 Sup. Ct. 340, 32 L. Ed. 712; *Corbett v. Littlefield* (Mich.) 47 N. W. 581, 11 L. R. A. 95, 22 Am. St. Rep. 681; *Hornthal v. Burwell*, 109 N. C. 10, 13 S. E. 721, 13 L. R. A. 740, 26 Am. St. Rep. 556; *Harrison v. Sterry*, 5 Cranch, 289, 298, 3 L. Ed. 104; *Story on Confl. L.* § 402. These authorities are not cited as pointed on this question, for they involve rights of third persons, but are cognate. In our case the rights of no third person had intervened. We do not say whether or not Wall could enforce this lien in another state. If he could not, the lien would end at the state line, and the garnishee, having rightfully taken the car to Hagerstown, would be under no obligation to return it. We must pass simply on the rights between Wall and the Norfolk & Western. The company had right to take the car loaded to Hagerstown. It seems clear that at that point it had the right to end its obligation to the Pennsylvania Company by delivery of the loaded car to it. It was not under obligations to assume the burden of carrying the car back to

Wall v. Norfolk & W. R. Co

Jefferson county. Its contract placed upon it no such burden. On the contrary, that contract gave it the right to end its relation with Pennsylvania Company by delivery of the car, and thus end its obligation, as the right to end an obligation under a contract is an essential part of the contract. The Norfolk & Western Company could not be called upon to unload the car, for that would be a violation of the rights of the shipper in the middle of the transit, and the company could not be required to haul the load back to Jefferson county, first, because that, also, would be a great wrong upon the shipper of the load in the car; and, second, because it would place a burden upon the Norfolk & Western, which its contract did not put upon it. Thus we cannot see that the garnishee company was under any obligation to return the car.

There is another reason still, of very controlling force, exempting the garnishee from liability, and that is that clause of the federal Constitution giving power to Congress to regulate commerce among the states, and the act of Congress providing "that every railroad company in the United States, whose road is operated by steam, its successor and assigns, be and is hereby authorized to carry over its road passengers, freight and property on their way from any state to another state, and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination." It has been frequently held that the powers of the federal government under said clause of the Constitution are exclusive of all power in the state. This power in the national government was held in *Bowman v. Chicago*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700, and *Railroad v. Richmond*, 19 Wall. 584, 22 L. Ed. 173, to be "designed to remove trammels upon transportation between states which had previously existed, and to prevent a creation of such trammels in future, and to facilitate railway transportation by authorizing the construction of bridges over the navigable waters of the Mississippi to reach trammels interposed by state enactments. * * * The power to regulate commerce among the several states was vested in Congress to secure equality and freedom in commercial intercourse against discriminating state legislation. * * * So far as these regulations made by Congress extend, they are certainly indications of its intention that the transportation of commodities between the states shall be free, except where it is positively restricted by Congress itself." It would be easy to cite many federal cases to show that any state legislation hindering, obstructing, or placing burdens upon interstate commerce are void, and that no state legislation can be so used or applied as to effect this result. No one can claim that the attachment laws of West Virginia are void under the commerce clause of the federal Constitution, but that the use of the writ of attachment in this case works a hindrance of the freedom of interstate commerce; that is, that the writ is abortive and of no

Wall v. Norfolk & W. R. Co

effect, applied as in this case. Any statute or action by state authorities which amounts to a regulation of commerce between the states is void, and, if it works obstruction or even retardation of such commerce, it is, in law, a regulation of commerce. Thus a state tax on telegraph messages beyond the state is void for that reason. *Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067. A state act requiring a telegraph company to deliver messages within a mile of the office was held void under the commerce clause. *W. U. Tel. Co. v. Pendleton*, 132 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187. A state statute prohibiting a greater charge for a shorter than for a longer haul was held invalid because it tended to hinder interstate commerce, from the fact that it might prohibit, or operate to prohibit, the railroad from carrying freight from another state at lower rates than it could afford to carry for from points within the state. It worked a consequential effect upon business outside the state, *L. & N. R. Co. v. Eubank*, 184 U. S. 27, 22 Sup. Ct. 277, 46 L. Ed. 416. A steamboat was engaged in navigating a river between two towns in Michigan, but it was in a habit of carrying goods destined for points in another state. The court said that the case related to transportation on navigable waters, and, further, it was unable to draw any distinct line between the authority of Congress to regulate an agency employed in commerce between the states, and when it is confined in its action entirely within limits within a single state. Several agencies combining, each taking up the commodity transported at the boundary line at one end of the state, and leaving it at the boundary of the other, would not oust the federal power under the commerce clause. *Daniel Ball v. U. S.*, 10 Wall. 557, 19 L. Ed. 999. In *Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547, it was held that the statute requiring a steamboat to carry colored passengers in the same cabin with white was unconstitutional, in requiring those engaged in the transportation of passengers among the states to carry colored passengers in Louisiana in the same cabin with whites, and was void under the commerce clause. These cases will show that, no matter what the form, mode, or means by which such commerce is impeded or obstructed, it is void. 4 Elliott on Railroads, § 1664. Even the state's power of taxation, large as it is, cannot be exerted on interstate commerce, because it tends to lessen it and impair it. *Robbins v. Shelby County*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694. It is true that, in order to brand state law or action as contrary to the federal Constitution and law, the operation of such state law or action must be direct and substantially hurtful to such commerce, not merely remotely hurtful. *L. & N. R. Co. v. Kentucky*, 183 U. S. 503, 22 Sup. Ct. 95, 46 L. Ed. 298. But is not the operation of this writ of attachment a direct impediment and obstruction of interstate commerce? If this levy is given any effect, it would take the car

Wall v. Norfolk & W. R. Co

from the custody of the Norfolk & Western after it had started on its mission of carriage from one state to another, while yet its freight was under its roof and entitled to shelter from the elements and the security of its inclosure. Its transit with its freight had not yet ended when the writ was levied. The protection and security of the plaster were a part of the function of interstate carriage, and the railroad company and consignee were entitled thereto, just as much as they were entitled to the car for transportation to the point of consignment. Not only so, because that attachment would prevent the Norfolk & Western Company from taking that car to some point on its line, loading it with goods, and hauling it back over its road, and prevent the Cumberland Valley Road from hauling in Maryland and Pennsylvania, and prevent the Pennsylvania road from hauling it on to Newark, it would prevent those companies from earning freight for such return load, and would prevent citizens of West Virginia and another state from the benefit of such car in transporting their goods, and thus deprive them, as consignor and consignees, from the full enjoyment of the benefit of interstate commerce. I cannot imagine anything more directly operative on interstate commerce than an attachment so used. The Norfolk & Western Railroad Company passes from state to state with its line, and is engaged in the business of interstate commerce, as held in *Norfolk, etc., Railroad v. Pennsylvania*, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394. It is a link and part of lines of railroads affording communication and transportation between different states.

It will not do to say that we can find no act of Congress saying that state process shall not be served upon railroad cars running from state to state, and that, until there is such act, state process can be so used. Powers of the national government were given to it in this commerce matter by the states at the foundation of the government, in order that the indispensable transaction of interstate commerce should be under one single governmental power, for the sake of uniformity, so that it would not be hampered and crippled by the action—the different and diverse and variant action—of many states, which would forbid the growth of commerce and prosperity of all the states; and this power in the nation is exclusive. It is well established that, “so long as Congress does not pass any law to regulate commerce among the states, it thereby indicates its will that commerce shall be free and untrammelled.” *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257. The power is exclusive, and “the failure of Congress to make express regulations indicates its will that the subject shall be free from any restriction or imposition; and any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom.” *Robbins v. Shelby County*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694.

I have already said that our state attachment statute is

Brunick v. Ann Arbor R. Co

entirely valid, but that it cannot be used in a manner and in cases in which it would operate to infringe upon the exclusive power of the federal government as to interstate commerce. It may be asked, if this is so, what becomes of that section of the very Constitution of this state providing that rolling stock shall be liable to execution? I apply to it the same rule as the attachment law is subject to. Both are subject to the paramount force of the national Constitution, as it is an admitted principle that a state Constitution can no more detract from the force of federal law than can a state statute. It may be that this ruling will render the application in practice of the provision of the state Constitution making liable the rolling stock of foreign corporations, or even of railroad companies created by the state, very narrow; but, if so, it is the result of the force—the paramount force—of the federal Constitution.

For these reasons, we reverse the decree of the circuit court and dismiss the plaintiff's suit.

BRUNICK v. ANN ARBOR R. CO.

(Supreme Court of Michigan, Feb. 3, 1903.)

[93 N. W. Rep. 433.]

Railroad—Killing Cattle at Crossing—Negligence of Drivers—Question for Jury.

Plaintiff's cattle were crossing a railroad track in procession, one behind the other, when a wild engine dashed through them, killing some half dozen animals. No bell was rung or whistle sounded as required by statute. It did not appear that, had the drivers gone upon the track, and looked for approaching trains, while the cattle stopped to drink before crossing the track, they would have discovered this engine. The night was still, and the drivers relied on their sense of hearing and knowledge that no train was due. The company's witnesses testified that the engine could have been seen two miles away: *held*, that it was error to withdraw the question of the driver's contributory negligence from the jury.

Grant, J., dissenting.

Case made from circuit court, Wexford county; Clyde C. Chittenden, Judge.

Action by Everett Brunick against the Ann Arbor Railroad Company. From a judgment for defendant, entered on a directed verdict, plaintiff appeals. Reversed.

Sawyer & Bishop, for appellant.

T. W. Whitney, for appellee.

MONTGOMERY, J. This is an action on the case, brought by Everett Brunick against the Ann Arbor Railroad Company, to recover the value of certain cattle killed by a wild engine on a highway crossing in the township of Richland. The whole case turns upon the question of contributory negligence, and there is practically nothing else involved, so far as the hearing in this court is concerned. On this particular

Brunick v. Ann Arbor R. Co

evening the plaintiff's cattle were being driven along the highway by his two sons. When they came to this crossing, the cattle stopped to drink at a pond in the highway near the railroad track, and the boys waited for them to come out and proceed homeward. When they had finished drinking, they returned to the highway, and pursued their course, cattle fashion, one behind the other. When about half of them were over the track, this wild engine suddenly appeared, and struck them amidships, so to speak, killing some five or six of them, but leaving unharmed the cattle at either end of the procession. It was the claim of the plaintiff that the boys were so situated that they could and would have been able to clear the track of these cattle in time for the engine to pass had the bell been rung and the whistle sounded in accordance with the statute, and that they were on the lookout for danger, and were exercising all the care possible with a large herd of cattle, and that the sole cause of the accident was the negligence of the trainmen in failing to give the proper warning of their approach. The defendant claimed that the boys were negligent in not going onto the track, and there waiting until the cattle had all passed. The circuit judge took this latter view of the case, and directed a verdict for no cause of action.

The error complained of is in not leaving the question to the jury to say whether or not the boys were exercising ordinary care in the management of these cattle, and whether or not they were so situated that they could have prevented the accident had the proper signals been given. We think the case presented a question of fact for the jury. The case is quite different from one of an attempt to cross a track with a team of horses, which the driver is presumed to have in hand and be able to control. There was no noise of a wagon to prevent these boys from hearing an approaching train. It is true, their view was obscured, but, had they gone to the track and looked when the cattle stopped to drink, and then returned to drive the cattle across the track, it is not clear that this precaution would have prevented the injury. True, the defendant's witnesses testify that the approaching engine could have been seen two miles away, as it passed Lucas; but, had they gone to the track to look when the cattle first stopped to drink, and then returned to drive the cattle, it is probable that they would not have seen the approaching engine. It was a still night, and they relied upon their sense of hearing and their knowledge that no train was due. The jury might have been justified in saying that this was negligent, but we think the question was for the jury. A case directly in point in *Bates v. Railroad Co.*, 4 S. D. 394, 57 N. W. 72. See, also, *Snook v. Clark*, 20 Mont. 230, 50 Pac. 718; 2 Thomp. Neg. (2d. Ed.) § 2011.

Judgment will be reversed, and a new trial ordered.

HOOKE, C. J., and CARPENTER and MOORE, JJ., concurred with MONTGOMERY, J.

Brunick v. Ann Arbor R. Co

GRANT, J. (dissenting). The facts in this case are undisputed. It was dark. Plaintiff's two sons were familiar with the situation, and knew and fully comprehended the danger at the crossing. Their vision was obscured, so that they could not see the headlight of an approaching engine. They stood 100 feet from the track while their cattle drank at the pond beside the road. As they drank they came back into the road, and walked, cattle fashion, towards the track. Standing at the crossing or near it, the headlight of the engine could be seen coming two miles distant. The negligence of the defendant in failing to blow its whistle and ring its bell is established by the finding of the jury. There is no dispute as to the rule of law. Where there is a conflict in the testimony, and where different minds may reasonably draw different conclusions from undisputed facts—some that there is negligence, and others that there is not,—the question belongs to the jury to determine. The facts being undisputed, is this a case where reasonable minds can draw different conclusions? Can one mind reasonably say that the plaintiff's sons were not guilty of contributory negligence, and another that they were? This depends upon the determination as to what care they were required to take to protect the property in their charge, and as well to protect the property of the defendant, its employees and passengers. In case of a collision some of the cattle were sure to be killed or injured. The engine was liable to be derailed, causing injury to property, and injury, if not death, to defendant's employees. Yet the contention is made that these young men had the right to rely upon the absolute performance of duty by the defendant's engineer and fireman in giving the signals, and that they themselves had done all required of them when they stopped and listened 100 feet from the track, where they stood about five minutes. It cannot be successfully disputed that, without incommoding themselves, they might easily have prevented the accident. The two were not needed to drive the cattle along the road. One could have gone to the track and watched for a train, while the other waited until all the cattle had finished drinking, and then followed them up. Had they done so, the accident would certainly have been avoided. It is of no consequence that it was not time for a regular train. Every traveler is chargeable with knowledge that regular trains are often behind time; that sometimes they are run in sections; that special trains, and what are known as "wild" trains and "wild" engines, are run over these railroads, and must, of necessity, be run in order to do the work required of them. *Vincent v. Steamship Co.*, 48 La. Ann. 933, 20 South. 207, 55 Am. St. Rep. 287, 5 Am. & Eng. R. Cas., N. S., 463. Therefore the duty to take at least ordinary precautions for one's own safety and the safety of those upon the trains is required of every traveler in making these crossings. The circuit judge, in directing a verdict,

Brunick v. Ann Arbor R. Co

used the following language: "It would seem that these young men, standing there for five minutes, if they desired to run that risk, and stay there, waiting for the bell to ring or the whistle to blow, that they were certainly guilty of negligence. They had plenty of opportunity—they had five minutes, according to their testimony—to go to the track and look up and down, and see whether there was any danger in the cattle crossing the track. Instead of doing that, they stood one hundred feet from the track, allowed the cattle to drink from this water hole, pass out, and rove over the track, without taking any precaution on their part to see whether an engine or train was coming; and it seems to me that under these circumstances they did not use and employ all reasonable means at their disposal to ascertain whether there was any danger in the cattle crossing the track." Here we have two persons, travelers, in charge of a large herd of cattle; not one person in charge, as was the case in *Bates v. Railroad Co.*, 4 S. D. 394, 57 N. W. 72. In that case the decision was by a majority of the court. In the majority opinion it was held that the evidence tended to show negligence, but did not establish it so conclusively as to justify the court in deciding it as a matter of law. The only act of contributory negligence claimed was in failing to go forward to the track and ascertain whether a train was approaching. Justice Corson filed an able dissenting opinion, in which he gives the testimony of the plaintiff in full, and cites many authorities to sustain his position. In *Snook v. Clark*, 20 Mont. 230, 50 Pac. 718, the highway led through a narrow canon. The right of way was not fenced, and the negligence charged was a failure to fence the right of way and to maintain a cattle guard. The cattle were evidently killed on the right of way, and not in the highway. The contributory negligence claimed was "in driving his stock into the canon without taking proper steps to avoid coming in collision with the train," and in not riding down the track to stop the train by flagging when he heard it approaching. It was held that he could not have flagged the train without exposing his life in riding along a deep and dangerous cut. These cases are so different in their facts that I do not regard them as authority in this case. If these two young men had been driving six heavily loaded teams, tied together, one after the other, or if they had been so well broken as not to require a driver, but would follow without being tied to the team in front, would they have been justified in stopping 100 feet from the track to listen, and then walk behind the teams the rest of the way to the track, assuming that no train would come? Or, if these cattle had been tied together, with a leader in front, and they had stopped at the same distance to listen, and then driven on, both drivers being behind, would that have been the exercise of due diligence? Would not common prudence dictate that one should be in front of the procession and the other in the rear, when

Johnson v. New York Cent., etc., R. Co

they were about to cross the track? The fact that the cattle were loose does not change the rule of law. If anything, they were bound to greater care when they were loose because they would be more beyond their control than when tied together. I deem it unnecessary in this case to discuss the question of the duty of one traveler driving cattle along the highway. That is not this case. Here were two. One could have gone ahead, while the other remained, and thus have secured the passage in perfect safety. I think it was their clear duty to do so.

I think the judgment should be affirmed.

KANSAS CITY, FT. S. & M. RY. CO. v. WALKER.

(*Supreme Court of Arkansas, Jan. 10, 1903.*)

[71 S. W. Rep. 660.]

Railroads—Injuries to Stock—Negligence—Prima Facie Case—Evidence.*

Where, in an action against a railroad company for the killing of a horse on the track, the evidence failed to establish that the horse was injured by the running of defendant's train, there was no prima facie case of negligence of defendant made out, and a verdict for plaintiff was erroneous.

Appeal from circuit court, Sharp county, Northern district; Frederick D. Fulkerson, Judge.

Action by D. D. Walker against the Kansas City, Ft. Scott & Memphis Railway Company for the killing of a horse. From a judgment in favor of plaintiff, defendant appeals. Reversed.

L. F. Parker, Jno. T. Woodruff, and W. J. Orr, for appellant.

David L. King, for appellee.

BUNN, C. J. The evidence in this case fails to show that the horse in question was injured by the running of the trains of the defendant company. There was, therefore, no prima facie case of negligence made out against the defendant, and there was a total want of evidence to sustain the verdict.

Reversed, and remanded for new trial.

JOHNSON v. NEW YORK CENT. & H. R. R. CO.

(*Court of Appeals of New York, Jan. 6, 1903.*)

[65 N. E. Rep. 946.]

Trespasser on Train—Care Due.†

Where plaintiff was stealing a ride on a train, the railroad com-

*As to the presumption of negligence arising from mere proof of injury to stock on track, see foot-note appended to *Felton v. Anderson* (Ky.), 4 R. R. R. 114, 27 Am. & Eng. R. Cas., N. S., 114.

†See foot-note appended to *Cunningham v. Ft. Worth & D. C. Ry. Co.* (Tex. Civ. App.), 1 R. R. R. 519, 24 Am. & Eng. R. Cas., N. S., 519.

Johnson v. New York Cent., etc., R. Co

pany owed him no duty except to refrain from wantonly or unnecessarily injuring him.

Same—Violent Ejection—Sufficiency of Evidence.

In an action by a trespasser for injuries received by a train, evidence of plaintiff that he was kicked from the train by an employee of defendant *held* insufficient to establish such fact as against the positive evidence of all the operatives on the train at the time of the injury, which was uncontradicted and unquestioned.

Appeal from supreme court, appellate division, Third department.

Action by Edward Johnson against the New York Central & Hudson River Railroad Company. From a judgment of the appellate division (73 N. Y. Supp. 1137) affirming a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

William P. Rudd, for appellant.

Peter A. Delaney and Joseph A. Murphy, for respondent.

O'BRIEN, J. The plaintiff recovered a verdict of \$4,000 damages, resulting, as he claims, from a personal injury produced by the defendant's negligence. The learned court below affirmed the judgment entered upon the verdict, but, since the decision was by a divided court, the appeal presents the question whether there was any evidence for the jury which supports or tends to sustain the verdict. The plaintiff was not a passenger nor an employee, but, in the language of the record, was "stealing a ride" from New York to Rochester. He did not get onto the train at the New York station, but, going outside, went up the street to the second bridge north of the station, climbed the fence, got on the tracks, and, when the train going north came to a stop at that point, he got on the front platform of the third car from the engine, which was the baggage car, and sat down in the doorway. The train started, and he sat there for nearly five hours, until the train reached Rensselaer, opposite Albany, and there the plaintiff met with the accident or injury resulting in the loss of his arm, to recover for which the action was brought. The plaintiff undertook the journey in the manner stated on the night of the 23d of March, 1900, leaving New York shortly after 9 o'clock, and arriving at Rensselaer about 2 o'clock the next morning. These facts are all stated by the plaintiff himself, who was the principal witness at the trial, and, as to the accident, the only witness. He says that, as the train was approaching the bridge over the Hudson river at Albany, it slowed up, and when it was quite dark he saw a man running alongside the train, which was moving at a speed that the plaintiff described as slow, and the defendant's witnesses as fast. The plaintiff describes the man as dressed like a railroad man, with the coat and cap usually worn by trainmen, carrying a lantern, and, after running along with the train towards the engine for some minutes, he returned, and was proceeding towards the rear of the train, when he discovered

the plaintiff still sitting in the front doorway of the baggage car. He got onto the platform with the train in motion, asked plaintiff what he was doing there, and then kicked him off the car with one kick, and, the plaintiff falling off, his arm was crushed under the moving train, and the injury complained of was the result. The plaintiff says he was kicked off on the left side of the train, though when found a few minutes later he was on the right of the track on a six-foot space between tracks.

The plaintiff was not familiar with the locality, and hence might well be honestly mistaken with respect to surrounding objects, and as to whether he was kicked off on the right or left of the train. In whatever way the injury was inflicted, it is quite certain that it occurred at the point where he was found by the operatives of the yard and taken to the hospital in Albany. The question in the case is whether there is any proof that he was kicked off at all. The plaintiff was concededly a trespasser, and the defendant owed him no duty except to refrain from wantonly or unnecessarily injuring him. The theory of the action is that the plaintiff, being on the front platform of the baggage car, sitting in the doorway, was unnecessarily and wantonly assaulted by one of the defendant's servants, resulting in the injury complained of. This allegation is put in issue by the answer, and the plaintiff was bound to prove it. It is not claimed by the plaintiff that he knew the man who thus assaulted him. All he professed to know about him was that he was dressed as described, had the lantern, and was running ahead towards the engine, and had a "sandy mustache." On the part of the defendant every operative on the train and every man who had anything to do with the management or operation of it, from the highest to the lowest, was sworn, and they all testified in the clearest terms that they never touched the plaintiff, or even knew that he was on the train at all. The place where the plaintiff was upon the baggage car was favorable for concealment, since the only two cars in front were the express cars, that were always kept locked, and the baggage car was cut off from any connection with the rest of the train by the piles of baggage with which it was filled. This accounts for the fact that he made the journey unobserved. The plaintiff did not attempt to identify any of the operatives of the train as the person who assaulted him, nor was it even shown or claimed that any of them had, at the time of the injury, or at any time, a sandy mustache, or that any of them, from the color of the hair or the general complexion, could have produced one at the time.

If the positive evidence of all the operatives on the train on the night in question stands uncontradicted and unquestioned, it must be accepted as true. The jury could not reject it on the ground that they were in the employ of the defendant. *Hull v. Littauer*, 162 N. Y. 569, 57 N. E. 102. They had no legal or pecuniary interest in the controversy. What

Elkins v. South Carolina & G. R. Co

the plaintiff testified to was in no proper sense a contradiction. All that the plaintiff stated might be true without any impeachment of the operatives and trainmen, especially as it appears that in the same yard the operatives of the Boston & Albany Railroad were to be found. The plaintiff gave no proof to show that any servant of the defendant assaulted him. In view of the positive evidence of all the defendant's servants on the train, and in the absence of any contradiction of it on the part of the plaintiff, it cannot be said that he gave any evidence in support of the issue, or that the verdict is supported by any evidence. At best, there was but a scintilla, which in law is only another way of saying that there was no evidence. *Baulec v. Railroad Co.*, 59 N. Y. 356-366, 17 Am. Rep. 325; *Pollock v. Pollock*, 71 N. Y. 137, 153; *Pauley v. Lantern Co.*, 131 N. Y. 90-98, 29 N. E. 999, 15 L. R. A. 194; *Laidlaw v. Sage*, 158 N. Y. 73-97, 52 N. E. 679, 44 L. R. A. 216; *Linkauf v. Lombard*, 137 N. Y. 418, 33 N. E. 472, 20 L. R. A. 48, 33 Am. St. Rep. 743; *Hemmens v. Nelson*, 138 N. Y. 517-529, 34 N. E. 342, 20 L. R. A. 440; *Improvement Co. v. Munson*, 81 U. S. 442, 20 L. Ed. 867. It is not necessary to refer here to that part of the argument of the learned counsel for the defendant wherein he has attempted to point out that the plaintiff's version of the transaction cannot possibly be true. It is claimed that, when the plaintiff's testimony on direct and cross-examination is taken as a whole, it is so improbable and contradictory as to be incredible. We prefer, however, to place the judgment on the ground that, when the proofs were all in, there was no evidence upon which the jury could find that the defendant's servants, or any of them, assaulted the plaintiff, and inflicted the injury, and the exception of the defendant's counsel to the submission of the case to the jury should be sustained.

The judgment should be reversed, and a new trial granted; costs to abide the event.

PARKER, C. J., and BARTLETT, HAIGHT, VANN, and CULLEN, JJ., concur. GRAY, J., not sitting.

Judgment reversed, etc.

ELKINS *v.* SOUTH CAROLINA & G. R. CO.

(*Supreme Court of South Carolina, Dec. 2, 1902.*)

[43 S. E. Rep. 19.]

Injury to Boy Trespassing on Train—Sufficiency of Complaint.*

Where a complaint alleges that plaintiff's decedent was a boy 14 years of age and of weak mind; that he entered a car loaded with

*As to the care due from railroads to infant trespassers, see foot-note appended to *Illinois Cent. R. Co. v. Wilson* (Ky.), 21 Am. & Eng. R. Cas., N. S., 644.

As to the liability for injury to trespasser on train, see foot-note appended to *Crawleigh v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.), 2 R. R. R. 630, 25 Am. & Eng. R. Cas., N. S., 630.

Elkins v. South Carolina & G. R. Co

cross-ties, the door of which was open; that at a curve on the track the cross-ties fell down and killed the boy; that the track was so negligently constructed that the curve would cause the freight to tumble over; and that the boy's mother had asked defendant's agent not to let him ride,—it does not state a cause of action, as the boy was a trespasser.

Exceptions.

Where an exception does not state the point of law involved, but simply refers to certain articles of the complaint, without setting out in what manner the circuit court erred in construing them, it will be overruled.

Gary, A. J., dissenting.

Appeal from common pleas circuit court of Hudson county; Barnwell, Special Judge.

Action by Susan T. Elkins, administratrix of Marion Varn, against the South Carolina & Georgia Railroad Company. From a judgment sustaining a demurrer, plaintiff appeals. Affirmed.

Davis & Best and R. C. Holman, for appellant.

Joseph W. Barnwell and B. L. Abney, for appellee.

POPE, J. The sole question presented by this appeal is, was the demurrer to the amended complaint herein properly sustained by the circuit judge? The amended complaint was as follows (omitting the caption and allegations as to incorporation):

"(1) That on the 18th day of April, A. D. 1899, Marion Varn, an infant under the age of twenty-one years, was killed on board of one of the cars of the defendant company under circumstances which will hereinafter be set forth.

"(2) That thereafter, to wit, on the 1st day of June, the plaintiff was duly appointed the administratrix of the estate of the said Marion Varn, deceased, and is now such administratrix.

"(3) That the plaintiff's intestate, at the time of his death left no wife or children or father surviving him, but left a mother, the plaintiff herein, who after the death of intestate's father intermarried with one Elkins, and this action is brought by and in the name of said administratrix for her benefit as mother of said intestate."

The plaintiff further alleges:

"(4) That the town of Bamberg is a populous place, having a large cotton mill situated near the center of the business portion thereof, with a side railroad track running (owned and controlled by the defendant above named) from the main line of defendant company's road to said mill.

"(5) That defendant company, in constructing their said switch or side track, constructed it in such a negligent way that upon the curve it contained a slant, which slant was so great that loaded cars in passing over the same would tilt over to such an extent that the load therein contained would not remain stationary, but was liable to fall and endanger the lives and limbs of those who might happen to be in said car.

Elkins v. South Carolina & G. R. Co

“(6) That on the 18th day of April, A. D. 1899, the defendant company loaded a box car on said track near said cotton mill with cross-ties, for the purpose of shipment, and pulled them out to the main line, negligently and carelessly left the said box-car door open, and allowed the plaintiff's intestate, who was a boy of fourteen years of age and of weak mind, to ride in said car over the said track and play while it was in progress to its main line.

“(7) That plaintiff's intestate had been in the habit of playing in and riding in defendant company's cars from said mill, where he was working; with the full knowledge of the officers and servants in charge of said train (their names being unknown to this plaintiff, other than they were the engineer and conductor in charge of said train, and while riding as aforesaid on the aforesaid day, and while passing over said curve, the car tilted, turned, or careened to one side, caused by the careless and unskillful construction of said side track of its said railroad, precipitating said ties upon intestate, causing his instant death.

“(8) That the plaintiff had frequently complained to the defendant, and requested it not to allow her child (the intestate herein) to play and ride in said car on said side track; the said defendant replying, through the conductor or brakeman in charge of said train (this plaintiff not being able to say which, nor does she know their names) that they did not care if he (intestate) did ride therein and break his neck.

“(9) That the said defendant company was negligent and careless in leaving said car door open, where children are tempted to play and hide; and the plaintiff further charges that at the time of the death of the intestate the defendant company allowed him to ride in said car over said dangerous track, and the conductor, brakeman, and engineer in charge of said train (their names being unknown to the plaintiff) had full knowledge of the intestate's presence in said car; they pulled said train over said dangerous track, precipitating the cross-ties on the intestate as aforesaid.

“(10) That the plaintiff's intestate was earning from fifty cents to one dollar per day, and by reason of his death plaintiff had been greatly damaged, and by reason of all the facts herein set forth she has been damaged ten thousand dollars.”

The defendant's demurrer was on these grounds: “That the complaint did not state facts sufficient to constitute a cause of action.

“(1) Because there is no sufficient allegation of negligence on the part of the South Carolina & Georgia Railroad Company: (a) In that the complaint only alleges that the track mentioned in the complaint was liable to endanger the lives of persons riding in loaded cars, which are not intended for the carriage of passengers. (b) That it is not the duty of a railroad company to keep its cars closed while in motion over its track, under the circumstances alleged in the complaint.

Elkins v. South Carolina & G. R. Co

(c) In that plaintiff's intestate was a trespasser on the car of defendant, and it is not the duty of the railroad company to guard against trespassers upon its cars. (d) In that neither the conductor nor the engineer is alleged to have had authority to permit said intestate to ride in said car, and they are not presumed to have such authority. In that it was not the duty of the defendant to guard its freight cars or trains from persons playing thereon. (f) In that the complaint, so far from alleging that the defendant permitted the intestate to ride in the said car, alleges, in effect, that the plaintiff was warned that the intestate was riding thereon at his own risk.

"(2) Because the facts as stated in the complaint show that the plaintiff's intestate was guilty of negligence in riding in the loaded freight car of defendant, which negligence was a proximate cause of the injury, concurring with negligence of defendant."

As before remarked, the circuit judge sustained the demurrer and passed an order dismissing the complaint. From this judgment the plaintiff has appealed upon the following grounds:

"(1) Because his honor erred in sustaining the demurrer and dismissing the complaint, it appearing on the face thereof that the plaintiff's intestate 'was a boy of fourteen years of age and of weak mind,' and was allowed 'to ride in said car over said track while it was in progress to its main line.'

"(2) That the complaint alleges 'that the plaintiff's intestate had been in the habit of playing in and riding in defendant company's cars with full knowledge of the officers and servants in charge of said train'; and it is respectfully submitted that this fact, coupled with the allegation contained in the eighth paragraph of the complaint, in which it is alleged that the plaintiff had warned the defendant against allowing her intestate to ride on said car, alleges negligence in the defendant company, and his honor erred in not so holding.

"(3) It is admitted by the demurrer that the car upon which plaintiff's intestate was killed was a place where children were tempted to play and ride, and, coupled with the further allegation that the track over which said car was drawn was dangerous, shows negligence in the defendant, and his honor erred in not so holding.

"(4) That his honor erred in dismissing the complaint, when it appears upon the face thereof that the intestate was riding on said train with full knowledge of defendant's servants in charge thereof, and impliedly by their consent.

"(5) That the allegation of the eighth paragraph of the complaint, 'that the plaintiff had frequently complained to defendant, and requested it not to allow her child to play and ride in said car on said track,' and the answer of defendant's servants 'that they did not care if he (intestate) did ride therein and break his neck,' shows a wanton and reckless disregard of the safety of the said intestate, who was riding in

Elkins v. South Carolina & G. R. Co

said car by the implied consent of the defendant, all of which, it is respectfully submitted, shows negligence, and his honor erred in dismissing the complaint.

“(6) That the allegations of fact contained in the sixth to the ninth paragraphs of the complaint, inclusive, show negligence, and his honor erred in not so holding.”

We have given the matter of this appeal serious reflection. The difficulties which confront us are that by the terms of the complaint, viewed under our decisions, the plaintiff's intestate was over 14 years of age, at which age, under the common law, which has been adopted by this state, he was *capax doli*. *State v. Toney*, 15 S. C. 409; 4 Bl. Comm. 24. It is true, there is an allegation of the complaint that he was of weak mind, but it also alleges that the intestate was an employee of the cotton mill in Bamberg, S. C., earning from 50 cents to a dollar per day. Under such circumstances, the circuit judge, in construing the complaint as to its allegations of fact, must have determined that the presumption flowing from the age of 14 years must be heeded. In addition, the young man was a trespasser upon the railroad's property. It is evident from the allegations of the complaint that the plaintiff seeks to neutralize the force of this matter by the allegation that this was done with the knowledge and acquiescence of the defendant's servants, the conductor, the engineer, and brakeman. But she failed to note the distinction betwixt such knowledge or acquiescence of such railroad employees on a train not intended or used by the defendant to transport passengers for hire, and one intended and used merely to shift cars from a side track to the main line, where no element of passengers could possibly enter. This matter of the defendant's responsibility to minors and adults—also, for that matter, for injuries received by them while trespassing upon the freight trains of defendant, and on its track and on its engines—has been fixed by our decisions: *Burns v. Railway*, 63 S. C. 46, 40 S. E. 1018; *Smalley v. Same*, 57 S. C. 243, 35 S. E. 489; *Darwin v. Railroad Co.*, 23 S. C. 531, 55 Am. Rep. 32. In *Burns v. Railway*, *supra*, a lad, who was employed to carry meals from a boarding house to the conductor and engineer, on reaching the train of the defendant in that case, which train was employed to haul lumber and other material to a bridge which was being constructed, was allowed by such employees to ride in the cab of that train. When such train was anchored on the bridge, another train of defendant collided with the material train and injured the lad. In action brought to recover damages, this court held: “It will be observed that all the exceptions are intended to show that the circuit judge committed reversible error in sustaining the demurrer, whose sole purpose was to show that the complaint failed to state facts sufficient to sustain a cause of action against the defendant. It must be borne in mind that the complaint does not allege that the

Elkins v. South Carolina & G. R. Co

plaintiff's injuries, received by him while in the cab of defendant, were the result of wantonness or willfulness on the part of the defendant to him. It appears there was no contractual relation existing between him (the plaintiff) and defendant. The plaintiff was not an employee of the defendant. He was not a passenger for hire on the defendant's train. In addition to this, it is not alleged that the defendant used this train upon which plaintiff rode for any other purpose than to carry material to its new bridge over the South Tiger river, and to hoist and lower the said material in its place in its construction of its said bridge. Nor does it appear in the complaint that the conductor and engineer of said material train were allowed or authorized by the defendant railroad company to allow any one of the general public to ride upon said train. Indeed, the allegations of the complaint determined that the plaintiff well knew the object and character of defendant as to said material train. What relation, we ask just here, did this plaintiff sustain to the defendant, if he occupied its cab attached to its material train when he went into its cab by permission of the conductor and engineer of said material train, without the permission or authority of said agents to so invite the plaintiff into defendant's said cab? He was a trespasser. It is true, he could say in defense of such trespass that the same was with knowledge of defendant's agents. But when, as such trespasser, the plaintiff seeks to hold the defendant to answer in damages for any injuries received by him while occupying the cab attached to the defendant's said material train, he must stand or fall upon the question of the conductor's or engineer's power and authority to allow him to so occupy said cab. Was the power to allow the plaintiff to so ride within the agency existing between the conductor and engineer, on the one side, and the defendant railway, on the other side? There is no allegation in the complaint showing that any such agency existed. On the contrary, by its allegations the complaint, when strictly construed, denied such agency. Then, if plaintiff was a trespasser upon the defendant's railway train, the only duty the defendant owed him was not to wantonly or willfully injure him. This doctrine of our law is well established, for in the case of *Darwin v. Railroad Co.*, 23 S. C. 540, 55 Am. Rep. 32, it is said: 'But to a trespasser the company owes no such duty. The company is not bound to assume, or even expect, that trespassers will intrude themselves into dangerous places upon their trains, and is therefore under no obligations to provide for their safety by warning them of the danger of their unlawful and reckless acts.' And also in the case of *Smalley v. Railway Co.*, 57 S. C. 251, 35 S. E. 492, the same doctrine is upheld. Any other doctrine, it seems to us, would impose an unnatural care and responsibility upon railroads. They are organized for wise purposes, and should respond to the duty they owe the public; but to impose upon them the burden of

Elkins v. South Carolina & G. R. Co

a quasi guardianship of all infant trespassers who ride in cabs. or other cars not intended for passengers to occupy, is extending the rule too far." Those views are supported by the decisions of many other courts. *Flower v. Railroad Co.*, 69 Pa. 210, 8 Am. Rep. 251; *Eaton v. Railroad Co.*, 57 N. Y. 382, 15 Am. Rep. 513; *Everhart v. Railroad Co.*, 78 Ind. 292, 41 Am. Rep. 567, 4 Am. & Eng. R. Cas. 292; *Railroad Co. v. Harrison*, 48 Miss. 112, 12 Am. Rep. 356,—all of which are cited in the *Darwin Case*, *supra*. In *Darwin v. Railroad Co.*, *supra*, the court held: "From these cases it will be seen that the fact that it was known to the conductor or other officers in charge of a train that the person injured had, by his own recklessness, placed himself in a dangerous position, does not affect the question, and that such fact cannot have the effect of overcoming the defense of contributory negligence." It may be said that this last citation from the *Darwin Case* related to the defense of contributory negligence upon the trial upon its merits, and not upon demurrer. But in *Jarrell v. Railway Co.*, 58 S. C. 495, 36 S. E. 910, Mr. Justice Jones, as the organ of the court, declared: "We may also say that, while contributory negligence is ordinarily a matter of defense, yet, if the complaint shows contributory negligence by the plaintiff, that would render the complaint demurrable for insufficiency, since it contained allegations that would defeat the cause of action alleged, or prevent a recovery thereon." The expression of these views disposes of this appeal; still we will pass upon the grounds of appeal themselves:

Sixth. This ground of appeal cannot be considered, under the well-established rule of this court that each exception, by its own terms, must contain the point of law involved. Here there is a reference to the 6th, 7th, 8th, and 9th articles of the complaint, without any effort to set out in the exception any view or views, or what view or views, presented by such articles, the circuit judge erred in construing. This exception is overruled.

First. While it did appear on the face of the complaint that the intestate was 14 years of age and of weak mind, it also appeared there that he was employed in a cotton mill, where he earned from 50 cents to \$1 a day; and also, while there was an allegation that the intestate was allowed to ride on said train on the side track from the mill to the main line of the railroad, it also appeared that such train was used to switch cars to the main line, and such cars were freight, and never passenger, cars. This exception cannot be sustained, for the reason that in the complaint it does not appear that the employees who allowed the intestate to ride had any power to so allow the intestate to ride thereon. This exception is overruled.

Second. Stress seems to be laid upon the allegation that the plaintiff warned the engineer and conductor against allow-

Elkins v. South Carolina & G. R. Co

ing her son, the intestate, to ride on and play in their cars. Has a parent of a boy just beyond the age of 14 years no power to control her son? Has it got to that condition, in the matter of discipline, that parents must beg and beseech others to do their duty for them? Stress is laid, also, upon the reply of the railway employees, "He may ride and break his neck, for all we care." This was nothing more than an indignant method of putting a stop to this mother upbraiding them for her own folly; virtually telling her, "We have not the time to be following your fourteen year old son and keeping him out of mischief." This case shows that there is a desire on the part of some living parents to convert railways into guardians of their children. The law should end such trifling. But suppose this plaintiff did warn these employees of the defendant not to allow her son to ride on a freight car on the side track in question; how is the defendant responsible therefor? It has nothing to do with trespassers stealing rides on its freight cars, except it is alleged that the injury was wrought by the defendant to the intestate willfully and purposely, "or, we may add, where it was the result of such gross negligence as would imply wantonness or recklessness." This exception is overruled.

Third. Now, it seems to us that it has come to a wonderful state of things, when the mother of trespassing intestate can complain that a railroad must so construct its side track, over which its freight cars are passed on to the main line, as to avoid all possible danger to such trespasser. There is no such law. Persons whose freight is loaded on cars, when goods are injured, or passengers on a passenger car which may run on such a side track, and injuries are produced thereby, can properly complain, but not trespassers who may place themselves on either of such trains, respectively. This exception is overruled.

Fourth. Agents can bind by their conduct in the service of a principal only within the scope of their agency. There is no allegation in this complaint that the principal delegated any such power to these, their agents. This exception is overruled.

Fifth. We have explained what is the natural and proper inference to be drawn from the language imputed to defendant's servants by the allegations of the complaint. Such language as used by the conductor or engineer was the petulant expression of annoyance felt by them at having the responsibility for this young man thrust upon them by his natural guardian. There is no suggestion that the defendant itself had anything to do with this trespasser. The exception is overruled.

It is the judgment of this court that the judgment of the circuit court be, and it is hereby, affirmed.

JONES, J., concurs in the result. GARY, A. J., dissents.

BULLARD v. SOUTHERN RY. CO.*(Supreme Court of Georgia, Dec. 10, 1902.)*

[43 S. E. Rep. 39.]

Accident on Track—Licensees—Degree of Care.*

Where a number of persons habitually, with the knowledge and without the disapproval of a railroad company, use a private passageway for the purpose of crossing the tracks of the company at a given point, the employees of the company in charge of one of its trains, who are aware of this custom, are bound, on a given occasion, to anticipate that persons may be upon the track at this point; and they are under a duty to take such precautions to prevent injury to such persons as would meet the requirements of ordinary care and diligence.

Same—Same—Same—Crossings.

The rule above stated is more especially applicable where the crossing is at a populous locality within an incorporated city.

Same—Contributory Negligence.

In view of the allegations of the petition, it was a question for the jury to determine whether the deceased could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence after the same was existing, and was either apparent, or the circumstances were such as to cause a reasonable person to apprehend its existence.

Question for Jury.

The allegations of the petition made a case for submission to a jury, and the court erred in dismissing the same on demurrer.

(Syllabus by the Court.)

Error from city court of Griffin; E. W. Hammond. Judge, Action by E. A. Bullard against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Marcus W. Beck and Chas. R. Gwyn, for plaintiff in error.

Battle & Little and Searcy & Boyd, for defendant in error.

COBB, J. Emma A. Bullard brought suit against the Southern Railway Company, making in her petition substantially the following allegations: Petitioner is the mother of Jessie Bullard, who was killed by the running of a passenger train of the defendant within the corporate limits of the city of Griffin, Ga., on the 11th day of September, 1900. Plaintiff was largely dependent upon the labor of the deceased for a support, she contributing a stated sum per month for such support. The deceased was killed by being struck by an engine, and the train to which the engine was attached was being run at a high and negligent rate of speed, to wit, from 35 to 40 miles per hour. The killing occurred within 250 yards of where a street of the city crossed the track east or southeast, and no signal was given of the approach of the train, either by the ringing of a bell or the blowing of the whistle. The engine was being run through a populous and

*As to the care due licensees on track, see foot-note appended to *Cleveland, A. & C. Ry. Co. v. Workman* (Ohio), 4 R. R. R. 551, 27 Am. & Eng. R. Cas., N. S., 551.

Bullard v. Southern Ry. Co

thickly settled section of the city of Griffin at a time when and place where people from the different cotton mills were continually passing from their work in the mills to their homes, and the killing occurred upon a crossing constantly used by the public in crossing the railroad at that point, which facts were known to the employees of the defendant in charge of the train. Notwithstanding these facts, the train was run at such a high and reckless rate of speed as to make it gross negligence on the part of the defendant; and, in addition to this, if the employees of the train had been upon the lookout, they could have seen the deceased, and several companions who were with her, as they entered upon the track, for at least 500 yards, and, having passed the blow post for the crossing, it was the duty of the defendant to check the speed of the train, the killing occurring at least 150 yards south or southeast of the blow post, and near the crossing; and had this been done, and the approach of the train been signaled, the deceased would have been warned of the approach of the train in time to have avoided the injury, but, instead of doing this, the employees of the train ran it at a rate of speed, which, in view of the place where the killing occurred, amounted to wantonness, the train being behind time. The deceased was killed at a crossing which was used by the public daily for crossing the railroad at that point. She and her companions believed the train had passed, it being later than the schedule time by about 30 minutes, and they were not expecting a train from that direction; their backs being turned in the direction of the approaching train. The deceased was in the exercise of all due care and caution, and was killed without fault or negligence on her part. She could not have avoided the negligence of the defendant by the use of ordinary care, the train approaching so rapidly without warning, and giving only one or two short whistles of the engine when within a few feet of her, but not in sufficient time for her to get off, or out of the way of the engine. Defendant was negligent and lacking in ordinary care in running its train at such a high rate of speed at the time and place stated, and negligent in not giving any signal of its approach and in not keeping a lookout, or, if the engineer was on the lookout, in not giving sufficient warning of the approach of the train, and also negligent in not slackening its speed at the blow post and continuing to slacken as the train approached the crossing, and in not tolling the bell and blowing the whistle at the blow post, and continuing until the train reached the crossing, and in being behind schedule time. The petition was amended by alleging that at a point about 10 or 15 yards beyond and outside the city limits, near the track, and some 150 yards from where the deceased was killed, was a blow post, at which the whistle of defendant's locomotive should have been blown, and at which the speed of the train should have begun to slacken, but defendant's servants at this

Bullard v. Southern Ry. Co

blow post neither blew the whistle, nor began to slacken the speed of the train. The petition was further amended by alleging that at the time deceased was killed she and her companions were expecting a north-bound train on the tracks of the Central of Georgia Railroad Company, which train was about due; the tracks of the Central of Georgia Railroad Company being within a few feet of the defendant's track at the point where deceased was killed.

The defendant demurred to the petition on the following grounds: Because the petition sets forth no cause of action. It is apparent from the allegations of the petition that the deceased could, by the exercise of ordinary care, have avoided the accident. The death of the deceased was attributable solely to her own negligence and want of care, it appearing that she was killed at a place where the train could have been seen for a distance of 500 yards or more. The accident occurring at a place 250 yards distant from a public crossing, the defendant was under no duty to the deceased, she being a trespasser and a wrongdoer, until she was actually seen by the engineer in charge of the train, or until her danger was apparent. The demurrer was sustained and the petition dismissed, and to this the plaintiff excepted.

The foregoing demurrer is general in its character, and involves only the question whether the petition set forth a cause of action, and the determination of this question depends upon whether the defendant has violated any duty which it owed the deceased at the time when and the place where she was killed. It is of but little consequence, under the allegations of the petition, whether the deceased was to be classed as a licensee or a trespasser on the company's tracks at the place where she was killed. The authorities differ widely both as to when a person is to be treated as a licensee, and as to the duty which the railroad company owes to such a person. The rule, however, seems to be very generally recognized that a person is not a licensee unless he has permission, either express or implied, from the company, to use the property of the company. As to whether permission will be implied from the mere habitual use of the property without objection, the authorities do not seem to be agreed. We do not find it necessary in this case to solve any of these mooted questions, but interesting and exhaustive discussions and citations bearing on the questions will be found in 3 Elliott, R. R. §§ 1154, 1248-1251; 6 Rap. & M. Ry. Dig. 265; 2 Shear. & R. Neg. (5th Ed.) § 480, pp. 841, 842, notes. But let it be conceded, for the purpose of this discussion, that the deceased was a trespasser, what was the measure of the defendant's duty to her? Expressions will be found in many of the cases to the effect that the only duty which a railroad company owes to a trespasser is not to injure him wantonly or willfully after his presence in a position of peril has been discovered.

Bullard v. Southern Ry. Co

That this statement of the defendant's duty is entirely too broad, and not applicable to all cases and under all circumstances, was pointed out by Mr. Justice Fish in *Crawford v. Railroad Co.*, 106 Ga. 870, 33 S. E. 826, 16 Am. & Eng. R. Cas. 829, and more recently by the writer in *Ashworth v. Railroad Co.*, 116 Ga. 635, 43 S. E. 36, where a full discussion of the subject will be found. It was there held, in substance, that where persons, though trespassers, habitually use the property of a railroad company with the knowledge and without the disapproval of its employees having such property in charge, the railroad company is bound to anticipate that such use of the property will continue, and will not be heard to say, after injury, has been inflicted upon one of such trespassers, that it did not know of his presence upon the property. The rule applicable to such a case as the one now being dealt with is thus stated by Hon. John L. Hopkins in his admirable work on the Law of Personal Injuries of force in this state: "Where no permission is given, but there is a habit on the part of individuals or the public of traveling over the track on foot, and nothing is done to prevent it, that does not modify or change the legal rights or obligations of either the public or the company. By such use the public are not tacitly licensed to go upon the track, and the consent of the company to the use is not implied; but the fact that they do go there enters into the situation as it is known to the company, and affects the caution and amount of care required in running trains." Hopk. Pers. Inj. § 87, p. 142. We do not think any decision of this court can be found where it was held that where a person habitually used a passageway across the tracks of a railroad company at a particular point, with the knowledge and without the disapproval of the company, it was under no higher duty to him than simply not to injure him willfully after his presence on the track was discovered. On the contrary, exactly the opposite rule has been applied in a case where the trespasser was using the tracks of the company longitudinally at a place where the public were in the habit of passing along the tracks. That case was *Railroad Co. v. Meigs*, 7 Ga. 864, and it was there said: "There was no error in admitting the testimony relating to the habit of the public in walking on defendant's tracks at and near the place where this injury happened. While this habit, even if acquiesced in by the railroad company, did not prevent the deceased from being a trespasser, it was a circumstance which the jury might properly consider in determining whether or not the persons in charge of the train showed proper diligence at the time the killing occurred. Railroad engineers should observe more caution in running at places where they know persons are likely to be on the track than elsewhere, even if those persons are trespassers, and especially is this true when the company has at least tacitly consented to this otherwise unauthorized use of its property by the public." See also,

Bullard v. Southern Ry. Co

in this connection, 3 Elliott, R. R. § 1154; Railway Co. v. Bond, 114 Ga. 913, 41 S. E. 70.

While the failure of the defendant company to observe the statutory requirements as to blowing the whistle and checking the speed of the train may not have been, relatively to the deceased, negligence per se, it was bound to anticipate the presence of the deceased at that particular place, and consequently was under a duty to take some steps to prevent injury to her. It was for the jury, and not for the court, to say what was the measure of its duty under all the circumstances of the case. If ordinary care would have required that the whistle be blown or the bell tolled, and the speed of the train slackened, then the company would be liable for its failure to do these things. Under the allegations of the petition, no precautions whatever were taken to prevent the unfortunate casualty which resulted in the death of the plaintiff's daughter. In passing upon the question as to what rate of speed and what signals would have met the requirements of ordinary care on the part of the defendant company, the jury will also take into consideration the fact that the killing occurred in a populous locality within the limits of an incorporated city. Under such circumstances, a greater degree of care is necessary in passing over a portion of the track used by the public as a passageway. See Railroad Co. v. Cromer, 106 Ga. 296, 31 S. E. 759, citing Comer v. Shaw, 98 Ga. 543. It will also be for the jury to say whether the deceased could have avoided the consequences of the defendant's negligence by the exercise of ordinary care. No such duty on the part of the deceased arose until the negligence of the company was existing, and was either apparent, or the circumstances were such that an ordinarily prudent person would have had reason to apprehend its existence. Railroad Co. v. Ferguson, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802. The allegations of the present petition present a stronger case than the facts of that just cited, where a verdict was upheld on the theory that the jury were warranted in finding, under the operation of the rule above stated, that the plaintiff could not have avoided the negligence of the company by the exercise of ordinary care. It is alleged in this case that the train was about 30 minutes late; that the deceased and her companions had reason to believe that it had already passed; that they were expecting a train on another railroad, a few feet away, to approach from an opposite direction; and that the deceased could not have seen or heard the train until it was too late to avoid the casualty. We do not say that the plaintiff sought to recover, even if these allegations be proved; but it was certainly not within the power of the court to say, as matter of law, that she ought not. She made a case which entitled her to go to a jury, and the court erred in dismissing her petition.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent.

BALTIMORE & O. S. W. R. Co. v. STATE *ex rel.* GREENWOOD.*(Supreme Court of Indiana, Nov. 25, 1902.)*

[65 N. E. Rep. 508.]

Mandamus—Pleading.

A petition in mandamus proceedings on the relation of the trustee of a designated township, which alleges that the relator is the trustee of the civil township designated, is not defective, though the word "civil" might have been omitted.

Same—Same—Verification.

A petition in mandamus proceedings on the relation of a public officer need not be verified by him in his official capacity, but is sufficient if verified by him in his individual capacity; Burns' Rev. St. 1901, § 1183, authorizing the verification by any person competent to make an affidavit.

Highways—Establishment—Notice.

Though Burns' Rev. St. 1901, § 6742, provides for the giving of a notice of the proceedings for the establishment of a highway, either by publication or posting of the same in public places in the vicinity of the proposed highway, a petition in mandamus proceedings to compel a railway company to construct a highway crossing across its right of way for a newly established highway, which alleges that due and legal notice of the application for the establishment of the highway was given to the railway company, is not demurrable for uncertainty for failing to aver the method of the giving of the prescribed notice, where the facts show that the highway was established by the county commissioners at a regular session in proceedings had for that purpose.

Same—Same—Petition.

The question of the uncertainty of the petition could only be raised by a motion to make it more specific.

Crossings—Duty of Railroad to Construct.

Burns' Rev. St. 1901, § 5153, cl. 5, providing that a railway company may construct its road across a highway so as not to interfere with the free use of the same, and shall restore the same to its former state, or place it in such condition as not to unnecessarily impair its usefulness, imposes on a railway company the duty not only to maintain its crossings over existing highways in a reasonably safe and good condition for travel, but also to maintain such crossings over highways established after the construction of the road.

Same—Same—Mandamus—Defenses.

When a railway company failed to present to the board of commissioners for allowance in proceedings to establish a highway across its right of way any claim for damages arising out of the location of the proposed highway, a railway company succeeding to the rights, franchises, and property of the former company after the making of the final order establishing the highway and opening the same, cannot show, in a mandamus proceeding to compel it to construct a highway crossing over the right of way, that it will subject it to considerable expense to construct the crossing; the statute providing ample opportunity for all persons affected by the location of the proposed highway to be heard before, and have their claims for damages adjusted by, the board of commissioners.

Same—Compensation—Taking Property without Due Process of Law.

Though a railway company had no actual notice of the proceedings to establish a highway over its right of way, did not appear therein, and was awarded no damages, the refusal to award damages to its successor, compelled to construct a highway crossing for the highway at considerable expense, does not deprive it of its property without due process of law, in violation of the fourteenth amendment of the federal constitution.

Same—Same—Same.

The refusal to award damages is not a taking of its property for a

Baltimore, etc., R. Co. v. State

public use without compensation, in violation of Const. "Bill of Rights," § 21.

Same—Same—Same.

A contention that, because the highway statute does not require the giving of actual notice of the proceedings to establish a highway to all persons affected, a railway company succeeding to the rights, franchises, and property of another company after the establishment of a highway across the latter company's right of way, the latter company having had no actual notice of the proceedings, not appearing therein, and being awarded no damages, is deprived of its property without due process of law and without compensation, rendering the statute unconstitutional, is without merit.

Appeal from circuit court, Daviess county; H. Q. Houghton, Judge.

Mandamus by the state, on the relation of John W. Greenwood, trustee of Washington township, Daviess county, against the Baltimore & Ohio Southwestern Railroad Company to compel respondent to construct a highway crossing across its right of way. From a judgment awarding the writ, respondent appeals. Affirmed.

W. R. Gardiner, C. G. Gardiner, T. D. Slimp, and Edward Barton, for appellant.

Ogdon & Inman and Hefron & Harrington, for appellee.

JORDAN, J. The state, on the relation of John W. Greenwood, trustee of Washington township, Daviess county, Ind., prosecuted this action in the lower court to secure a writ of mandamus to compel appellant to put a certain described public highway at a point where it crosses the right of way of appellant's railroad in a condition so as to enable the public to safely use the same at the said crossing without interference. A trial upon the issues joined resulted in appellee being awarded a peremptory writ of mandamus commanding appellant to make and put the said highway at the said crossing of appellant's right of way in such a condition as will enable the public to freely use the highway at that point, and so as to afford security to life and property. The errors assigned are predicated on the decisions of the court in overruling a demurrer for insufficiency of facts to the alternative writ, in overruling a motion to quash the same, and in denying a motion for a new trial. The facts as set out in the petition and in the alternative writ appear to be as follows: Appellant owns and operates a railroad running from Parkersburg, W. Va., to St. Louis, Mo. This road, on its route, runs through Washington township, Daviess county, Ind. In the year 1898, and prior thereto, and at the time the highway herein involved was established and laid out, this railroad was owned and operated by a railroad company known as and denominated the "Baltimore, Ohio & Southwestern Railroad Company," which, as alleged, was incorporated under the laws of the state of Indiana. At the September term, 1898, of the board of commissioners of Daviess county, Ind., proceedings before said board appear to have been properly

Baltimore, etc., R. Co. v. State

instituted for the location and establishment of a certain public highway proposed to be located through a portion of Washington township in said county, and across and over the right of way of said railroad company in said Washington township. Notice, as prescribed by the highway statute, seems to have been given in respect to the pendency of said proceedings before the board; and such steps appear to have been taken therein as resulted in the board of commissioners at its December term, 1898, ordering said highway to be established, laid out, and opened as located by the viewers over and across the several tracts of land mentioned, including appellant's right of way herein involved. After the board of commissioners had made the final order establishing the highway as laid out and located, and subsequent to the opening of and putting the highway, by the proper officials, in a condition for travel thereon, except as to that part thereof which crosses the right of way in question, appellant, by and through certain proceedings had in the federal court, and by virtue of certain transfers, succeeded to all the rights, titles, franchises, privileges, and property of the above-mentioned company. At the time of said succession it had full knowledge of the location and establishment of the highway across the right of way of its predecessor at the particular crossing in dispute. Appellant's predecessor, it appears, was made a party to said highway proceedings, but had no actual notice of their pendency, and in fact had no notice save and except the constructive notice provided for by the statute. As to which particular method of giving the notice prescribed by the statute—whether by publication in a newspaper, or by posting notices in public places in the vicinity of the proposed highway—was employed, is not clearly disclosed. Appellant's predecessor, however, it appears, wholly failed to appear in said proceedings and filed no remonstrance, and made no claim therein for damages by reason of the proposed highway being located across its right of way at the intersection in controversy. The relator is shown to have been duly elected, at the general election held in November, 1900, trustee of said Washington township, and duly qualified as such official, and was so acting at the time this action was instituted. At the time the highway in dispute was established and laid out, there was a high embankment on appellant's right of way at the point where it was crossed by the highway, and this embankment was used by appellant's predecessor as a roadbed at that point. The top of this embankment was 10 feet above the level of the highway, and above the general level of the ground in the vicinity thereof on the north and south of said right of way. This embankment, as maintained by the railroad company, obstructs the highway at the point where it and the right of way cross each other, and prevents the highway from being used by the public at said crossing, and so interferes with travel thereon at said crossing as to render the highway

at that point of no use as a public road. After the establishment and opening of the highway, as heretofore stated, it is disclosed that appellant, in the year 1900, further elevated this embankment on its right of way at the point of intersection, so as make the height thereof at least 18 feet above the level of the highway, by dumping or placing thereon large quantities of earth and gravel, and said elevation was extended to the distance of 100 yards and more, and serves to and does wholly prevent the free use of the highway by the public at said crossing. After this embankment was raised or elevated as shown, it resulted in rendering the approaches of the highway to the railroad crossing so steep and high as to wholly debar or prevent the public from using the road at this railroad crossing. By reason of the condition in which appellant's railroad has been constructed and is maintained by it at the point where it intersects the highway, no security is afforded for the life and property of persons traveling over the highway at said railroad crossing. After the establishment and opening of this public road as previously shown, and before the commencement of this action, it appears that the proper township trustee duly notified the appellant of the condition of its said right of way at the crossing of the highway, and requested and demanded that it proceed to put the crossing in question in such a condition as would enable the public to freely and safely use the highway at the crossing; with all of which demands appellant refused to comply, and still refuses.

Appellant's first contention is that there is no legal relator shown in this prosecution, for the reason that the trustee named is described or designated in the pleading as the trustee of Washington civil township, instead of the trustee of Washington township; second, that the petition is not shown to have been legally verified, for the reason that the affidavit thereto was made by Greenwood in his individual capacity, instead of his official. But the relator is shown to be the trustee of Washington township, and as such he is certainly appearing and acting herein as the trustee of the civil township, and not of the school township. The law recognizes that there are two corporations within the territory included within Washington township. One is "Washington township of Daviess county," and the other is "Washington school township." The first is known as the "civil township," and the other as the "school township," organized for school purposes. This distinction is made by the statutes pertaining to our common schools, and has been repeatedly recognized by the decisions of this court. *Carmichael v. Lawrence*, 47 Ind. 554; *Jackson Tp. v. Home Ins. Co. of Columbus, Ohio*, 54 Ind. 184; *Wilcoxon v. City of Bluffton*, 153 Ind. 267, 54 N. E. 110. While not necessarily required in this case, nevertheless it was proper for the relator to designate himself as trustee of Washington civil township of Daviess county, Ind. The word "civil" might have been omitted without detri-

Baltimore, etc., R. Co. v. State

ment to the petition. In respect to the second contention it may be said that under section 1183, Burns' Rev. St. 1901, the affidavit in verification of the application or petition for the writ of mandate was not required to be made by the relator in his official capacity. The petition may be verified by any person competent to make an affidavit.

It is next insisted that the petition and alternative writ are uncertain in not specifying the character of the notice given in the highway proceedings. It is alleged in the petition and alternative writ herein "that due and legal notice of the filing and pendency of said petition and application for the location and establishment of said highway and of the time and place set for hearing the same was duly given to said * * * Baltimore & Ohio Southwestern Railway Company, as required by the statute in such cases made and provided." It is insisted that this is too uncertain, for the reason that it is not disclosed thereby which method of giving the notice prescribed by section 6742, Burns' Rev. St. 1901, was employed,—whether by posting notices in three public places in the vicinity of the proposed highway, or by publication in a newspaper. But the facts, however, do show that the highway in controversy was, by the board of commissioners of Daviess county, at its regular session, ordered to be established, laid out, and opened in certain proceedings had before the board for that purpose. As that tribunal is, under the statute, invested with exclusive, original jurisdiction in such highway proceedings, it may, under the circumstances, so far as the case at bar is concerned, in the absence of anything to the contrary, be presumed that by reason of the fact that the board is shown to have entertained the petition for the highway in question, and ordered the same to be established and laid out, that it first found that the required notice had been given through the means at least of one of the methods prescribed by the statute to appellant's predecessor and all other landowners affected by the location of the highway. *Jones v. Cullen*, 142 Ind. 335, 40 N. E. 124, and cases there cited. Again, upon another view, if the petition in the case at bar is too uncertain, as claimed, the question should have been presented by motion to make the pleading more specific. *Falley v. Gribbling*, 128 Ind. 110, 26 N. E. 794; *Potter v. Lumber Co.*, 146 Ind. 114, 44 N. E. 1000; *Clow v. Brown*, 150 Ind. 185, 48 N. E. 1034, 49 N. E. 1057. The gist of the relief sought and awarded under the facts in this case is that appellant be required to put its right of way at the crossing in question in such a condition as to enable the public to use the highway at that point without interference for the purpose of travel, and so as to afford reasonable safety or security to the property and lives of those passing over the highway at the crossing. The facts disclose that this public road, as established and laid out, is being used at all other points along the route thereof, except at the crossing on appel-

lant's right of way, on which, by reason of the condition, as shown, in which appellant has placed and maintains its road-bed and right of way at that point, the public is virtually prevented from using the highway; or, in other words, from the facts alleged it is evident that this public road as established cannot be used for travel as an entirety, as intended, but can be used only in parts; or, more clearly stated, it is susceptible of being used by the public at all other points along the line thereof, except at the crossing in controversy. Counsel contend that by this action it is sought to compel the railroad company to put the highway crossing not only in a condition so as to be passable, but also to make it convenient for travel usual to public highways, and to require the company to do all of the work and bear all of the expense in the performance thereof, which it is claimed will amount to \$3,000. This amount as damages it is asserted appellant at the trial offered to and was ready and prepared to prove, but its offer, over its exceptions, was rejected.

We previously stated what, in effect, was the relief sought and awarded in this proceeding, and we do not perceive wherein appellant, under the circumstances, will be compelled to discharge any duty other than that which the law exacts. We may repeat that what appellant, in effect, under the writ of mandate, is required to do, is to put the highway crossing in a reasonably safe and fit condition for travel by the public thereover. By the fifth clause of section 5153, Burns' Rev. St. 1901 (section 3903, Horner's Rev. St. 1901), which forms a part of the general laws of this state pertaining to railroad companies, a railroad company is authorized "to construct its road upon or across any stream of water, water-course; road, highway, railroad or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or water-course, road or high highway, thus intersected, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises." The authorities, as a general rule, affirm that it is the duty of every railroad company to construct and maintain its crossings over highways in a reasonably safe and good condition for travel, so far as the same can be done without interfering with the operation of the railroad. 3 Elliott, R. R. § 1102. Mr. Pierce, in his work on Railroads, says: "The laying of a railroad across highways often requires excavations and erections, and a greater or less change in the surface. The duty, however, to restore the highway as far as may be to its former condition, and to erect and maintain structures necessary for such restoration, is presumed to be incumbent on the company, even without any express requirement imposed by statute. The duty to restore it to its former condition, so as not to interfere materially with its usefulness, and to make the crossing safe

Baltimore, etc., R. Co. v. State

and convenient for the public, is usually imposed by statute. It is a continuing duty, and binds other corporations which succeed to the ownership or possession of the railroad. It is to be substantially, rather than literally, performed." Pierce, R. R. p. 245. In 3 Elliott, R. R., supra, the author says: "Where such duty is imposed by statute, the weight of authority is to the effect that it applies to crossings of highways laid out after the construction of the railway as well as to those in existence at the time of its construction." Such is the interpretation given to clause 5 of section 5153, Burns' Rev. St. 1901 (section 3903, Horner's Rev. St. 1901), by the decisions of this court. See *Railway Co. v. Smith*, 91 Ind. 119; *Railroad Co. v. Carvener*, 113 Ind. 51, 14 N. E. 738; *Evansville & T. H. R. Co. v. State*, 149 Ind. 276, 49 N. E. 2, and cases there cited; *Lake Railroad Co. v. Cluggish*, 143 Ind. 347, 42 N. E. 743. In the appeal of *Railway Co. v. Smith*, supra, the court, in construing clause 5, supra, said: "Whether the highway is laid out and opened *before* or *after* the construction of the railroad, the legislative intent in the cause quoted is clear, we think, that the railroad company shall construct its road, at its intersection with such highway, in such manner as to afford security for life and property." (Our italics.)

Inasmuch as the public are entitled to have highways to meet the requirements of the increased growth of business and population, therefore the general rule is well affirmed that every railroad corporation acquires its right of way subject to the right of the state to extend public highways and streets across such right of way. *City of Ft. Wayne v. Lake Shore & M. S. Ry. Co.*, 132 Ind. 558, 32 N. E. 215, 18 L. R. A. 367, 32 Am. St. Rep. 277; *City of Terre Haute v. Evansville & T. H. R. Co.*, 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189, 8 Am. & Eng. R. Cas., N. S., 759-760; *Gold v. Railway Co.*, 153 Ind. 232, 53 N. E. 285; *Chicago & N. W. Ry. Co. v. City of Chicago*, 140 Ill. 309, 29 N. E. 1109, 50 Am. & Eng. R. Cas. 150; *Chicago & A. R. Co. v. Joliet, L. & A. Ry. Co.*, 105 Ill. 388, 44 Am. Rep. 799; 3 Elliott, R. R. § 1098. Were this not the rule, then, as the authorities properly affirm, the grant by the state of the privilege to construct and operate railroads across or through its territory, instead of conducing to the progress and prosperity of the people, would prove to be a serious obstacle in the way of their future prosperity or progress. See authorities last above cited. A standard authority on public highways, in speaking of the legislative control over railroad companies in regard to the crossings of highways, says: "Such corporations are largely under the control of the legislature in the exercise of its police power. It may regulate the use of highways by a railroad company by requiring the crossings to be made in a particular manner, and may even impose upon the company the duty of adapting the track and the grade to new highways so as to make the

crossing safe and convenient." Elliott, Roads & S. (2d Ed.) § 778. See, also, 3 Elliott, R. R. §§ 1102-1109, inclusive. In section 1107 of the work last mentioned it is said: "At every crossing something must be done to make the highway safe for travel, and the duty, as a rule, rests upon the railway company to make such changes and to erect such structures as will make the highway safe for use. The railway company must erect and maintain such structures as are reasonably necessary to enable the traveler to get on, over, and off the crossing in safety. Proper approaches and embankments necessary to enable a traveler to reach and leave the crossing are a part of the crossing, and the railway company must construct and maintain them." Under the express language of our statute above set out, the railroad company is authorized to construct its road across a highway so as not to interfere with the free use of the same, and in such a manner as to afford security to life and property. This requirement of the law, as we have seen, not only applies to its crossings over highways in existence at the time the railroad was constructed, but is equally applicable to a crossing over a highway laid out and established after the construction of the railroad; hence, in view of the facts in this case, appellant, under the law, must be held to be obligated to adapt and maintain its crossing over the highway in dispute so as not to interfere with the free use thereof at that point, and also to be constructed and maintained in such a manner as to afford reasonable safety or security for the lives and property of travelers using the highway at the crossing. *Chicago, I. & L. R. Co. v. State* (Ind. Sup.) 63 N. E. 224; *Chicago & S. E. R. Co. v. State* (Ind. Sup.) 64 N. E. 860.

The mere fact that appellant may be subjected to expense in the discharge of this duty is not a matter of legitimate defense in this action; consequently the trial court, under the circumstances, did not err in refusing to permit it to prove the expense to which it would be subjected in the discharge of the required duty. Such damages, if any, so far as legitimate, arising out of the location of the highway over the railroad company's right of way, were matters which appellant's predecessor might have presented for consideration and allowance before the board of commissioners in the proceeding to lay out and establish the highway in question. But this it neglected to do, and appellant, as its successor, under the circumstances in this case, stands in its shoes, and is bound and estopped by such proceedings before the board of commissioners in like manner as the company through whom it claims would be precluded and bound were it the party defendant in this action. *Gold v. Railway Co.*, 153 Ind. 232, 53 N. E. 285. Under the circumstances, appellant's predecessor must be considered as having had its day in court in respect to the establishment of the highway in dispute, and in regard to the damages, if any, arising out of its being located over the right of way.

Baltimore & O. R. Co. v. State, to Use of Roming

The statute governing proceedings for the establishment of highways before boards of commissioners provides ample opportunity and means for all persons affected by the location of the proposed highway to be heard in opposition thereto, and also the right to be heard upon any claim or demand for damages which they may assert in such proceedings. It is further insisted by appellant's learned counsel that, because it appears that neither appellant, an interstate railroad company, nor its predecessor, had no actual notice of the highway proceedings, and did not appear thereto, and was awarded no damages, consequently it should be held that appellant had the right in this case to prove and be awarded damages; otherwise, it is asserted, appellant will be deprived of its property without due process of law, and the same will be taken for public use without just compensation, in violation of the fourteenth amendment of the federal constitution, and section 21 of the bill of rights of the constitution of this state. It is further contended that, because the highway statute does not provide for actual notice, appellant's property has been taken and appropriated without due process of law, and without just compensation, and the contention is advanced that the statute is, therefore, antagonistic to the federal and state constitution. These contentions are without merits, and wholly untenable. A proceeding to establish a highway under the statute of this state, before boards of commissioners, is one in rem, and constructive notice is provided to be given to those who will be affected by the establishment or location of the highway. Appellant's predecessor, as it appears, had the benefit of such notice. This was sufficient to give the board of commissioners jurisdiction over that company, and to bind it by the order made in the proceedings before the board. *Tucker v. Sellers*, 130 Ind. 514, 30 N. E. 531; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616.

Further answering appellant's contention, we may say that we recognize nothing in our highway statute which can be said to be violative of any provision of either the federal or state constitution. The question in respect to appellant's being bound in like manner as its predecessor by the order of the board establishing or locating the highway in controversy is ruled and settled by the decisions of this court in *Gold v. Railway Co.*, supra.

We have read the evidence, and are satisfied that it sustains the judgment, and, as we find no error, the judgment is affirmed.

BALTIMORE & O. R. Co. v. STATE, to Use of ROMING *et al.*

(*Court of Appeals of Maryland, Dec. 3, 1902.*)

[53 Atl. Rep. 672.]

Accident at Crossing—Contributory Negligence.

The driver of a wagon, who had been drinking, approached a

Baltimore & O. R. Co. *v.* State, to Use of Roming

familiar railroad crossing at 10 o'clock at night; the track to the east being visible as he neared the crossing for distances varying from 1,275 to 1,115 feet, and from the center of the tracks about 850 feet. He was struck by a train coming from the east, which had sounded a whistle about 600 feet east of the crossing, and again at a nearer distance. The train was running from 15 to 18 miles an hour: *held*, that the driver was guilty of contributory negligence as a matter of law.

Same—Absence of Negligence.

The engineer was keeping a lookout, but did not see the horse in time to avert the accident, though he stopped the train within its own length: *held*, that the company was free from negligence, as a matter of law.

Appeal from Baltimore city court; George M. Sharp, Judge.

Action by the state, for the use of Julia Roming, widow, and others, against the Baltimore & Ohio Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Hugh L. Bond, Jr., W. Irvine Cross, and Edward T. Noble, for appellant.

William S. Bryan, Jr., and Edwin Burgess, for appellees.

SCHMUCKER, J. The equitable appellees are the widow and children of John C. Roming, who was struck and killed by a passenger train of the appellant at a grade crossing near Annapolis Junction. The suit was brought for their use, to recover damages for the loss of his life, which the declaration alleged was caused by the negligence of the servants of the appellant. The verdict and judgment were against the defendant, and it appeals.

There are several exceptions in the record to the rulings of the court below, but the substantial issue in the case is presented by the rejection of the defendant's first and second prayers, offered at the close of the evidence. The first prayer asked the court to take the case from the jury for want of evidence legally sufficient to show that Roming's death had been directly caused by the negligence of the defendant or its agents. The second prayer instructed the jury to find for the defendant because by the undisputed evidence the negligence of Roming directly contributed to the accident which caused his death.

A plat of the location of the accident, made from actual measurements, was used, by agreement, as if it were part of the record, at the hearing of the case. From this plat, and the testimony of the witness Zepp, who made the measurements, it appears that at the crossing where the accident occurred, and for some distance on each side of it, the railroad tracks run east and west by a uniform curve northerly of 30 minutes. The railroad has two tracks, and there is a switch on the south side of the main tracks, thus making three tracks in all, which the public road crosses at grade.

Baltimore & O. R. Co. v. State, to Use of Roming

Annapolis Junction station is a little over 100 yards west of the crossing. At the distance of nearly 200 yards east of the crossing a county road passes over the railroad by an overhead bridge, of a single span, having a clear width of 50 feet between its abutments. From the crossing to the bridge the view is unobstructed, but east of the bridge the railroad runs through a cut of such depth as to conceal a train of cars from the view of a person standing at the crossing, except in so far as the curve in the tracks permits it to be seen by looking underneath the bridge. The railroad company voluntarily maintains a gate at the crossing, which is operated by a gate-man during the day, but is left open at night. The public road by which Roming was attempting to cross the tracks when he was killed runs a short distance south of, and nearly parallel to, the railroad, until it reaches the crossing, where it turns north by almost a right angle, and crosses the tracks. Roming at the time of the accident had been going east on this road until he reached the crossing, when he turned north across the railroad. The train by which he was struck was coming west toward him, on its way from Baltimore to Washington. The witness Zepp testified that by actual measurement the distance from the grade crossing to the overhead bridge was 575 feet. He further testified that, in approaching the crossing from the south by the road on which Roming traveled, he could, when 50 feet south of the center line between the tracks, by looking easterly under the overhead bridge, see a man standing in the center of the west-bound track, 1,275 feet distant; that, when 45 feet south of the center of the tracks, he could see him 1,245 feet off; that when 35 feet south of the center of the tracks he could see him 1,150 feet off, and, when 25 feet south of the center line of the tracks, he could see him 1,115 feet off. He further testified, though not from actual measurement, that he was positive that one standing midway between the tracks at the crossing could see the west-bound track at least 250 feet beyond the bridge, and that when standing there he had in fact seen trains approaching from the east at that distance beyond the bridge. There was no direct contradiction of this testimony, although other witnesses expressed the opinion that the distance from the crossing to the bridge was somewhat less than Zepp's measurement made it, and that a west-bound train could not be seen by one standing at the crossing until it reached the bridge. The accident by which Roming lost his life occurred at about quarter past 10 o'clock at night. No one saw the actual collision between the train and the wagon in which he was riding. J. W. Furley, the engineer of the train, testified that as he approached the crossing he was standing in his usual place, in the right-hand side of the engine cab, looking forward, and when within an engine length of the crossing he saw a horse trying to cross the track, and that he at once pulled the whistle with one hand, and applied

Baltimore & O. R. Co. *v.* State, to Use of Roming

the brake with the other hand; that he stopped the train (five cars and the engine) within its own length, and went forward and found Roming under the tender, which had dragged him along after he was struck; that the train was running from 15 to 18 miles an hour at the time, and nothing could have been done to save Roming after the horse was seen. The engineer further testified that, when approaching Annapolis Junction from the east, he is in the habit of blowing a long blast for the block signal at the station when about 100 yards east of the bridge; then, as he goes into the cut toward the bridge, he sees the block signal, and responds at once by two short blasts of the whistle, to notify the signalman that he has seen the signal; that he blew all of these blasts of his whistle at the usual places on the night of the accident, and also blew the danger signal as soon as possible after seeing the horse on the track in front of him; that out in the open country his train runs 50 to 60 miles an hour, but as he approached the junction on that night he had his train somewhat under control, as he expected to be signaled to stop there for passengers, and was looking out for that signal, as well as for the block signal. The fireman and the conductor on the train and the night operator at the signal tower all corroborated the engineer's testimony as to blowing the long blast of his whistle before reaching the bridge, and subsequently the two short blasts in response to the block signal. Bertha McCauley, who was waiting at the station, heard the long blast of the whistle when, as she said, the engine was coming under the bridge, and also the short blasts which followed. The fireman also testified that he began to ring the bell at the sounding of the long blast of the whistle, and continued to ring it as they approached the station. There is no contradiction of this testimony as to the giving of the usual signals from the train as it approached the crossing, except that of David Sykes and his son Philip, who lived a short distance west of the station; and they only testified that they heard no whistle or bell prior to the danger signal, which they said came simultaneously with the crash of the collision. Bertha McCauley also said that "she never noticed the bell." Charles A. Murphy testified that Roming called at his mill about 3 o'clock on the afternoon of the accident, and that "he was under the influence of liquor, to a certain extent, so any person could easily tell it, but not drunk enough not to know that he wanted to buy chop and to pay for it." George Diven, who keeps a saloon at Laurel, testified that Roming was at his saloon on that afternoon, and left about 7 o'clock; that he drank six glasses of beer while there, and took away a dozen beers in his wagon, but that "he seemed to be able to take care of himself, and knew what he was doing when he left." Richard Whitehead testified that Roming on that evening drove him from Diven's saloon to his home, about halfway between Laurel and Annapolis Junction, and re-

Baltimore & O. R. Co. v. State, to Use of Roming

mained there until about half past 8 o'clock, and further said: "It looked to me like Roming was able to take care of himself. He was sober then, I suppose." Nothing further was seen of Roming by any of the witnesses until about 10 o'clock, or shortly after when he was seen by David Sykes and his son Philip to pass their house in his wagon going east on the public road which crosses the railroad at the place of the accident. The Sykes house stands a short distance west of the railroad station. Roming passed the house at a gentle trot, and he was seen by Philip Sykes until his wagon turned north into the railroad crossing, and got nearly on the track, not more than four yards distant, when it was concealed from view by a coal bin standing there. This witness further testified that when he thus lost sight of the end of Roming's wagon it was "almost at a standstill, like," and that although the witness was then looking east, right down toward the overhead bridge and the cut beyond it, no train whatever was in sight. It further appears from the uncontradicted testimony that Roming lived near Annapolis Junction, and often came there, and was familiar with the whole local situation, and that he was a strong and healthy young man, and had good sight and hearing.

The mutual and reciprocal obligations of railroad companies and travelers about to cross their tracks on public highways have been clearly defined by numerous decisions in this state. The recognized doctrine upon the subject was well stated in *Railroad Co. v. Hogeland*, 66 Md. 160, 161, 7 Atl. 105, 106, 59 Am. Rep. 159, as follows: "The railroad trains, from the nature of things, have the precedence of passing the crossing of public ways unobstructed; but it is the duty of those directing the trains to be careful to give all proper and sufficient signals of their approach, and to take all reasonable precaution, in view of the nature of the crossings to avoid collision. Failure in the strict performance of these duties to the public, whereby injury is inflicted upon individuals, will subject the company to liability to respond in damages to the injured party. But while such is the plain duty of the managers of railroad trains, it is equally the duty of those approaching the crossings as travelers upon highways to approach with care; and the more difficult and dangerous the crossing, the greater the care required. The rule is now firmly established in this state, as it is elsewhere, that it is negligence per se for any person to attempt to cross tracks of a railroad without first looking and listening for approaching trains; and, if the track in both directions is not full in view in the immediate approach to the point of intersection of the roads, due care would require that the party wishing to cross the railroad track should stop, look, and listen, before attempting to cross. Especially is this required where a party is approaching such crossing in a vehicle, the noise from which may prevent the approach of a train being heard. And if a

Baltimore & O. R. Co. v. State, to Use of Roming

party neglect these necessary precautions, and receives injury by collision with a passing train which might have been seen if he had looked or heard if he had listened, he will be presumed to have contributed by his own negligence to the occurrence of the accident; and, unless such presumption be repelled, he will not be entitled to recover for any injury he may have sustained. This is the established rule, and one that the courts ought not to relax, as its enforcement is necessary as well for the safety of those who travel in railroad trains, as those who travel on the common highways." *Hogeland's Case* has been cited with approval and relied on in numerous cases, and has been affirmed as recently as in *Holden's Case*, 93 Md. 420, 49 Atl. 625, and *McNab's Case*, 94 Md. 726, 51 Atl. 421. In *Watson's Case*, 91 Md. 354, 46 Atl. 996, the court said it will not do for the plaintiff to say that he looked, and did not see, or listened, and did not hear, the train, when the facts of the case show that, if he had looked or listened with the requisite care or caution, he must have seen or heard it. Tested by these authorities, it must be presumed that Roming's own negligence directly contributed to the accident which caused his death. The uncontradicted evidence shows that when he had turned into the crossing, and almost reached the tracks, no train was in sight. When the train did in fact come, he could have seen the headlight of the locomotive at a distance sufficiently great to have enabled him to avoid the collision by the use of reasonable and ordinary care and prudence. The usual blasts of the whistle were sounded as the train came up, and, further than that, it is almost incredible that a heavy train, approaching, before its speed was slackened, at 50 or 60 miles an hour, did not make noise enough, in the quiet of the night in the country, to have been heard by him if he had listened for it with proper caution. Whether he loitered upon the crossing after he passed out of sight of the witness Sykes, or whether the condition in which his free indulgence in beer left him so blunted and confused his senses as to deprive him of the ability to exercise that measure of care which his situation demanded, cannot now be told, and must remain a matter of speculation. The appellees not having been able to produce any explanation for his failure to avoid the train, when by the exercise of proper care he might have seen or heard it in time to save himself, they cannot recover for any injury they may have sustained from his death. If he had survived, he would have been unable to recover, under these circumstances, for any injury caused by this collision; and as their right is, under the statute, no greater than his, they suffer from the same disability.

The record does not, in our opinion, furnish legally sufficient evidence of any negligence of the appellant directly contributing to the collision by which Roming lost his life; but, if it did contain such evidence, it is apparent from all of

Potter v. Leviton

the facts of the case that he is chargeable with contributory negligence of such character as to preclude the right of the appellees to recover in this suit.

The defendant's first and second prayers should have been granted, and, for the error of the circuit court in rejecting them, the judgment appealed from must be reversed; and, as it is apparent that the appellees are not entitled to recover, no new trial will be awarded. Judgment reversed, with costs, without awarding a new trial.

POTTER v. LEVITON *et al.*

(*Supreme Court of Illinois, Oct. 25, 1902.*)

[64 N. E. Rep. 1029.]

Accidents on Track—Variance.

Where a declaration alleges in one count that plaintiff was on the east track of the street railway company when he was hurt, and in another that he was on the west track of such company, and the evidence shows that he was not on either track, but was between the two, and was within the space which the car running on the rails occupied as it passed, he was on the track, within the meaning of the allegation of the declaration.

Appeal for Delay—Damages.

Where the point raised on appeal is so clearly untenable and devoid of merit that it appears that the record was brought to the court on appeal for delay only, damages will be assessed against plaintiff in error to an amount not exceeding 10 per cent. of the judgment.

Error to appellate court, First district.

Action by Frank Leviton, by his next friend, against Edwin A. Potter, as receiver, etc. Judgment for plaintiff was affirmed by the appellate court (101 Ill. App. 544), and defendant brings error. Affirmed.

Frank W. Welch, for plaintiff in error.

Roy O. West, J. R. Becket, and Kitt Gould, for defendant in error.

CARTER, J. Frank Leviton, suing by his next friend, recovered a judgment against the plaintiff in error in the circuit court of Cook county for a personal injury caused by the running of a street car against him at the public crossing of Michigan avenue and 111th place, and the appellate court affirmed the judgment.

The plaintiff, a boy of 3½ years, was attempting to cross Michigan avenue from east to west when he was struck by defendant's car running south. The only ground for reversal urged here by plaintiff in error is that the trial court erred in refusing to instruct the jury to find the defendant not guilty, and the only reason given in support of the contention that the court should have so instructed the jury is that there was no evidence (as it is claimed) that the boy, when he was struck, was on the railway track of the defendant, as alleged

Day v. Boston & M. R. R

in the declaration. The declaration, in some of its counts, alleged that he was at the time lawfully on the east track, and in others that he was lawfully on the west track; and counsel says that the evidence shows that he was not on either track, but was between the two tracks. There is no evidence how far apart the tracks were, nor what the space was between the tracks that was not in fact occupied by one track or the other. If he was within the space which the car, running on the rails, occupied as it passed, we are of the opinion that he was on the track, within the meaning of the allegation of the declaration. In *Delaware & H. Canal Co. v. Village of Whitehall*, 90 N. Y. 21, the term "track" was given a broader signification than this. But without attempting any precise definition, we are satisfied that there was no such variance between allegation and proof as to prevent recovery under the pleadings. Besides, one or more of the witnesses testified that the boy was crossing the street and was on the track of the railway when he was struck, and this fact, if necessary to a recovery, has been conclusively established by the judgment of the appellate court. Lack of ordinary care could not, because of his tender years, be imputed to him, and there was abundant evidence of negligence on the part of the servants of the company or of its receiver. These questions, however, are not controverted by counsel. The one raised is so clearly untenable and devoid of merit that it must be held, as insisted by counsel for defendant in error, that the record was brought to this court for delay only. It therefore becomes our duty, under the statute, to assess damages against plaintiff in error, not exceeding 10 per cent. of the amount of the judgment of the circuit court.

The judgment of the appellate court will be affirmed, and, in addition to the judgment for costs, the clerk will enter judgment against the plaintiff in error, in favor of defendant, in error, for 5 per cent. of the amount of the judgment recovered in the circuit court. Judgment affirmed.

DAY v. BOSTON & M. R. R.

(*Supreme Judicial Court of Maine, Feb. 26, 1902.*)

[52 Atl. Rep. 771.]

Death by Wrongful Act—Due Care on Part of Deceased—Burden of Proof.*

In an action for negligently causing the death of a person, the plaintiff has the burden of proving affirmatively due care on the part of the deceased.

Same—Same—Same.

That the witnesses who could have testified to facts showing such due care are all deceased does not change the rule that absence of evidence of due care on the part of the deceased will defeat the action.

*See *McVey v. Chesapeake & O. Ry. Co.* (W. Va.), 13 Am. & Eng. R. Cas., N. S., 788, and note at end of case.

Day v. Boston & M. R. R

Accident at Crossing—Duty to Stop, Look and Listen.†

A traveler upon a highway, as he approaches a railroad crossing, should use adequate means to ascertain whether a train be approaching the crossing from either direction. He should listen for the sound of trains on either hand, and look both ways along the track to see if trains be approaching. The greater the difficulties in the way of hearing or seeing approaching trains, the greater should be the effort of the traveler.

Same—Same—Speed.

That the train was approaching the crossing at a much greater rate of speed than allowed by law in that locality does not lessen the duty of the traveler to use due care upon his own part to avoid collision.

Same—Same.

Where the evidence only shows that a traveler with a team upon a highway, approaching a railroad crossing, stopped momentarily a few rods from the crossing and then immediately drove upon the crossing, and there is no evidence that he at that or any other time listened or looked either way for approaching trains, there is not sufficient evidence of due care upon the part of the deceased.

Same—Same.

Evidence that such a traveler, driving toward a railroad crossing, when near the crossing was seen looking directly before him at the crossing, and was not looking in either direction along the railroad track, is not sufficient evidence of due care on his part to ascertain the approach of trains.

Same—Same—Evidence.

Evidence that a hand car passed over the crossing when the highway traveler with a team was some 500 feet therefrom, driving along parallel with the railroad, and that the men on the handcar saw the traveler on the highway, does not amount to evidence that the traveler noticed the handcar. Quantitative probability as to a past event does not amount to evidence of such event.

Same—Same—Same.

Whatever the probabilities in this case, there is no evidence that the deceased traveler, as he approached the railroad crossing, observed due care to ascertain whether a train was approaching, and no evidence that any act of the railroad company or any of its servants induced him to forego such care. So far as appears, the case is the too common one where the traveler either forgot to look and listen, or, being aware of the approaching train, recklessly undertook to cross before it.

(Official.)

Action by Lottie I. Day, administratrix, against the Boston & Maine Railroad. Verdict for plaintiff for \$4,000. New trial granted.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT, SAVAGE, and POWERS, JJ.

E. P. Spinney, for plaintiff.

Geo. C. Yeaton, for defendant.

EMERY, J. The evidence for the plaintiff shows the following: The plaintiff's intestate, Edwin Day, in the forenoon of a summer day was driving alone in a hay rack drawn by one horse along a village street toward a grade crossing of the street with the railroad tracks of the defendant com-

†See foot-note appended to Chicago, I. & L. Ry. Co. v. Reed (Ind.), 3 R. R. R. 627, 26 Am. & Eng. R. Cas., N. S., 627.

Day v. Boston & M. R. R

pany in North Berwick. He was standing up next the front rail of the hay rack as he was thus driving. When first seen by any of the witnesses, he was driving along Portland street nearly parallel with the railroad tracks. He then turned from Portland street into Wells street, which led more directly to the crossing and over it at an angle of $43\frac{1}{2}$ degrees with the track. The distance from the turn into Wells street to the crossing was 471 feet. He was "jogging along," as the plaintiff's witness described it, at a rate of about five miles an hour. He stopped momentarily some 20 feet from the crossing and then drove immediately upon the crossing, where he was struck and killed by a train of the defendant company, which had come along the track from the direction thus partially behind him. He was about 35 years of age, in the full possession of all the usual faculties, and was familiar with the crossing and the surroundings.

There is no evidence that, in approaching the railroad crossing, Mr. Day took any precautions whatever to ascertain whether a train was also then approaching the crossing from either direction. True, he stopped momentarily some 20 feet from the crossing, but it does not appear that he looked or listened or took any other measures to ascertain what might be approaching on the railroad tracks. There is no evidence for what purpose he stopped there. He may have stopped to look at something else than railroad or trains, or his horse may have stopped of its own volition without any act or will of Day's. We can only conjecture. There is no evidence. Nor can we assume, in the absence of evidence, that he did then look and listen for trains. On the contrary, it would seem that he could not have looked and listened at that point for trains without seeing or hearing this train, which, according to the plaintiff's own theory of its speed, was then less than 300 feet away. It is also true that a witness testified that as he was going from the crossing on Wells street he met Day at a point three or four rods from the crossing, and that Day then appeared to be looking "straight ahead toward the crossing, and not off to the right" (which would be toward the railroad). This does not tend to show requisite care and precaution on the part of Day. There was then, at that distance, no occasion for him to look at the crossing itself. Nothing then on, or passing, the crossing could endanger him at that distance. Looking straight ahead at the crossing would give him no information as to what might be on the tracks at a distance from the crossing and approaching it. Looking at or toward a railroad crossing is clearly not enough precaution for any traveler who proposes to pass over. He should look both ways along the tracks, to see what is approaching the crossing as well as what is on it.

It is the firmly settled law of this state that, in approaching a railroad crossing at grade, the traveler upon the highway, to be in the exercise of ordinary prudence, must bear in mind

that trains are liable to be approaching the crossing at that same time, and at any moment, from either direction; that the train cannot turn aside for him, and cannot be easily stopped to avoid him. He must, therefore, to comply with his duty to exercise ordinary care, be on the alert to ascertain by the use of his senses of sight and hearing, and by any other appropriate means, the approach of trains, and to seasonably avoid collision with them. He can usually avoid collision readily, easily, and promptly, if he be properly careful and alert while approaching the crossing. In view of the obvious peril at grade crossings and of the obvious inability of the train to turn out or stop instantly, it has further been repeatedly held that care commensurate with the peril requires the traveler upon the highway to look and listen for trains at the very time he is approaching the crossing, and that an omission to take this ordinary precaution is, if unexplained, contributory negligence per se as matter of law, and will bar an action for the collision even though the railroad company was negligent in the premises. He must bear in mind, what is of common knowledge, that railroad trains move much faster than the ordinary pace of a horse drawing a vehicle along the highway, and hence must not rest content with an observation made at considerable distance from the crossing, especially if there be objects or circumstances to obstruct his vision or hearing at the more remote point. He must be mindful, must observe, look, and listen, as he approaches close to the place of peril, the crossing. *Chase v. Railroad Co.*, 78 Me. 346, 5 Atl. 771; *Allen v. Same*, 82 Me. 111, 19 Atl. 105, 19 Am. & Eng. R. Cas., N. S., 729; *Smith v. Same*, 87 Me. 339, 32 Atl. 967; *Romeo v. Railroad*, 87 Me. 540, 33 Atl. 24; *Giberson v. Railroad Co.*, 89 Me. 337, 36 Atl. 400.

It is further the settled law of this state that it is incumbent upon a plaintiff, suing to recover damages alleged to have resulted from the negligence of another party, to affirmatively prove his own freedom from contributory negligence in the premises. There is no presumption that a plaintiff in such case was thus free from contributory negligence, though some times the circumstances may of themselves show that he was, as in the case of a passenger injured, by the negligence of a railroad company, while sitting in his seat doing nothing. In the absence of affirmative evidence tending to show that the plaintiff, himself being an actor, exercised on his part the care and effort incumbent on him to avoid the injury, he cannot maintain his suit. That the only witness who could testify to facts showing such care is dead, and the plaintiff is thus left without the evidence, does not enable the plaintiff to recover without the evidence. In support of the foregoing proposition, it is only necessary to cite the late case of *McLane v. Perkins*, 92 Me. 39, 42 Atl. 255, 43 L. R. A. 487, where the proposition is fully reviewed and affirmed.

In this case the plaintiff contends that the evidence shows

Day v. Boston & M. R. R

circumstances and conditions which made it difficult for Mr. Day to see or hear the approaching train, or to obtain any other information of its nearness to the crossing. If such was the case, it was the duty of Mr. Day to make all the more effort to ascertain the truth; but the case is barren of evidence that he made any effort whatever, great or small. The difficulty of seeing and hearing the train is therefore immaterial, since it is not claimed that it was impossible with any effort to know of the train's approach. It is the absence of the evidence of any, even the smallest, effort on the part of Day, not his inability to see or hear with reasonable effort, which convicts him of contributory negligence.

The foregoing statement of the law and the evidence would seem to require a judgment for the defendant notwithstanding the verdict of the jury in favor of the plaintiff. A verdict of a jury on matters of fact, and within even their exclusive province, cannot be the basis of a judgment where there is no evidence to support it, or when they have made inferences contrary to all reason and logic. In this case Mr. Day, as he approached the crossing, had a plain duty, long and clearly defined by law, failing to perform which, he or his representative could not sustain an action. There is no evidence that he did that duty or any part of it, and such a fact must be established by evidence, and not assumed.

But the plaintiff contends in this case that some of the defendant company's servants so conducted, during Mr. Day's approach to the crossing, as to assure him that no train was approaching so near as to danger him in attempting the crossing when he did. This assurance was given, the plaintiff says, by some of the section men propelling a handcar along the track over the crossing toward the direction from which the train was coming. The argument is that Mr. Day, seeing this handcar, and knowing that it must go nearly 1,000 feet to reach a switch or side track where it could let a train by, was thereby assured that no train from that direction would reach the crossing until that 1,000 feet had been first covered by the handcar and then by the train, which would have allowed him ample time for crossing safely; and that a jury might reasonably find that it was not negligence in Mr. Day to rely on that assurance, and cease his own personal outlook for the approach of such a train at such a time as would endanger him. *Hooper v. Railroad*, 81 Me. 260, 17 Atl. 64, and *York v. Railroad Co.*, 84 Me. 117, 24 Atl. 790, 18 L. R. A. 60, are cited.

It appears in evidence that the defendant company's section men did propel a handcar along the track over the crossing in the direction named, but this was while Mr. Day was on Portland street, some 50 feet from the turn into Wells street, and while he was traveling parallel with the railroad, and not toward it. The distance from the crossing on Wells street to its junction with Portland street was 471 feet. The

Day v. Boston & M. R. R

section men, or some of them, as they passed the crossing, noticed Mr. Day and his team at the locality named, on Portland street near Wells street.

Unfortunately for this contention, there is no evidence that Mr. Day noticed his handcar, although it was within the range of his vision. There are no circumstances tending to show that he noticed it, or, if he did notice it, that it in the least influenced his after conduct. He was on Portland street at the time, traveling parallel with the railroad, and, if he faced as he was driving, was not facing the car on the track. His momentary stop some 20 feet from the crossing does not tend to show that he noticed the car. That stop was some minute or two after the car had passed, and after the section men on the car saw him.

Of course, it is possible that he noticed the handcar. Indeed, it may be quantitatively probable that he did. Quantitative probability, however, is only the greater chance. It is not proof, nor even probative evidence, of the proposition to be proved. That in one throw of dice there is a quantitative probability, or greater chance, that a less number of spots than sixes will fall uppermost is no evidence whatever that in a given throw such was the actual result. Without something more, the actual result of the throw would still be utterly unknown. The slightest real evidence that sixes did in fact fall uppermost would outweigh all the probability otherwise. Granting, therefore, the chances to be more numerous that the plaintiff's intestate did notice the handcar than that he did not, we still have only the doctrine of chances. We are still without evidence tending to actual proof. However confidently one in his own affairs may base his judgment on mere probability as to a past event, when he assumes the burden of establishing such event as a proposition of fact as a basis for a judgment of a court he must adduce evidence other than a majority of chances.

The situation was very different from that in either of the cases cited. In each of those cases the traveler was directly at the crossing at the time of the event on the crossing. In the one case the gates were up when the traveler reached the gated crossing, and remained up. In the other case the traveler was at the crossing, halted and waiting, as the train passed directly before his face. In this case at bar, the event occurred when the traveler was 500 feet distant from the crossing, traveling parallel with the railroad, and nothing appears in evidence or the situation that would force the event upon his attention as in the other cases.

For lack of evidence, even from circumstances, that Mr. Day in fact noticed the handcar as it passed along the track and was influenced by it to cease further outlook, that episode does not suffice to show that Mr. Day took the requisite precautions, or was excused from taking them by any assurance of safety from the company's conduct. The whole evidence

Chicago & E. I. R. Co. v. Randolph

does not show, either that he took the precaution, or that he in fact relied upon assurances of safety.

The plaintiff calls attention to evidence that this crossing was in a compact part of the town, where the speed of trains was limited by law to six miles an hour when passing the crossing, and that this train passed the crossing at a much greater rate of speed. She contends that Mr. Day could properly assume, and act upon the assumption, that the train was not moving more than the lawful rate of six miles an hour, and therefore, if he could have safely crossed the track in front of a train moving only at that rate, she has shown that he was free from contributory negligence in crossing the track when he did. Unfortunately for this contention, also, there is no evidence that Mr. Day consciously saw or heard the train at all, or reasoned about its speed as compared with his own. So far as the evidence shows, he went upon the crossing entirely unmindful of what was approaching. Had he noticed the train, it was his duty to note its actual rate of speed, and take no chances of collision with it.

The plaintiff further calls attention to evidence that no bell was rung, no whistle was blown, and no other signal of approach was given by the train. She contends that the absence of all signals of approach was an assurance of safety. As to this contention, it has been repeatedly held that the traveler upon the highway must not depend solely upon any signal from the railroad company's servants, but must, in the absence of such signals, still be on his guard, and endeavor to ascertain the actual fact whether or not a train be approaching. See cases cited above.

So far as now appears, the case is the too common one where the traveler upon the highway either took no adequate care to ascertain whether a train was approaching, or else, being aware of the approaching train, recklessly undertook to cross before it.

We find in the law and the evidence no foundation for this verdict, and it must be set aside.

Motion sustained. Verdict set aside.

CHICAGO & E. I. R. CO. v. RANDOLPH.

(*Supreme Court of Illinois, Oct. 25, 1902.*)

[65 N. E. Rep. 142.]

Accident at Crossing—Care Required of Plaintiff.

An engine, which struck plaintiff while crossing a railroad track, had been engaged in switching for several minutes across the crossing, which it had obstructed. Plaintiff waited to cross until the engine had been put in rapid motion away from the crossing, when, believing the switching had been finished there, he attempted to cross. His view was obstructed by a freight car, and without warning the engine was suddenly reversed, and was moved rapidly backward over the crossing, striking plaintiff and causing injuries: *held*,

Chicago & E. I. R. Co. v. Randolph

that plaintiff was only required to proceed with ordinary care, and that he was not guilty of contributory negligence as a matter of law.

Appeal—Review.

Where, on the trial of an action for injuries, defendant made no objection to evidence of the value of services of plaintiff's wife in nursing him, it could not object thereto for the first time on appeal.

Same—Same.

Where, in an action for injuries, defendant made no objection to evidence of services of plaintiff's wife in nursing him, and of the value thereof, and made no request that the court should instruct the jury that plaintiff could not recover for such services, it could not object for the first time on appeal to an instruction authorizing the jury to include such services as an element of damages, if they should find for the plaintiff.

Personal Injuries—Nonexpert Testimony as to Nature of.

In an action for injuries evidence of nonexpert witnesses that plaintiff was "suffering," was "nervous," "in misery," "weak," "feeble," "in distress," "sore," "in pain," "nauseated," etc., was proper.

Instruction.

Where plaintiff was injured at a railroad crossing, an instruction that, if plaintiff attempted to cross the track under circumstances specified in the instruction, then "the plaintiff assumed the risks," was properly refused, since, as plaintiff bore no contractual relation to defendant company, the doctrine of assumed risk did not apply to him.

Appeal from appellate court, Third district.

Action by Francis F. Randolph against the Chicago & Eastern Illinois Railroad Company. From a judgment in favor of plaintiff, affirmed by the appellate court (101 Ill. App. 121), defendant appeals. Affirmed.

H. M. Steely and W. H. Lyford, for appellant.

Isaac A. Love and W. R. Jewell, Jr., for appellee.

BOGGS, J. The judgment in the sum of \$1,500, awarded the appellee against the appellant company in the circuit court of Vermilion county as damages for personal injuries sustained by the appellee through the alleged negligence of the appellant company, was affirmed by the appellate court for the Third district, and the record thereof is before this court by the further appeal of the railway company. The appellee, while endeavoring to pass over the tracks of the appellant company at a public crossing in Germantown in a buggy, was run upon by the tender of a locomotive, which servants of the appellant company were moving with a backward motion over and across the public crossing.

Counsel for the appellant company concede the evidence was such as to present to the jury as a question of fact whether the company was guilty of negligence as charged in the declaration. Counsel, however, contend it appeared in the evidence, without dispute, that the appellee, in going upon and attempting to cross the tracks of the railroad company, deliberately calculated upon the chances of driving across the tracks before the engine would reach the crossing, and voluntarily took the risk of reaching and clearing the crossing be-

Chicago & E. I. R. Co. v. Randolph

fore the engine could strike him, and that for this reason the court, in passing upon the motion entered by the appellant company for a peremptory verdict in its favor, should have held as matter of law the appellee was guilty of contributory negligence, and should have directed a verdict for the company. The engine which struck the appellee had been engaged for 15 or 20 minutes in switching cars back and forth across the public crossing, and during that period of time had obstructed the crossing. The appellee was waiting to cross, and the evidence tended to show that the engine was put in rapid motion toward the south, with every appearance that the work of switching had been finished there, and that the engine was going away from the locality of the crossing to work elsewhere, and that he believed he could cross with entire safety. He therefore attempted to pass along the highway over the railway crossing. His view of the engine was obstructed by a freight car. Without any warning whatever the motion of the engine was suddenly reversed, and it was moved rapidly backward over the crossing, and thus ran upon and injured the appellee. The trial court correctly regarded it as a question of fact, under the proof, whether the appellee exercised reasonable care for his own safety in attempting to cross the tracks. The question was not, as counsel for appellant argue, whether the appellee was free from even the slightest negligence, but whether he acted with that degree of care which a reasonably prudent and cautious person would have exercised under like conditions. *Railroad Co. v. Hutchinson*, 120 Ill. 587, 11 N. E. 855. Slight negligence is not incompatible with due and ordinary care, and if one has proceeded with ordinary care, though slightly negligent, he has observed the degree of care required by law. *Railway Co. v. Hessions*, 150 Ill. 546, 37 N. E. 905; *Railway Co. v. Dinsmore*, 162 Ill. 658, 44 N. E. 887.

Complaint is made that the appellee, in order to enhance his damages, was permitted to prove that his wife rendered services to him as a nurse and that he agreed to pay her therefor. In this same connection we may consider the further complaint that the court erred in so framing an instruction given to the jury on the motion of the court as to warrant the inclusion of the value of the services of the wife in assessing the damages to be awarded to the appellee. The testimony having reference to the services of the wife in nursing the appellee was given by the appellee. It was, in substance, that he required care and nursing; that his wife and son and others, his neighbors, waited upon and nursed him; that he agreed to pay his nurses, including his wife, for their labor; that he was waited upon and nursed for 13 weeks; and that the total expense for such services was \$10 per week. Counsel for appellant did not object to this testimony, ask that it be excluded or that the jury be instructed to disregard it, or in any way ask the court to rule as to its admissibility; nor

Chicago & E. I. R. Co. v. Randolph

did the court make any ruling thereon. Counsel for appellant treated the testimony as admissible, and proceeded to cross-examine with reference thereto, and in the course of such cross-examination brought out the fact that nothing had been said between the husband and wife as to how much should be paid to the wife. The court did not make, or was not asked to make, any ruling as to the admissibility of the testimony. The litigants proceeded upon the theory it was competent and proper proof. There is, therefore, nothing in the record on which to base an assignment that error intervened in the admission of the evidence. Had the objection been raised in the trial court, the testimony might have been withdrawn, or the jury instructed to disregard it, and the record freed from error. The appellant company could not be permitted to omit all objection, act upon the testimony as legal and proper in the trial court, take the chances of a favorable verdict, and, that failing, complain in this court for the first time that an error thereby crept into the record.

In the instruction framed by the court, upon the motion of the court, for the purpose of advising the jury as to the elements of damages in the event the verdict should be for the plaintiff, the reasonable expenses, if any are proven, "in repairing the buggy and harness, in nursing, and physician's services," are mentioned as proper for consideration. It is urged a general objection preserved to this instruction calls upon this court to reverse the judgment on the ground the instruction, in view of the evidence, authorized the jury to include the value of the services rendered by the wife in the damages assessed to be paid by the appellant company. The parties, in producing the testimony for the consideration of the jury, proceeded upon the theory the value of the services of the wife in nursing her husband, if rendered upon a contract that she should be paid therefor, was, in legal contemplation, proper to be considered by the jury in arriving at the damages sustained by the husband. In the instruction under review the court merely accepted the view entertained and acted upon by the parties, and instructed accordingly. The appellant company did not seek to have the jury otherwise instructed on the point, and cannot now be heard to complain that the jury were permitted to decide the case on evidence which it voluntarily allowed to go to the jury as proper and competent to be heard and considered.

The objection that a number of witnesses were improperly allowed to give in evidence opinions as to the injury received by appellee and its effect upon his health is not well taken. We have examined all the testimony pointed out by counsel to which the objection applies. It consists of statements of witnesses that the appellee was "suffering," was "nervous," was "in misery," "weak," "feeble," "in distress," "sore," "in pain," "nauseated," etc. This testimony was competent, within the rule laid down in *Railway Co. v. Fishman*, 169 Ill. 196, 48 N. E. 447. We there said (page 198, 169 Ill., and

Snell v. Minneapolis, etc., Ry. Co

page 448, 48 N. E.): "Where a previous habit or study is essential to the formation of an opinion sought to be put in evidence, only such persons are competent to express an opinion as have, by experience, special learning, or training, gained a knowledge of the subject-matter upon which an opinion is to be given, superior to that of an ordinary person. Witnesses not experts are, however, allowed to express opinions when the subject-matter to which the testimony relates is such in its nature it cannot be reproduced and described to the jury precisely as it appeared at the time. Opinions may be given by nonexpert witnesses as to the state of health, hearing, or eyesight of another, or the ability of another to work, or walk, or use his arms or legs naturally, or whether such other is apparently suffering pain, or is unconscious, in possession of his or her mental faculties, intoxicated, excited, calm," etc.

Instruction No. 25, asked by the appellant company, but refused, was, in substance, that if the appellee attempted to cross the track of the railroad under certain circumstances, specified in the instruction, "then, under the law, the plaintiff assumed the risks, perils, and dangers incident to so doing," and could not recover because of such assumption of the risk and peril from which he received the injury. The principle that a servant of sufficient age and experience, who voluntarily contracts to enter the employ of a master, assumes the risks ordinarily and usually incident to the employment, and will be supposed to have contracted with reference to such risks, has no reference to the rights and duties of the parties to this cause. The appellee bore no contractual relation to the appellant company. He was charged with the duty of exercising ordinary care for his own safety, and, if he conducted himself with that degree of prudence and caution, he was entitled to recover, if injured by the negligence of the appellant company. If he failed to so order his actions, he should have been denied a right to recover, not on any theory that he had assumed the dangers and risks from which he was injured, but because he had failed to act with reasonable care.

There appears no reason we should interfere with the judgment. It is affirmed.

Judgment affirmed.

SNELL v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO.

(*Supreme Court of Minnesota, Oct. 31, 1902.*)

[91 N. W. Rep. 1108.]

Accident at Crossing—Stop, Look, and Listen—Obstructed View—Contributory Negligence of Person in Charge of Cattle.

The plaintiff's 16-year old son approached defendant's railroad crossing with a team and wagon, at the rear of which were tied two cows; and, because they did not lead well, the boy left the team to go on without a driver, and went behind the cows to drive them along. At a point about eight rods from the track, where the view

Snell v. Minneapolis, etc., Ry. Co

of the track was obstructed by a growth of underbrush and timber, the boy stopped and listened for signals or other indications of approaching trains, and, hearing none, he went on without further investigation. While crossing the track, the cows were killed by one of defendant's trains: *held*, the boy was guilty of contributory negligence.

Same—Proximate Cause—Question for Jury.

In the village of Eden Valley defendant maintained a depot and side track for the accommodation of warehouses, lumber yard, coal shed, etc. The distance from the east to the west switch was 1,800 feet, and the space, to the extent of 200 feet west of the west switch and 350 feet east of the east switch, was left unfenced by defendant, and treated as a part of its depot grounds or switching yard. Certain stock belonging to plaintiff was killed at a point about 150 feet west of the west switch: *held*, it was a question of fact for the jury to determine whether the proximate cause of the killing of the cattle was the absence of the fence, and whether the point where they were killed was reasonably required by the railway company as a part of its depot grounds or switching yard.

Start, C. J., and Brown, J., dissenting.

(Syllabus by the Court.)

Appeal from district court, Meeker county; Gorham Powers, Judge.

Action by Robert Snell against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. Verdict for plaintiff. From an order denying a motion for a new trial, defendant appeals. Reversed.

Alfred H. Bright and E. P. Peterson, for appellant.

N. D. & C. H. March, for respondent.

LEWIS, J. First cause of action: At a point one mile from the village of Eden Valley a highway crosses defendant's railroad at an angle of about 45 degrees. The right of way was fenced at this point, and the distance from the fence to the center of the track was 50 feet, and from the fence, running parallel to the highway, to the center of the wagon road, 75 feet. The space on both sides of the right of way was, for a considerable distance, covered with brush and timber, which obstructed a view of the track by a traveler on the highway until reaching the right of way fence. From the portion of the highway which crossed the right of way the view was unobstructed for a long distance, both east and west. Plaintiff's son, a lad 16 years of age, approached this crossing with a team and wagon, at the rear of which were tied two cows. For some time before arriving at the crossing the boy had left the team to travel without a driver while he had gone back to drive the cows, which were not leading well. According to his testimony, when he arrived within about eight rods of the railroad track he stopped the team and looked and listened for trains. At that point his view was cut off by the brush, and, not being able to hear any signals or trains, he started on again, still walking along behind the cows. When the horses were about to step upon the track, the boy noticed a gravel train close upon them, rapidly backing down from

Snell v. Minneapolis, etc., Ry. Co

the east. The horses succeeded in getting across with the wagon, but the cows were struck and killed by the train. It is admitted that defendant was guilty of negligence in rapidly backing its train over the crossing without giving the ordinary signals. The only question is, was the boy guilty of contributory negligence? We must answer the question in the affirmative. No exception can be made on account of his age, and the evidence discloses the fact that he was a boy of average intelligence and experience. While the team was gentle, and it was not in itself an act of negligence to leave them to travel without a driver, yet it is clear that had the boy remained in the wagon, in direct control of the horses, he would have been in a position to discover the approaching train and control the team; and if he left such point of advantage, and for his own convenience walked behind the cows, he thereby placed himself and the property in a more hazardous position, because by so doing he reduced his chances of discovering approaching danger. Therefore, if his view was obstructed before reaching the right of way by reason of the disadvantage of his position at the rear, it was his duty to go forward and look for approaching trains before starting across the track; and, having failed so to do, he must be held to have contributed to the injury which followed.

2. Second cause of action: Eden Valley was an incorporated village, wherein were established defendant's depot, water tank, and coal sheds upon the main track, two elevators and a lumber yard upon the north siding track, and in addition there was a siding track running along the south side of the coal shed, and a stub track running off to the northeast. According to the record, the west switch was located at a point 1,050 feet from the depot, and 750 feet from the coal shed. The west switch was the point where the elevator and lumber yard siding track connected with the main track, and at a point on this siding track about 150 feet east of the main west switch the stub track above mentioned branched off. The switch to the east, where the elevator and lumber siding track connected with the main track, was at a point 700 feet east of the depot and 825 feet east of the coal shed. To the east of the village the defendant had fenced its right of way to a point 350 feet east of the east switch, and to the west the fence across the right of way was located 200 feet west of the west switch, at the end of a pile bridge which acted as a cattle guard, so that the space remaining unfenced was 2,350 feet, and the total distance between the two extreme switches was 1,800 feet. During the night some of plaintiff's cattle had broken out of the pasture, located some distance east of the village, and were huddled together upon the track at a point about 150 feet west of the west switch, and two of them were killed by defendant's train. The court instructed the jury to return a verdict for plaintiff for the value of the stock killed, upon the ground that it appeared, as a matter of law, that the

Snell v. Minneapolis, etc., Ry. Co

cattle entered upon the railroad track by reason of the absence of a fence, and that it was the duty of the company to maintain fences at the point where the cows were killed. We are unable to agree with the court on either proposition. It was clearly for the jury to determine from the evidence, under proper instructions, whether or not the cattle entered upon the right of way at a point where the company was or was not required to fence.

The other question may be stated as follows: Was that portion of the track between the bridge and the west switch, a distance of 150 feet, reasonably necessary for the accommodation of defendant's employees in cutting off cars and in making up trains? Or does it appear, as a matter of law, that defendant should be required to maintain a fence and cattle guard at a point contiguous to the west switch, and that therefore the space between the west switch and the bridge should have been fenced? The question turns upon the effect the cattle guard would have in the vicinity. From the evidence on behalf of respondent, it appears that for the purpose of working a switch only six or eight feet of ground are necessary, and it is urged that defendant should be required to construct its cross-fence within 8 or 10 feet of the switch. On the other hand, the testimony on behalf of defendant tended to show that this switch was within what may be termed the depot grounds or switching yard of the village; that it was frequently used in switching cars upon the several side tracks mentioned, and, if a cross-fence was required to be maintained in that vicinity within a few feet of the switch, it would necessitate putting in a cattle guard; and that a cattle guard is a dangerous thing, increasing liability to accident by employees in charge of defendant's trains. The evidence tends to show that brakemen, in handling the switch and in cutting off cars, were required to pass back and forth over the track for the entire distance between the switch and the bridge, and that the presence of the cattle guard would unreasonably increase their liability to accident. We are of the opinion that it was a question of fact to be determined by the jury whether or not the space mentioned was reasonably required by defendant as a part of its depot grounds or yard system. It certainly does not aver, as a matter of law, from the evidence, that the defendant was required to maintain fences and a cattle guard at that point.

In the case of *Greeley v. Railway Co.*, 33 Minn. 136, 22 N. W. 179, 53 Am. Rep. 16, it was held that the facts in that case did not tend to bring the case within either of the implied exceptions to the statute; and those exceptions are declared in that case to exist when there is a legal duty imposed upon the company to the contrary, or when the public convenience is conserved, and a "public place" is defined as a place put into practical use by the public. We are not disposed to insist upon the term "depot grounds" as descriptive of the limita-

Snell v. Minneapolis, etc., Ry. Co

tion to the implied exception to the statutory requirements. We can see no distinction in principle between the necessities of a fence at a point strictly within the so-called depot grounds, and a point where, by the use of switches and side tracks, the presence of cattle guards would tend to increase the hazard to employees of the railway company, although such point might be beyond the ordinary limits of the depot grounds. In other words, the implied exceptions to the terms of the statute should not be held strictly to apply to the convenience or safety of the public having business relations other than as employees. In a certain sense, the employees of a railroad company are the public, and their interests and convenience are to be considered in the application of the statute, as well as those who do not bear that relation to the company. Of course, the mere inconvenience or the mere matter of expense on the part of the railway company would not bring the case within the implied exceptions; but there may be such a condition that it is impracticable to put a fence along the yard system of a railroad, when it would materially affect the safety of those in the discharge of their duties. Although in one sense the public would not, in a direct way, be affected by such condition, yet, in another and broader sense, the public is interested in having such a condition maintained that employees may work with reasonable safety. It is better that the public dispense with the presence of the fence for the protection of persons and stock, than that a condition be maintained which would unreasonably increase the hazard of railroad employment. In *Greeley v. Railway Co.*, *supra*, it does not appear from the record to what extent the yard was used for switching, and to what extent the railroad employees would be affected by the presence of the cattle guard; hence the court's attention was not called directly to the point now before us. In some of the states the legislatures have taken note of the necessity of making the exceptions applicable to such places as switching yards, and have so enacted. In our own state, in the more recent decisions, this court has recognized the necessity of extending the exceptions beyond the narrow limits understood by the term "depot grounds." In the case of *Nickolson v. Railway Co.*, 80 Minn. 508, 83 N. W. 454, 18 Am. & Eng. R. Cas., N. S., 682, the court uses this language: "This implied exception has been held as to such places as depot and station grounds used for the convenience of passengers and the necessary handling of freight. This is as far as this court has gone, although there may be other and further exceptions,—such, for instance, as a yard used for switching purposes, crossed at surface by streets. Fencing without cattle guards on either side of the street crossings would be of no value, and at such places guards would prove death traps to switchmen, who in such yards have to do a large part of their work on the ground." In the case of *Marengo v. Railway Co.*, 84 Minn. 397, 87 N. W. 1117, this language is

Chicago & E. I. R. Co. v. Beaver

used: "An exception would probably also apply to yards devoted distinctively to switching, and the work of receiving, distributing, or making up and sending out trains, whenever the legal duty of maintaining cattle guards at highway crossings might seriously endanger the lives of switchmen in the use of the tracks." In both those cases, however, the facts were not sufficient to bring them within the exception.

Order reversed, and a new trial granted.

BROWN, J. I dissent. The evidence made the question of contributory negligence one for the jury. The boy did not, as said in the majority opinion, walk behind the cows "for his own convenience," but, on the contrary, for the reason that he deemed it necessary to do so. He testified—and there is nothing in the record to contradict him—that one of the cows would not lead, and because of this fact, his team being gentle and easily guided by the voice, he walked behind to drive her. If the cow would not lead, tied behind the wagon, it was clearly not necessary that the boy remain upon the seat of his wagon, and drag the animal across the track by the horns. It was for the jury to say whether he acted prudently or not. Indeed, if the evidence is conclusive either way upon this question, it is in favor of the proposition that he was not negligent. I concur in the result in other respects.

START, C. J. I concur in the dissenting opinion of JUSTICE BROWN.

CHICAGO & E. I. R. CO. v. BEAVER.

(*Supreme Court of Illinois, Oct. 25, 1902.*)

[65 N. E. Rep. 144.]

Accident at Crossing—Contributory Negligence—Extra Train.

Evidence, in action for death of one killed by his team being struck by an extra train at a railroad crossing, *held* sufficient to go to the jury on the question of his having used ordinary care for his own safety.

Same—Same—Obstructed View.

On the question of deceased, killed by a train at a railroad crossing, having used ordinary care for his own safety, evidence of the presence of willows near the track, on or near the right of way, obstructing the view, is admissible, though their presence was not charged as constituting negligence of the railroad company.

Evidence—Village Ordinances.

Under 1 Starr & C. Ann. St. 1896, p. 718, providing that all ordinances may be proved by the certificate of the clerk, and, when printed in pamphlet and purporting to be published by authority of the board of trustees, the pamphlet shall be received as evidence, the certificate of the village clerk, printed on a pamphlet of printed ordinances, certifying that it was published by authority of the board of trustees, sufficiently proves it was so published.

Death by Wrongful Act—Damages.

In an action for wrongful death of an unmarried man, who contributed to the support of his parents and their family, consisting of his brothers, sisters, and two nieces, an instruction is not erroneous

Chicago & E. I. R. Co. v. Beaver

because advising the jury that, in assessing damages, they are not limited to consideration of deceased's ability to earn wages during his minority but may consider the reasonable expectation of benefits from continuation of his life, so far as it appears from the evidence.

Appeal from appellate court, Third district.

Action by Mattie M. Beaver, administratrix, against the Chicago & Eastern Illinois Railroad Company. From a judgment of the appellate court (96 Ill. App. 558) affirming a judgment for plaintiff, defendant appeals. Affirmed.

H. M. Steely and W. H. Lyford, for appellant.

C. H. Beckwith and Geo. T. Buckingham, for appellee.

BOGGS, J. The appellee administratrix, in an action on the case under the statute, on a trial before the court and jury in the circuit court of Vermilion county, recovered a judgment for \$2,000 as for damages occasioned to the next of kin of her intestate by reason of his death, which, as she alleged, was occasioned through the negligent acts of the servants of the appellant company. This is an appeal from a judgment of the appellate court for the Third district affirming that of the circuit court.

We do not think the court erred in refusing to direct a peremptory verdict in favor of the appellant company. The ground of the motion for such a verdict was that there was a total lack of evidence to establish that the deceased exercised ordinary care for his own safety on the occasion in question. Walter G. Beaver, appellee's intestate, while riding in a buggy drawn by one horse, a short time after midnight on the morning of the 23d day of July, 1899, attempted to cross the track of the appellant's railroad in one of the streets in the outskirts of the village of Grape Creek, in Vermilion county, when he was run upon and killed by a work train operated by employees of the appellant company. The engineer in charge of the locomotive drawing the train saw the horse, which the deceased was driving, approaching the track, when its head was not more than four feet from the rails, and the fireman of the locomotive saw the horse after it had stepped upon the track. Neither of them saw the deceased, nor, so far as the record disclosed, did any one see the deceased at the time in question. It appeared in the proof that the deceased was a young man of about the age of 19 years, in good health, and in full possession of all of his mental faculties. His occupation was that of a coal miner. He lived with his father and mother, was industrious, and contributed out of his wages to the assistance of his parents. He was going to his home when he was killed. He was a member of a temperance society. A witness was produced who saw him near the hall of the Good Templars' Lodge, in South Danville, about 11 o'clock of the night he was killed. Another witness saw him on the same night at a schoolhouse about one-fourth of a mile from the crossing where he was

Chicago & E. I. R. Co. v. Beaver

killed. The testimony of these witnesses tended to show he was in a normal condition. He had for a number of years lived in the vicinity of the crossing, was familiar with the surroundings, and knew when trains were due to pass there. The train which struck him was an extra work train, and there was no regular train due to pass the crossing at the time he was killed. There was evidence tending to show that the whistle was not blown or the bell of the locomotive sounded within one-half mile of the crossing, and that the view of the approaching train was obstructed by a barn, by tall weeds and willows, and by a sycamore tree which stood near the track.

It was necessary, to a right of recovery, it should be made to appear the deceased was in the exercise of due care and caution for his own safety; but it is not indispensable it should be established by direct proof. It may be shown by circumstantial evidence, or, as has been sometimes said, it may be inferred by the jury from circumstances appearing in the proof. *Railroad Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358, and cases there cited; *Railroad Co. v. Kelly*, 182 Ill. 267, 54 N. E. 979; *Dallemand v. Saalfeldt*, 175 Ill. 310, 51 N. E. 645, 48 L. R. A. 753, 67 Am. St. Rep. 214. The natural instinct prompting to the preservation of life and the avoidance of injury, and consequent suffering and pain, may also enter into the consideration of the jury in determining the question. *Railroad Co. v. Nowicki*, supra; *Railroad Co. v. Kelly*, supra. We cannot say that the facts and circumstances which we have referred to, bearing upon the question whether the deceased was in the exercise of ordinary care, were not fairly and reasonably sufficient to warrant the jury in inferring that deceased conducted himself with ordinary and reasonable prudence. That willows were growing along or near the track of the railway was proper to be proven as a circumstance bearing upon the question of the exercise of due care on the part of the deceased. It was not necessary, to the introduction of such proof for this purpose, the existence of the willows should have been charged in the declaration as constituting negligence on the part of the company. It was unimportant, so far as the care and prudence of the deceased was concerned, whether the willows or other obstruction to the view of the train were on the right of way or not. If the view of the approaching train was obstructed by any object, it was proper the jury should have knowledge of it, and should consider it, in connection with all other facts bearing upon the question of the exercise of due care by the deceased.

The certificate of the clerk of the village of Grape Creek, printed on a pamphlet of printed ordinances of the village, certifying such pamphlet was published by the authority of the president and board of trustees of the village, sufficiently proved that such pamphlet was published "by the authority of the board of trustees" to entitle the pamphlet to be received as evidence of the passage and legal publication

Chicago City Ry. Co. v. Fennimore

of the ordinances of the village, within the provisions of paragraph 66 of chapter 24, entitled "Cities," etc. 1 Starr & C. Ann. St. 1896, p. 718.

The objection preferred to a number of instructions given in behalf of the appellee, that it was error, in view of the evidence, to submit to the jury, as did the instructions, the question whether the deceased exercised due care, has been answered by what has been said with reference to the action of the court in denying the motion of the appellant company for a peremptory verdict.

Instruction No. 9, given at the instance of the appellee, did not lay down an erroneous rule for the assessment of damages. The next of kin were the parents, brothers and sisters, and two nieces (who lived with his parents) of the deceased. He was an unmarried man, and earned \$40 to \$50 per month. He contributed to the support of his parents and their family. These relatives might reasonably expect to derive pecuniary benefit from the continued life of the deceased, and the instruction did no more than to advise the jury that, in assessing damages, they were not limited to the consideration of the ability of the deceased to earn wages during his minority, but that they might take into consideration such reasonable expectation of benefits from the continuation of the life of the deceased, so far as the same should appear from the evidence in the case. The instruction does not depart from the rule laid down by this court in *Railway Co. v. Wangelin*, 152 Ill. 138, 38 N. E. 760, for measuring damages in actions of this character.

We think the appellant company has no just ground to complain of the action of the court in refusing the only one of its instructions which was refused. The appellant company asked, and the court gave, 27 instructions in its behalf. The one refused was a substantial duplicate of instructions Nos. 5 and 19, which were given. The judgment of the appellate court must be, and is, affirmed.

Judgment affirmed.

CHICAGO CITY RY. CO. v. FENNIMORE.

(*Supreme Court of Illinois, Oct. 25, 1902.*)

[64 N. E. Rep. 985.]

Appeal—Review—Amount of Damages.

The amount of damages sustained by plaintiff in an action for injuries is a question of fact, and, where a verdict claimed to be excessive is sustained by the appellate court, it cannot be reviewed by the supreme court on that ground.

Accident at Crossing—Speed, Absence of Signals, and Insufficient Headlight.

Where plaintiff was injured by being struck on a dark night by a street car while crossing a street behind a car on another track, which had just passed, and there was evidence that the headlight on the car was insufficient and could not be seen more than a half a block, and that the car passed over the crossing at a high rate of speed without

Chicago City Ry. Co. v. Fennimore

sounding a bell or giving other signal to warn pedestrians of its approach, there was sufficient evidence of defendant's negligence to entitle plaintiff to go to the jury.

Same—Stop, Look, and Listen.

Plaintiff was injured by being struck by a street car running at a high rate of speed, without a sufficient headlight, at a crossing. She looked for a car when she came out of her house, less than a block from the crossing, and again as she started to walk diagonally across the street, between the curbstone and the east rail of the east track, where she waited for a train going in the opposite direction to pass her, and saw no car coming from the other direction: *held*, that she was not guilty of contributory negligence, as a matter of law, in not looking a third time, just before she started to cross the track on which she was injured.

Same—Contributory Negligence—Instructions.

Where, in an action for injuries, the court charged, at defendant's request, that plaintiff could not recover unless it was shown that she was exercising ordinary care, the omission of the element of plaintiff's care from an instruction authorizing a recovery by her under certain contingencies was not error.

Same—Burden of Proof.

An instruction that while the burden of proof is on the plaintiff, and it is for her to prove her case by a preponderance of the evidence, still, if the evidence preponderates in plaintiff's favor, although but slightly, it would be sufficient for the jury to find the issues in her favor, was correct.

Same—Evidence.

In an action for injuries, an instruction that, in estimating plaintiff's damages, it will be proper to consider the effect of the injury upon the plaintiff, the use of her body and limbs, and her ability to pursue any ordinary trade or calling, if these will be affected by the injury complained of, and also the bodily pain she sustained, if any, and all damages, if any, which the jury find from the evidence to be the direct result of the injury complained of, was proper.

Appeal from appellate court, First district.

Action by Jennie Fennimore against the Chicago City Railway Company. From a judgment in favor of plaintiff, affirmed by the appellate court (99 Ill. App. 174), defendant appeals. Affirmed.

This is an action in case, brought in June, 1895, by the appellee against the appellant railway company to recover damages, sustained by her, for a personal injury. She charges in her declaration that she was struck by one of appellant's cable trains at the corner of Forty-Eighth and State streets, in the city of Chicago, on the night of April 30, 1895. The trial in the court below resulted in verdict and judgment in behalf of appellee for the sum of \$2,250. An appeal was taken to the appellate court, and the appellate court has affirmed the judgment. The present appeal is prosecuted from such judgment of affirmance. The material facts are thus stated by the appellate court: "The injury happened on the tracks of appellant on State street at Forty-Eighth street. At that point there was a double track; the east one being used for north-bound cable trains, and the west one for trains south-bound. Appellee lived on the east side of State street, about midway between Forty-Seventh and

Chicago City Ry. Co. v. Fennimore

Forty-Eighth streets. On the evening in question she left her home to go to Englewood, which lay southward, and she desired to take a south-bound train. Coming to the sidewalk, she looked north for an approaching train, but, seeing none, she walked along on the sidewalk on the east side of the street southward to Forty-Eighth street. There she started to cross State street to reach the west side of the street, in order to get in the proper place to take a south-bound car. In doing so, she says she walked cater-cornered (presumably, from the northeast corner of Forty-Eighth and State streets). Just before reaching the east or north-bound track, a north-bound train came along, and she stopped to let it pass. It went by at the usual rate of speed, without stopping. Just before or as it passed her, she looked again in the direction of Forty-Seventh street for an approaching train, but saw none; and, as soon as the north-bound train passed, she stepped in behind it, and crossed the track on which it was running, and was about to step onto the south-bound track, when she was struck by the grip car of a south-bound train, and injured in the manner complained of."

Wm. J. Hynes and Watson J. Ferry (Mason B. Starring, of counsel), for appellant.

James C. McShane, for appellee.

MAGRUDER, C. J. (after stating the facts). Counsel for appellant say in their brief: "The grounds upon which appellant relies for a reversal of the judgment herein are (1) that the verdict is against the evidence; (2) error in the giving of improper, and the refusal to give proper, instructions to the jury; (3) that the verdict is excessive."

1. The statement that the verdict is excessive, is, of course, merely another form of stating that the damages are excessive. We have frequently held that the amount of damages sustained by the plaintiff in an action at law is a question of fact, which is not open for consideration in this court, under the statute. *Railroad Co. v. Bode*, 150 Ill. 396, 37 N. E. 879, and cases cited; *Railway Co. v. Walsh*, 157 Ill. 672, 41 N. E. 900.

2. The objection that the verdict is against the evidence is not an objection that can be entertained by this court. Under this objection, however, and as a part of it, appellant claims that the trial court erred in refusing, at its request, to give to the jury a written instruction to find the issues for the defendant. It has often been said by this court that a case ought not to be taken from the jury if there is evidence tending to sustain the cause of action. *Railway Co. v. Johnsen*, 135 Ill. 641, 26 N. E. 510; *Railway Co. v. Walsh*, *supra*. There is evidence in the record tending to establish the cause of action set up in the declaration.

In order to entitle the plaintiff to recover in an action of this kind, it must appear that the defendant has been guilty

Chicago City Ry. Co. v. Fennimore

of such negligence as produced the accident or injury, and that the plaintiff at the time of the accident was in the exercise of ordinary care for his or her safety.

In the first place, the evidence tends to show that the appellant was guilty of such negligence as produced the injury complained of. The grounds of negligence set up in the declaration are that at the street crossing where the accident occurred, and at the time of its occurrence, to wit, at the hour of 8:30 o'clock in the evening, and while it was dark, the appellant was propelling the train of cable cars which inflicted the injury at an unreasonable rate of speed, and without ringing a bell as a warning of its approach, and without maintaining a proper and suitable headlight upon the forward car, which struck the appellee. The evidence tends very strongly to show that whatever headlight there was was dim in its character, and insufficient to enable a person standing at even a short distance ahead of the train to see its approach upon a dark night. The appellant's gripman testifies that, when the train in question was going north, he discovered when it reached Fortieth street that the chimney of the lamp supposed to furnish the light was broken, and that he was obliged to turn the light down. He says: "The chimney was toppled over in the top a little. It could not fall in any way. It was broke." Some six or seven other witnesses testify as to the dimness of the headlight, and that the chimney of the lamp was either broken, or the light turned down too low. They say that the light could not be seen plainly, inasmuch as it was filled with smoke on the inside. The witnesses differ as to the distances at which the light could be seen as the train approached. Some of them say that the light was so dim as to make it impossible to see the approach of the train at the distance of half a block. Other testimony shows that it was impossible to see the headlight even at a less distance than half a block, and at a distance not greater than the width of the street or crossing. As the evidence was conflicting in regard to the character of the headlight, it was a matter to be determined by the jury, and was properly submitted to them under the instructions of the court. "Where the cars are operated at night, a headlight should be kept, the bell constantly sounded, and other means used to warn those who may happen to be on the track." 23 Am. & Eng. Enc. Law (1st Ed.) p. 1023; *Rascher v. Railway Co.*, 90 Mich. 416, 51 N. W. 463, 30 Am. St. Rep. 447; *Johnson v. Railroad Co.*, 20 N. Y. 65, 75 Am. Dec. 375; *Little v. Railway Co.*, 78 Mich. 205, 44 N. W. 137; *Button v. Railroad Co.*, 18 N. Y. 248. In *Burling v. Railroad Co.*, 85 Ill. 18, this court said: "It is a high degree of negligence to run trains without a headlight on a night so dark as this was." In the case at bar there is evidence not only tending to show that the night was dark, but also that it was a foggy night. In *Railway Co. v. Alsop*, 176 Ill. 471, 52 N. E. 253, 732, this

Chicago City Ry. Co. v. Fennimore

court again said: "It is a high degree of negligence to run a train without a headlight on a dark night, as this was shown to be." There was some evidence tending to show that no bell was rung, but, as the evidence upon this subject was conflicting, it also was properly submitted to the jury to determine. The proof tended to show that the train was traveling at the rate of 12 miles an hour, and that that was its usual rate of speed. It may be true, as is claimed by counsel for the appellant, that the rate of speed at which the train was going was not evidence of negligence per se. But it is to be remembered that this accident occurred at a street crossing in a large and populous city, and in the nighttime. Booth, in his work on Street Railway Laws (section 306), says: "A greater degree of watchfulness is necessary at street intersections,—especially at crossings which are usually thronged with vehicles and persons on foot, and at curves in the street or route." In the case at bar the evidence shows that when the train which struck the appellee was at the crossing of Forty-Seventh and State streets, one block north of Forty-Eighth street, a wagon passed directly in front of the train in question. This necessarily caused a slackening of the speed of the train at that point, and therefore it must have been hurried into a greater rate of speed as it passed southward to the crossing of Forty-Eighth and State streets. It is the doctrine of this court that drivers, gripmen, and motormen of street cars are obliged to exercise a more exacting attention when they approach street crossings in a crowded city, where vehicles and pedestrians may always be expected in front of them. "The failure under such circumstances to ring the bell, sound the gong, or give other proper warning is undoubtedly evidence of negligence to be submitted to a jury under all the circumstances, whether there is an ordinance requiring such precautions or not." *Railway Co. v. Peuser*, 190 Ill. 67, 60 N. E. 78; *Railroad Co. v. McCallum*, 169 Ill. 240, 48 N. E. 424; *Railway Co. v. Robinson*, 127 Ill. 9, 18 N. E. 772, 4 L. R. A. 126, 11 Am. St. Rep. 87; *Railway Co. v. Tuohy*, 196 Ill. 410, 63 N. E. 997; 2 *Thomp. Neg.* §§ 1399–1401; *Railroad Co. v. Perkins*, 125 Ill. 127, 17 N. E. 1. Although no ordinance limiting the speed at which cable cars were allowed to run in the streets of Chicago was introduced, yet in each case it must be a question for the jury to decide whether or not, under the facts and circumstances of that particular case, the speed is or is not a dangerous or unreasonable rate of speed. A railroad company in the running of its trains is always required to use ordinary care and prudence to guard against injury to the persons or property of those who may be rightfully traveling upon the public streets, and this is true whether there is a statutory regulation upon the subject or not. *Railroad Co. v. Perkins*, *supra*; *Railroad Co. v. Engle*, 84 Ill. 397; *Railroad Co. v. Henks*, 91 Ill. 406; *Railroad Co. v. Slater*, 129 Ill. 91, 21 N. E. 575, 6 L. R. A. 418, 16 Am. St.

Chicago City Ry. Co. v. Fennimore

Rep. 242; Id., 139 Ill. 190, 28 N. E. 830; Railway Co. v. Raymond, 148 Ill. 241, 35 N. E. 729. Where a cable train is running along the street in a city like Chicago on a dark and somewhat foggy night, with a headlight so small and dim as scarcely to be noticeable, or, if noticeable, likely to be mistaken for some other light, we are not prepared to say that it is error to submit to the jury the question whether the company propelling such train under such circumstances is or is not guilty of negligence. The question does not arise here whether the speed of the car might have been justifiable if the headlight had been in good condition, but, with such a headlight as the evidence shows in the present case, it would seem to have been the duty of the persons propelling the car to run it at a reduced rate of speed. In *Rascher v. Railway Co.*, supra, the supreme court of Michigan said: "A street car can neither turn to the right nor left. * * * It ought to be lighted in the nighttime, so that its approach can be seen by other travelers; and between twilight and dark, if not lighted, it ought to be run so slowly as to avoid collision, or else give, by some signal, warning of its approach."

We also think that there is evidence in the record tending to show that the appellee was in the exercise of ordinary care for her safety. At any rate, it was a fair question to be submitted to the jury whether or not she was in the exercise of reasonable care for her safety. When she came out of her house, between Forty-Seventh and Forty-Eighth streets, she looked northward to see if a train was approaching, and swears that she could see none. At the northeast corner of Forty-Eighth and State streets she started to cross diagonally to the southwest corner of Forty-Eighth and State streets, inasmuch as the car which she wanted to take, going southward, would pass upon the west track, and would stop at the south side of the crossing. When she started across the street, and was between the curbstone and the east rail of the east track, she again looked northward, and saw no train approaching. She then stopped and waited until a train coming from the south, and going northward, passed her. When this train passed, she stepped in behind it to cross to the west side of the street, and was struck by the train coming from the north and going towards the south, which she swears she did not see. The ground upon which it is alleged that she is chargeable with negligence is that she did not again look a third time towards the north to see whether or not a train was approaching, after the train going northward had passed. It has often been held by this court that it is not evidence of negligence per se that a person does not stop and look before crossing the track of a railroad, and it has been held to be a question for the jury to say whether the failure to so stop and look is or is not negligence. Inasmuch as the appellee looked northward twice, as has already been stated, the question whether or not it was negligence on her

Chicago City Ry. Co. v. Fennimore

part not to look northward a third time, after the train, which she did not intend to take, had passed, was one for the jury to determine under the instructions of the court. Anticipation of negligence in others is not a duty which the law imposes. On the contrary, it is a presumption of law that every person will perform the duty enjoined by law or imposed by contract. Where, for instance, the traveler knows that the law requires a railroad company to ring a bell or sound a whistle, he has a right to rely upon the performance of such duty by the company. 2 Jag. Torts, p. 970; Shear. & R. Neg. § 92; Railroad Co. v. Dunn, 78 Ill. 197; Railroad Co. v. Gunderson, 174 Ill. 495, 51 N. E. 708; Thomas v. Railway Co. (C. C.) 8 Fed. 732. In the case at bar, appellant owed it, as a duty to appellee and to the public generally to equip its trains with proper headlights. When appellee started to cross the street, she had a right to assume that the appellant would perform this duty, and had a right to rely upon the belief that no train would approach without a proper headlight. If she saw no headlight, she had a right to assume that no train was approaching. It has been held that the traveler is not at fault in failing to look and listen, if he is misled without his fault. There may be various circumstances which excuse him from stopping to look and listen, and, if the evidence tends to show that there was such an excuse, the existence of it is a matter for the determination of the jury, and to be submitted to them. Railway Co. v. Hansen, 166 Ill. 623, 46 N. E. 1071; Hayes v. Railroad Co., 20 C. C. A. 52, 74 Fed. 284; Railroad Co. v. Pearson, 184 Ill. 386, 56 N. E. 633; Shear. & R. Neg. § 485c, and cases there referred to. In the case at bar, if the evidence showed that appellee did not look a third time, it was for the jury to say whether or not she was excused from so doing by all the circumstances of the situation which faced her. It was a dark night. A train had just passed on the track nearest to her. The light of the approaching train was exceedingly dim, and, although its light was dim, the approaching train was running at full speed. By their verdict the jury have found that all the circumstances surrounding her constituted a sufficient excuse for the failure of the appellee to look again before stepping from behind the north-bound train. Railroad Co. v. Ptacek, 171 Ill. 9, 49 N. E. 191; Railroad Co. v. O'Connor, 119 Ill. 586, 9 N. E. 263; Maginnis v. Railroad Co., 52 N. Y. 215.

In view of what has been said, we are of the opinion that the trial court committed no error in refusing to instruct the jury to find for the appellant.

3. Appellant complains that the court erred in the giving and refusal of certain instructions. Complaint is made that the court erred in giving the first instruction given for the appellee. This instruction is substantially the same as the third instruction, commented upon by this court and approved in Railroad Co. v. Fisher, 141 Ill. 614, 31 N. E. 406. More-

Chicago City Ry. Co. v. Fennimore

over, at least four instructions were given by the court at the request of the appellant, and in its behalf, which told the jury that the appellee could not recover unless it was shown by the evidence that she was exercising ordinary care, and thereby the alleged omission in the instruction complained of was cured.

It is also urged as error that the court gave the third instruction which was given for the appellee. This instruction is a verbatim copy of instruction numbered 1, of which this court said in *Taylor v. Felsing*, 164 Ill. 331, 45 N. E. 161, that there was no valid objection to it.

It is said that the court below erred in giving the sixth instruction which was given for the appellee. This instruction is a verbatim copy of the third instruction given for the plaintiff, referred to in *Railroad Co. v. Warner*, 108 Ill. 538, and there approved by this court.

Complaint is next made of the refusal to give appellant's second refused instruction, to the effect that if appellee could, by the exercise of reasonable care, have avoided the injury, there could be no recovery. The proposition embodied in this instruction was fully covered by the second, third, and sixth instructions given for the appellant.

Complaint is also made that the court refused to give an instruction asked by the appellant telling the jury that a witness could be impeached by showing that such witness had made different and contradictory statements on material points on former occasions. The material part of the instruction whose refusal is thus complained of was given in other instructions which told the jury that, if any witness willfully swore falsely to any matter or thing material to the issues, then they were at liberty to disregard his or her entire testimony, except in so far as it had been corroborated, etc.

Complaint is also made of the refusal of the court to give for the appellant an instruction which informed the jury that they had a right to take into consideration the interest witnesses had in the suit, in determining the value of their testimony. The substance of this instruction was given in other instructions, and therefore its refusal could have done no harm.

The instructions were unusually full, and were favorable to appellant. It has no just ground to complain in that regard. Under such circumstances, if the court committed slight error in refusing some of appellant's instructions, such error affords no ground for reversing the judgment. *Railway Co. v. O'Conner*, 115 Ill. 254, 3 N. E. 501.

The judgment of the appellate court is affirmed. Judgment affirmed.

RINGSTAFF *v.* LANCASTER & C. RY. CO.*(Supreme Court of South Carolina, Nov. 25, 1902.)*

[43 S. E. Rep. 22.]

Railroads—Trespasser on Track—Negligence.

The evidence showed that persons had been accustomed for 20 years to pass over a railroad bridge; that there was at each end of the bridge a notice to keep off; that the president of the railroad company refused to allow a plank to be laid on the bridge to accommodate foot passengers: *held*, that the bridge was not a "traveled place," within the statute providing that failure to give signals at such a place is negligence per se, and a nonsuit for the injury received by a person thereon was properly granted.

Gary, A. J., dissenting.

Appeal from common pleas circuit court of Lancaster county; Townsend, Judge.

Action by Mrs. Lottie C. Ringstaff, administratrix, against the Lancaster & Chester Railway Company. From an order of nonsuit, plaintiff appeals. Affirmed.

Joseph Clark, for appellant.

Ernest Moore, for appellee.

GARY, A. J. (dissenting). The appeal herein is from an order of nonsuit in an action for damages claimed to have been sustained by reason of the alleged killing of the plaintiff's intestate. Though the exceptions are numerous, they raise practically but three questions: (1) Was it error on the part of his honor the presiding judge in not allowing the plaintiff to introduce in evidence a plat or diagram of the surrounding locality where the plaintiff's intestate was killed? (2) Was there any testimony whatever tending to sustain the allegation that the trestle upon which the intestate was killed was a "traveled place," in contemplation of the statute? (3) Was there any testimony tending to show negligence on the part of the defendant?

The complaint, omitting the formal portions thereof, is as follows: "(2) That on or about the 9th day of September, 1899, while H. F. Ringstaff, deceased, was on his way along a traveled place leading from the Lancaster Cotton Mills, in Lancaster county, to his home, and having arrived at a place where the traveled place crosses the track of the defendant company at a place known as "Bear Creek Crossing," a short distance west of the Lancaster Cotton Mills, in the county and state aforesaid, and was in the act of crossing the track of the defendant company at said point, the said defendant, by its agents, servants, and employees, caused one of its locomotives, with a train of cars attached thereto, to approach the said crossing, and then and there to pass rapidly over the track of said railway company, and negligently and carelessly failed and omitted while so doing to give the signals by sounding the steam whistle or ringing the bell as required by the statutes of this state, by reason whereof the said H. F.

Ringstaff v. Lancaster & C. Ry. Co

Ringstaff was not aware of their approach, and was then and there run over and killed by said train of cars. (3) That by reason of said negligence of the defendant company, by its agents, servants, and employees in charge, and their careless conduct in the management of said locomotive and train of cars, the same struck the said H. F. Ringstaff, passing over and upon him, then and there causing his death, to the damage of the said heirs at law \$15,000; that the said railway company knew, as it was its duty to know, that H. F. Ringstaff, the deceased, habitually passed and would have to pass along said traveled place and cross its track at said crossing in going to and from the Lancaster Cotton Mills, where he was employed and worked. (4) That the said traveled place and crossing have been used by the public for more than twenty years as such, and the deceased had a right to travel upon the same." These allegations were denied.

We will first consider whether the presiding judge erred in not allowing the plaintiff to introduce in evidence the plat or diagram. When the plaintiff's attorney offered the plat or diagram for the purpose of introducing it in evidence, the defendant's attorney objected. The record contains the following, as the conclusion of a lengthy colloquy: "The Court: You might look at the paper and refresh your memory, but the paper, unless it shows the measurements, can't go to the jury. You might have it before you, and give your opinion as to the distance and so forth, and show the jury where you did measure, but you can't put the paper in. If you put the paper in, then you put in a lot of matter that has not been measured. Plaintiff's counsel: I will only refer to those matters that I have actually measured. The Court: Well, sometimes a witness, in doing that, will say, 'Well, here is where so and so lives.' Unless that has been measured and located, he can't say that,—unless he knows it, has measured it and located it. Plaintiff's Counsel: I understand your honor's ruling, and I don't wish to use anything but what has been measured." The plaintiff's attorney was permitted to use the diagram for the desired purpose. Therefore the exceptions raising this question are overruled.

We will next consider whether there was any testimony whatever tending to show that the trestle upon which the intestate was killed was a "traveled place," in contemplation of the statute. Joseph Clark, a witness for the plaintiff, testified: "That in 1876, the trestle, the woodwork, was put there, and that before that, there being a public road and ford, people continued to go through that way; and, inasmuch as there was no other way of crossing the creek, they used that trestle, and the public has been using it ever since. My wife owns a piece of land where Mr. Ringstaff lived, on both sides of the narrow-gauge railroad. It was purchased in 1873, and I have had occasion to cross that trestle ever since, going to that place, and have been using it for the whole time, and

Ringstaff v. Lancaster & C. Ry. Co

know myself that a great many of the country people out in that part of the country, coming to town and going through that plantation road leading down to the trestle, have been crossing there ever since; and I have never heard any objection or protest against their crossing there, except when the railroad company changed hands first. Well, it is the Southern Railway now. Mr. Moore: You mean the Charlotte, Columbia & Augusta road? A. Yes, sir; about the time they took charge there was some pieces of plank, with these words on it, stuck up at each end: 'Keep Off.' That was all the warning that I have ever seen to persons, in any shape or form, not to use the trestle, if it could be construed that way. But there is never any one paid attention to that at all, and I know that the public, all those people out towards Col. Springs' plantation,—colored people and white people,—all have been using it up to the present time. I have seen as many as from one to thirteen people on that trestle at one time, crossing, and frequently half a dozen boys and girls. And I know the fact that it has been traveled ever since, and it is being traveled more than ever, because I think there is about 2,000 inhabitants on Factory Hill. There are two stores on the other side of the creek. They have to go across there when they want to visit those stores. They do cross there. I have seen them crossing there, and I know the fact that they have been using that trestle for over twenty years. Now, those roads over there—I speak of the road that comes in from where Mr. Stephen Williams used to live. I have known that road at least fifty years ago, and a great many people came that way; but there is no ford now for a horse to cross, and it is merely pedestrians. The people who walk to town,—come to the factory to bring their produce and things of that sort,—they all cross there. * * * Now, as to those roads coming from Ringstaff's place, they come down some distance, and then come into the railroad on the south side; and, at the time he was killed, there was a beaten path along at the end of the cross-ties on the south side, but, since the railroad company have concluded to make it a broad gauge, they have hauled in a good deal of earth and thrown it off, and that track isn't so plain. And a great many people walk the railroad for miles, coming from towards the river, and come to that trestle and cross, and go to Factory Hill, and coming on to town; and in doing so they have to cross that trestle, and in crossing that trestle they have to cross the narrow-gauge railroad, and that is the only way they can cross at that point. They can cross at other points beyond there and this side of there by these little country roads and paths. When they come in from that way, there is no possible way for them to cross at that point without crossing the creek on the trestle. Of course, they could come the Lansford road and come on to opposite the factory. There is nothing to hinder them. But those who come down the nar-

Ringstaff v. Lancaster & C. Ry. Co

row-gauge from Mr. Ben. Dunlap's place and the Chaffee place— I don't say all of them, but a large portion of them, and I would say that at least nineteen-twentieths of the persons who have to cross there from the factory cross there on that crossing." In order for the plaintiff to establish the allegation that the spot where the deceased was killed was a traveled place, it was necessary to show not only that the public was accustomed to use it for travel, but that it had acquired the right to use it for such purpose. Furthermore, before the plaintiff was entitled to a recovery for statutory negligence, it was necessary to show that the collision occurred at a crossing, and not simply on a pathway over the track of the railroad. These requirements are fully sustained by *Hutto v. Railroad Co.*, 61 S. C. 495, 39 S. E. 710; *Jones v. Railroad Co.*, 61 S. C. 556, 39 S. E. 758; *Risinger v. Railway Co.*, 59 S. C. 429, 38 S. E. 1, 20 Am. & Eng. R. Cas., N. S., 517; *Hankinson v. Railroad Co.*, 41 S. C. 20, 19 S. E. 206; *Hale v. Railroad Co.*, 34 S. C. 292, 13 S. E. 537; *Barber v. Railroad Co.*, 34 S. C. 450, 13 S. E. 630; *Kirby v. Railway*, 63 S. C. 494, 41 S. E. 765. The testimony which we have set out, as well as other testimony which we deem it unnecessary to reproduce, tended to show compliance with all the foregoing requirements, and to establish the allegation that the collision occurred at a traveled place, as contemplated by the statute.

We proceed next to consider whether the testimony disclosed any facts from which negligence on the part of the defendant could be inferred. While the witnesses testified that the whistle was sounded when the train of cars approached the crossing, they were nevertheless unable to state that the bell was kept ringing or the whistle sounding until the engine crossed the traveled place, although they had the opportunity of hearing. This tended to show that there was a failure to comply with the requirements of the statute. Numerous decisions in this state show that such failure is negligence per se.

For the foregoing reasons, we dissent from the opinion of the majority of the court.

JONES, J. I cannot concur in a judgment of reversal in this case, inasmuch as a careful reading of the testimony satisfies me that the nonsuit was properly granted. There was no evidence whatever of any negligence on the part of the defendant, except upon the theory that there was some evidence that the railroad trestle upon which the fatal collision occurred was a "traveled place," in the sense of the statute, and that the trestle constituted a part of the crossing. The decisions, which need not be cited, show that the collision must be on the crossing where the railroad track crosses the public way. It seems to me that the statute contemplates a direct crossing, not such as is attempted to be set up in this case. There was no evidence of any way, which the public

Steber v. Chicago, etc., Ry. Co

had acquired the right to use, leading onto, along, and from the trestle, so as to constitute the trestle a part of such way; and even if it were admitted to be possible for the public to acquire the legal right to use the railroad trestle, already dedicated to other public uses, there was no evidence that the collision occurred at a place where the railroad and public way crossed each other. It may also be noticed that the evidence showed that on each end of the trestle there was placed a board warning all persons to keep off, and that such notice had been there ever since the lease of the line to the Charlotte, Columbia & Augusta Railroad Company, and before the defendant company became the owners. It was further shown that the president of the defendant company refused to allow planks to be placed along the trestle as a walkway. If the evidence in this case tended to show that the trestle was a "traveled place," then there is scarcely any portion of the line of the railroad which has been in existence for 20 years which may not be shown to be a "traveled place," for many individuals will persist, against all protests, in walking along the railroad track, when it suits their convenience to do so.

POPE, J., concurring in this view, the judgment of the court is that the judgment of the circuit court be affirmed.

STEBER v. CHICAGO & N. W. RY. CO.

(Supreme Court of Wisconsin, Sept. 23, 1902.)

[91 N. W. Rep. 654.]

Accident at Crossing—Failure to Look and Listen.

One who is killed at a railroad crossing by stepping in front of an engine approaching in plain sight and hearing, and so near as to render dangerous the attempted crossing, is guilty, as a matter of law, of contributory negligence.

Same—Same—Injury to Passenger.

That one has the rights of a passenger, as regards protection by the railway company, and is killed while taking the only way open to her destination, affords no excuse for such contributory negligence.

Appeal from circuit court, Langlade county; John Goodland, Judge.

Action by James Steber, as administrator of the estate of Anne First, against the Chicago & Northwestern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Action for damages, caused, as alleged, to Wenzl First by the wrongful conduct of defendant in that its servants negligently operated one of its locomotive engines so as to produce his wife's death. The deceased attempted to cross defendant's railway track at the intersection thereof with one of the

Steber v. Chicago, etc., Ry. Co

public streets of the city of Antigo in the nighttime, while one of its switch engines was rapidly approaching such locality. She was struck by the engine and so injured that she died.

The particular acts of omission and commission constituting the alleged negligence are as follows: Operating the engine at an unlawful rate of speed; neglect to ring the engine bell as the approach was made to the railway crossing; failure to have a watchman or flagman at the crossing as required by the city ordinances of the city of Antigo; failure to maintain gates at the crossing as required by the city; and failure to give any notice to persons, about to use the crossing for legitimate purposes, of the approach thereto of the switch engine. All the allegations of negligence were put in issue by the answer, and contributory negligence was pleaded as a defense.

The undisputed evidence was to the following effect: The accident happened on a dark, rather stormy night. There was no street light at the crossing. The situation was such that, as a person approached the crossing from the east, as the deceased did on the occasion of the accident, there was no obstruction to prevent her seeing an engine coming from the north for a distance amply sufficient to enable her, in the exercise of ordinary care, to avoid being injured by it. The railway tracks ran north and south. The depot was just south of the street, which crossed the tracks at right angles, and upon which deceased was walking when she was injured. Prior to the injury she was at the depot with two acquaintances, a man and his mother, presumably to meet a person who was expected soon to arrive on a train from the south. She remained on the depot platform till the train arrived and such person alighted therefrom. The four then started north on the platform, walking on the easterly side of the main track till they were within the limits of the street. The engine of the passenger train was located across the sidewalk on the southerly side of the street. West of the main track was a switch track. A headlight was on the passenger engine. It threw its light across the region common to the street and the railway track. The deceased and her companions, desiring to go to a point west of the tracks, passed into the street and then somewhat northwesterly so as to avoid the passenger engine. Two of deceased's companions proceeded first. She, accompanied by the other, walked a little way behind them. The former got across the switch track, and just as the latter stepped upon it the switch engine, backing up from the north, struck her, inflicting fatal injuries.

The substance of the evidence material to be considered, in addition to such as has been referred to in a general way, is as follows: John McArthur, a witness for plaintiff, said he did not see any light on the rear end of the switch engine; that it was backing up when it struck deceased; that he could not say but that there was a light on the engine; that just before the accident he was on the depot platform near the pas-

Steber v. Chicago, etc., Ry. Co

senger engine and heard the switch engine coming. Peter Jagla, a witness for plaintiff, said he was one of the party accompanying the deceased at the time of her injury; that he and his sister went ahead while his mother accompanied the deceased; that he hurried up to get across the track ahead of the switch engine; that the engine on the passenger train made some noise; that he saw the switch engine just as he got on the track; that he had to jump to get across; that he did not see any light on the engine, nor hear any bell; that he made a written statement of the circumstances characterizing the accident shortly after it occurred, in which he said that he heard a bell upon the engine and saw the engine coming about the time he crossed the track. The woman who was in the immediate company of the deceased at the instant of the accident said she did not see any light on the engine nor hear any engine bell; that she and deceased were about forty feet behind her son and daughter; that she saw they got across and thought she and her companion could too; that she did not see the engine. Another witness called for plaintiff said he was near the passenger engine at the time of the accident; that he heard the switch engine approaching the crossing. John Gaffney, another witness for plaintiff, said he saw the switch engine approaching the crossing, and heard it; that he was on the passenger engine; that there was a light on the switch engine and that the bell was ringing as it approached. The evidence on defendant's part fully corroborated that of the last witness. It was further to the effect that deceased and her companion, as they approached the crossing, did not pay attention to whether an engine was approaching, and that one of the trainmen who was on the footboard of the tender and had a light in his hand, grabbed hold of and tried to save them.

At the close of the evidence the court directed a verdict in defendant's favor, upon which the judgment appealed from was rendered.

Max Hoffman, for appellant.

Edward M. Hyzer, for respondent.

MARSHALL, J. (after stating the facts). Very little can profitably be said in deciding this case. Four errors are assigned. All, so far as they relate to the issues made by the pleadings, may be properly resolved into this one proposition: Did the trial court err in deciding that the evidence disclosed, as a matter of law, contributory negligence on the part of the deceased? We are unable to see how, in the light of well-settled legal principles, the affirmative of that can be considered urged. The duty of a person about to step upon a railway track to look both ways and listen, and to discover those dangers which can be readily discovered by the exercise of ordinary attention to that end by one so circumstanced, and not to go upon the track in the face of such dangers, is abso-

lute. It is as firmly established as any rule of law can well be. If it were a fact, as claimed in this case, that the deceased had the rights of a passenger as regards care for her safety by the railway company, and that she had no other way of reaching her destination than by going across the railway track, that does not constitute any exception to the general rule stated. She was bound to exercise ordinary care for her own safety, and she fell below that standard in failing to use her senses to discover the approaching engine, since, from all reasonable inferences from the evidence, it was in sight and hearing and so near the crossing as to render it dangerous for her to step upon the track when she did so. As we read the evidence and the argument of counsel for appellant, there is no claim that she looked north on the track or listened for a coming train or engine before she proceeded into the region of danger. Counsel seems to think that she had the rights of a passenger, and that no other way to reach her destination than the one she pursued was open to her, hence that she was excused for proceeding as she did, regardless of the probability of danger, and was warranted in depending upon respondent to avoid injuring her. We know of no such rule of law. There is no such rule. No one is excusable for stepping upon a railway track without first using the precautions we have stated for his own protection. As has often been said, the mere presence of the track is an efficient warning of danger. That warning must be reasonably heeded by a person about to cross the track, else he will be presumed conclusively, as a matter of law, to assume the risk of doing otherwise. *Lofdahl v. Railroad Co.*, 88 Wis. 421, 60 N. W. 795; *Flynn v. Railroad Co.*, 83 Wis. 239, 53 N. W. 494; *Hansen v. Railroad Co.*, 83 Wis. 631, 53 N. W. 909; *Schmolze v. Railroad Co.*, 83 Wis. 659, 53 N. W. 743; 54 N. W. 106; *Schlimgen v. Railroad Co.*, 90 Wis. 194, 62 N. W. 1045; *Nolan v. Railroad Co.*, 91 Wis. 16, 64 N. W. 319; *Lockwood v. Railroad Co.*, 92 Wis. 97, 65 N. W. 866; *McCadden v. Abbot*, 92 Wis. 551, 66 N. W. 694, 3 Am. & Eng. R. Cas., N. S., 651; *Cawley v. Railroad Co.*, 101 Wis. 145, 77 N. W. 179, 12 Am. & Eng. R. Cas., N. S., 453; *White v. Railroad Co.*, 102 Wis. 489, 78 N. W. 585; *Walters v. Railroad Co.*, 104 Wis. 257, 80 N. W. 451, 15 Am. & Eng. R. Cas., N. S., 606; *Buckmaster v. Railroad Co.*, 108 Wis. 353, 84 N. W. 845; *Dummer v. Light Co.*, 108 Wis. 589, 84 N. W. 853.

The subject involved in this appeal has been so often before this court, as indicated by the cases cited and many not mentioned, and the law has been so often declared as stated herein, that there is no room in the evidence presented by the record for reasonable contention that the trial court erred in directing the verdict. The way was open for the deceased to see the approaching engine. If she had looked north on the switch track before she stepped upon it she would have observed the danger. She must either have failed to perform

Central of Georgia Ry. Co. *v.* Duffy

her duty as to looking, or have observed the engine before getting in its pathway and heedlessly attempted to rush across the track before it reached her. The legal responsibility for the consequences rests wholly upon the unfortunate woman. The damages caused to her surviving husband were in law so far produced by her that there is no way by which her fault can be so separated from that of respondent, if respondent was also at fault, as to fix upon the latter legal responsibility. The judgment is affirmed.

CENTRAL OF GEORGIA RY. CO. *v.* DUFFY.

(*Supreme Court of Georgia, Aug. 9, 1902.*)

[42 S. E. Rep. 510.]

Personal Injuries—Evidence of Similar Accidents.

In an action against a railroad company for damages on account of personal injuries sustained by reason of the derailment and overturning of a car which the plaintiff was in, evidence that another car of the defendant was overturned on a nearby but different track, three months prior to the time the plaintiff's injuries were received, was not relevant to prove negligence on the part of the defendant at the time and place alleged in the petition; but in this case it appears that the failure to rule out such evidence worked no harm to the defendant.

Witness—Recalling.

It is within the discretion of the trial judge to permit a witness who has been examined, and after conference with counsel, to take the stand a second time, and correct his testimony as originally given; and such discretion will not be controlled unless it has been manifestly abused.

Injury to Licensee on Train—Liability as Affected by Fact That His Employer Had Been Notified to Withdraw Him.

A railroad company cannot avoid liability for injuring one who is rightfully upon its train, by showing that its servants notified his employer to have him leave the train by a certain time, and that if the employer had acted upon this notice, and the plaintiff had left the train before that time, the injuries complained of would not have been inflicted.

Same—Effect of Ignorance of His Presence.

Ignorance by the servants of a railroad company of the presence in one of its cars of one who was rightfully there will not, without more, relieve the company of liability for damage done by reason of its negligence. The circumstances must be such that the servants of the company had no reason to suspect his presence in the car.

Trial—Mortality Tables.

It is not error for the trial judge upon the trial of an action for damages against a railroad company, in illustrating to the jury the method of using the mortality and annuity tables, to use for example a figure approximating that shown by the evidence to be the plaintiff's age.

Case at Bar.

The requests to charge, so far as legal and pertinent, were covered by the general charge; the amount of damages awarded by the jury was not excessive; and the evidence supported the verdict.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.
Action by William Duffy against the Central of Georgia

Central of Georgia Ry. Co. v. Duffy

Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hall & Wimberly and J. E. Hall, for plaintiff in error.

Guerry & Hall and M. F. Hatcher, for defendant in error.

FISH, J. This was a suit for damages on account of personal injuries alleged to have been sustained by the plaintiff by reason of the negligence of the defendant. The petition alleged that, at the time the injuries complained of were inflicted, the plaintiff was employed by one Sanders as a laborer to sack and load corn in cars of the railroad company, which had been placed for that purpose on a track that was in its possession and under its control; that while he was in a car of the defendant, engaged in the performance of such work, the servants of the company, without warning to him, coupled an engine and cars to the car that he was in, and moved off with the train thus formed; that after going a short distance, and while moving at a moderate speed, the car that the plaintiff was in, owing to its defective condition and to defects in the track and roadway of the defendant, ran off the track and was turned over, as a result of which the plaintiff received the injuries on account of which he sued. The answer of the defendant denied all the material allegations of the petition. On the trial of the case the jury returned a verdict for the plaintiff for \$1,000 damages. The defendant made a motion for a new trial, which was overruled, and it excepted.

1. One ground of the motion for a new trial complained that the court erred in refusing to rule out, on motion of counsel for the defendant below, certain evidence to the effect that, about three months prior to the time the plaintiff received his injuries, another car of the defendant had been overturned on a different track, but in the vicinity of the place where the car in which the plaintiff was at work when injured was derailed. This testimony was given by a witness for the plaintiff on cross-examination. The evidence was not relevant to prove negligence on the part of the defendant at the time and place of the injuries complained of. But in view of the fact that there was ample evidence to support a finding that the railroad company was negligent on the particular occasion when the plaintiff was injured, and that no harm appears to have been done the defendant by the refusal to exclude the objectionable evidence, this ground of the motion furnishes no reason for reversing the judgment of the court below refusing a new trial.

2. It appears from the record that, at the conclusion of the cross-examination of a witness for the plaintiff, counsel for the plaintiff stated to the court that he had no further questions to ask the witness at that time, but that he might desire to recall him later. Subsequently, after a conference with this witness, plaintiff's counsel again placed him on the stand, and

Central of Georgia Ry. Co. v. Duffy

the witness changed his testimony as originally given, stating that he had been mistaken in the answers that he had made to certain questions when first asked him. Counsel for the defendant objected to the reintroduction of this witness, on the ground that all the witnesses were under the rule, and that to allow a witness thus to correct his testimony after a conference with counsel would defeat the object of the rule. The court overruled the objection, and allowed the witness to testify a second time. Error was assigned upon this ruling. We are unable to see what bearing the rule of the separation of witnesses has upon the question of the right of a party to recall a witness to the stand after he has been once examined, and after he has conferred with counsel for the party so reintroducing him. There is no law in this state which forbids an attorney to confer with a witness, either before or after his examination in court, and certainly there is no law against recalling a witness to the stand for any legitimate purpose. It is so well settled as to need no citation of authority that matters pertaining to the reopening of a case, and the reintroduction of witnesses, are within the sound discretion of the trial judge, and that, unless such discretion is shown to have been manifestly abused (which was not done in this case), it will not be controlled by this court.

3. Error was also assigned upon the refusal of the court, upon request of counsel for the defendant, to charge, in effect, that if the jury should believe that the servants of the railroad company had notified Sanders, the plaintiff's employer, that the car in which the plaintiff was working would be moved by a certain time, and to finish sacking the corn by that time; that if the defendant's servants did not move the car until after the time specified; and that if the failure of the plaintiff to leave the car before it was moved was due to the failure of Sanders to notify him to leave it,—they would be authorized to find "that the injury was not caused proximately by the act or negligence of the defendant in not notifying him, and that the plaintiff would not be entitled to recover." This request was very properly refused. If the plaintiff was rightfully in the car, and the servants of the company knew or had reason to suspect his presence there, it was then the duty of the company to notify him that the car was about to be moved, and that duty could not be shifted to Sanders or to any one else not connected with the company. The warning to Sanders that the car would be moved at a certain time could in no sense be considered as a warning to the plaintiff, and the responsibility for the defendant's acts of negligence cannot be placed upon him. If the defendant made Sanders its agent for the purpose of notifying the plaintiff when the car would be moved, it would be liable for his failure to carry out the object of his agency; if he was not its agent, the railroad company cannot escape liability to the plaintiff on account of

Central of Georgia Ry. Co. v. Duffy

a warning conveyed to Sanders which should have been communicated directly to the plaintiff.

4. Counsel for the defendant requested the court to charge the jury to the effect that, if the servants of the defendant did not know of the presence of the plaintiff in the car at the time the train was moved, the company would not be liable. The court instead charged, in substance, that if the defendant did not know of the plaintiff's presence in the car at the time mentioned, and was not negligent in failing to know that he was in the car, it would not be liable. The refusal to charge as requested, and the charge as given, are assigned as error. There can be no doubt as to the correctness of the instruction given by the court. To have charged without qualification that mere ignorance, on the part of the defendant, as to the presence of the plaintiff in the car, would have excused the defendant from liability, would have been manifestly erroneous; for it would have taken from the jury the consideration of one of the most important questions in the case, viz., whether the very ignorance behind which the defendant attempted to shield itself was of itself negligence. The charge as given was correct, and furnished no reason for granting a new trial.

5. Complaint was also made of the instructions given by the court as to the use by the jury of the mortality and annuity tables. The portion of the charge here excepted to is quite lengthy, but the chief objection interposed seems to be that the court, in illustrating to the jury the manner of using the tables, took for example an age differing only by one year from what the evidence showed the plaintiff's age to be. The charge as given was substantially correct, and we think there is no merit in the objection made to the method of illustration employed by the trial judge. We do not perceive how any harm could have been done the defendant simply because the judge, in demonstrating to the jury the use of the tables, used for example the figures 45, while the evidence showed that the plaintiff was 44 years old.

6. The foregoing disposes of all of the grounds of the motion for a new trial which in our opinion require discussion. The requests to charge, so far as legal and pertinent, were fully covered by the general charge. The amount of the verdict, in view of the evidence as to the extent of the plaintiff's injuries, was by no means unreasonable. There was ample evidence to establish the right of the plaintiff to be in the car at the time his injuries were received, and to support a finding that the defendant was negligent as charged in the petition in bringing about those injuries. The judgment of the trial court overruling the motion for a new trial will, therefore, not be disturbed.

Judgment affirmed. All the justices concurring, except LEWIS, J., absent on account of sickness.

WILSON *v.* ATCHISON, T. & S. F. Ry. Co.

(Supreme Court of Kansas, Jan. 10, 1903.)

[71 Pac. Rep. 282.]

Duty to Trespassers on Trains.*

As a general rule, a railroad company owes no duty to trespassers who jump on and off its moving trains for the purpose of stealing rides, except not to recklessly or wantonly injure them after their peril is discovered.

Injury to Boy Trespassing on Train—Liability.

An intelligent boy 12 years of age, who was familiar with the running of railroad trains, and who knew and appreciated the danger of getting on and off a moving train, climbed upon a slow-moving train, and was injured while getting down from one car and attempting to climb upon another: *held*, that he was a conscious trespasser, and responsible for his own negligence and injury.

Same—Same—Failure of Trainmen to Remonstrate.

The fact that the plaintiff and other boys had previously jumped on and off the cars of the company without remonstrance from the employees of the company did not amount to an invitation from the company to plaintiff to hop on and off its moving trains thereafter, nor make the company liable for an injury resulting from such reckless conduct.

(Syllabus by the Court.)

In banc. Error from court of common pleas, Wyandotte county; W. G. Holt, Judge.

Action by Howard M. Wilson, a minor, against the Atchison, Topeka & Santa Fe Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

L. F. Bird and H. G. Pope, for plaintiff in error.

A. A. Hurd, for defendant in error.

JOHNSTON, J. This was an action to recover for personal injuries. Howard M. Wilson, a bright, intelligent boy about 12 years of age, climbed upon a freight train consisting of about 20 cars, belonging to the Atchison, Topeka & Santa Fe Railway Company, which was slowly moving up a hill near Lansing. He and a companion began near the front end of the train, and jumped on and off again several times while it was in motion. He passed over the top of a car to the other side of the train, and dropped off of that car, and undertook to mount another one near the end of the train, and some way missed connection, with the result that the car ran over his foot and crushed it. It appears that he, as well as other boys of the community, frequently hopped on and off the cars as they went up the incline, and that he had practiced it for a period of about four years before the time of his injury. While he was crossing over a car, he saw a brakeman on top of the train about two car lengths from him, who looked towards him and smiled, but said nothing, and no one ordered him or his companion to leave the train. On a demurrer to

*As to the duty to trespassers on train, see foot-note appended to *Carter v. Charleston & W. C. Ry. Co.* (S. Car.), 5 R. R. R. 87, 28 Am. & Eng. R. Cas., N. S., 87.

Wilson v. Atchison, etc., Ry. Co

the evidence the court took the case from the jury, and gave judgment against the plaintiff for costs.

The evidence in the record shows this to be a clear case of contributory negligence. The plaintiff was a conscious trespasser, and, while he was a minor, the testimony shows beyond dispute that he was familiar with moving cars, and had sufficient intelligence and experience to understand the peril to which he exposed himself. *Railway Co. v. Todd*, 54 Kan. 558, 38 Pac. 804, was an action to recover damages for the death of a boy about 10 years old, who was killed while playing in the yard of a railway company. The boy there, as here, understood and appreciated the danger to which he was exposed, and it was held that, being in a place where the company had the exclusive use of the tracks, and a trespasser, the only duty the railway company owed him was not to recklessly or wantonly injure him. In *Railroad Co. v. Plaskett*, 47 Kan. 112, 27 Pac. 824, it was ruled that the railroad company was not bound to keep a lookout for children climbing on or under moving trains when passing through a city, and so here the railway company was not required to employ trainmen to keep boys from jumping on and off their moving trains; and the fact that boys had previously done so cannot be regarded as an invitation to the plaintiff to ride, nor relieve him from the consequences of his own negligence. It is contended that a slow-moving train is an attractive and alluring object to children, and that it was the duty of the railway company to take precautions to keep them off. This was an ordinary freight train, operated in the usual way, and the cars composing the train were almost as common and familiar to people as farm wagons. The plaintiff invokes the doctrine of what are known as the "Turntable Cases," in which railroad companies were required to keep turntables located in public places where children are wont to go and play so securely locked or fastened that children could not turn them and thereby injure themselves. While that doctrine is recognized in Kansas, we have no disposition to extend it so as to include railway trains. They pass and repass through every community with such frequency, the peril of jumping upon and from moving trains is so well understood, and the task of keeping boys from stealing rides and hopping upon cars of trains slowly moving through towns or railroad yards is so impracticable and burdensome, as to make the rule invoked inapplicable. To guard trains so as to keep boys entirely away from them would require a host of employees, and fix a standard of responsibility which has never received countenance in this state. Such a standard of duty and responsibility cannot be invented and applied by the court without legislation; and the legislature, instead of requiring railroad companies to provide guards to keep boys from jumping upon moving trains and stealing rides, has declared such action on their part to be a misdemeanor, punishable to the extent of

Garbaccio v. Jersey City, etc., St. Ry. Co

imprisonment for 30 days or a fine of \$25, or by both such fine and imprisonment. Gen. St. 1901, §§ 2414-2416. The fact that a slow-moving train may be a temptation to boys to mount and ride cannot be regarded as an invitation by the railroad companies to do so, and the boy who goes upon such a train without invitation or right is a trespasser, and the extent of the duty of the company towards him is not to injure him wantonly or recklessly. Apart, however, from the alleged negligence of the railway company, it is clear that the plaintiff was guilty of contributory negligence, which is sufficient of itself to defeat a recovery. Although a minor, he was bound to use the reason he possessed, and to exercise the degree of care of which he was capable. The testimony all conduces to show that he was familiar with moving trains, and that the danger to which he was exposed was as well known to a boy of his age, intelligence, and experience as to any one else; and, as stated in *Bess v. Railway Co.*, 62 Kan. 299, 62 Pac. 996, 19 Am. & Eng. R. Cas., N. S., 586: "Courts must look at the capacity, natural and acquired, of him whose conduct is under scrutiny; and if it clearly appears from the evidence that the child had a capacity for self-protection, which it culpably omitted to use in face of a danger which it knew and sufficiently appreciated, then no question is left for the jury to pass on concerning the contributory negligence of the person charged with it. The court ought not to be required to release its grasp on the facts presented to a jury, nor be hampered in applying its intelligence to their probative force, in a case where it manifestly appears that negligence contributing to an injury which is the subject of the action proceeds from a person, though under age, who has ample capabilities to make him apprehensive of threatened harm, and who at the same time is possessed with sufficient physical strength to avoid it." See, also, *Railroad Co. v. Henigh*, 23 Kan. 347, 33 Am. Rep. 167; *Handley v. Railway Co.*, 61 Kan. 237, 59 Pac. 271; *Powers v. Railway Co.*, 57 Minn. 332, 59 N. W. 307. From the view taken, it is clear that no error was committed in excluding testimony, nor in sustaining the demurrer to plaintiff's evidence.

The judgment of the trial court will be affirmed. All the justices concurring.

GARBACCIO v. JERSEY CITY, H. & P. ST. RY. CO.

(*Supreme Court of New Jersey, Nov. 10, 1902.*)

[53 Atl. Rep. 707.]

Death—Excessive Damages.

In an action for the death of a man 50 years of age, whose earning capacity did not exceed \$10 per week, and who left a widow and four children, one of whom was self-supporting and the others aged, respectively, 13, 6, and 5 years, a verdict for more than \$3,600 was excessive, and should be reduced to that amount.

Missouri, etc., Ry. Co. v. Bussey

Action for death by Constantina Garbaccio, administratrix, against the Jersey City, Hoboken & Paterson Street Railway Company. Verdict for plaintiff. Rule to show cause made absolute, unless plaintiff remit part of the amount of the verdict.

Argued June term, 1902, before VAN SYCKEL and FORT, JJ.

George P. Rust, for plaintiff.

William B. Gourley, for defendant.

FORT, J. There was evidence in this case from which a jury would be justified in finding negligence in the defendant and want of contributory negligence in the deceased. It was a fact case pure and simple. There were no errors in the rulings of the court on the admission of evidence nor in the charge. Under the proof the damages are excessive. The deceased was 50 years of age, and his earning capacity did not exceed \$10 a week. He left a widow and four children. His oldest child was self-supporting at his death, and the next was 13 years of age. The other two were small, being 6 and 5 years, respectively. Considering the reasonable probabilities as to the time the father would have contributed to the support of these children and the wife, coupled with his own life expectancy, we think, from his earning capacity as shown, the verdict was excessive. If the plaintiff will accept \$3,600, the verdict may stand; otherwise the rule will be made absolute.

MISSOURI, K. & T. RY. CO. v. BUSSEY.

(*Supreme Court of Kansas, Jan. 10, 1903.*)

[71 Pac. Rep. 261.]

Inconsistency between Special Findings and General Verdict.

It is the duty of the court, in construing a special verdict, to harmonize, if possible, the special findings with the general verdict.

Accident at Crossing—Contributory Negligence and Failure to Signal.*

A traveler who is injured in a collision with a train at a crossing while in full possession of her faculties, and when she might have seen the approaching train in time to have avoided the accident if she had looked, was guilty of contributory negligence, precluding recovery, though the operators of the train were negligent in failing to signal its approach.

Inconsistency between Special Findings and General Verdict.

Where the special findings are in direct conflict with the general verdict, the latter cannot stand.

Inconsistency between Special Findings.

Where the special findings are inconsistent with each other, and destructive of plaintiff's right of recovery, the court should enter judgment thereon for the defendant.

Special Findings—Legal Conclusions.

A special finding in an action for injuries in a collision with a

*See foot-note appended to *Central of Georgia Ry. Co. v. Freeman* (Ala.), 5 R. R. R. 62, 28 Am. & Eng. R. Cas., N. S., 62.

Missouri, etc., Ry. Co. v. Bussey

train at a crossing that plaintiff was not guilty of negligence is not a specific finding of an issuable fact, but a general conclusion drawn from all the evidence, and is no stronger than the general verdict in favor of plaintiff.

Accident at Crossing—Contributory Negligence—Special Findings.

A special finding in an action for injuries in a collision with a train at a crossing that plaintiff had no control over the vehicle in which she was driving did not acquit her of contributory negligence in failing to see the approaching train, where she could have seen it, had she looked, in time to have avoided the accident.

Same—Same—Same.

Where, in an action for injuries in a collision with a train at a crossing, special findings show that plaintiff did not see the train until immediately before the accident, and did nothing to avoid it, the court could not presume, from a special finding that she had no control over the vehicle in which she was riding, that she saw the train approaching, but that the time was too short in which to warn the driver.

In banc. Error from district court, Labette county; T. J. Flannelly, Judge.

Action by Sadie E. Bussey against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

T. N. Sedgwick, for plaintiff in error.

W. D. Atkinson, for defendant in error.

PER CURIAM. Action brought by Sadie E. Bussey against the Missouri, Kansas & Texas Railway Company to recover damages for a permanent personal injury received in a collision between a train backing up in the railway yards of the defendant across Johnson avenue, in the city of Parsons, and the vehicle in which the plaintiff was riding along said avenue. As this controversy depends alone upon an examination of the special findings of fact made by the jury, and as from these findings may be gleaned all the facts essential to the determination of the controversy, a statement of the facts in the case, aside from the findings made, is deemed unnecessary.

The findings requested by plaintiff are as follows: “(1) Do you find from the evidence that plaintiff sustained injury at the crossing of defendant’s tracks over Johnson avenue, in the city of Parsons, on the evening of October 11, 1900? Ans. Yes. (2) Do you find from the evidence that the injury sustained by plaintiff was caused by a collision of defendant’s cars with a buggy in which she was riding? Ans. Yes. (3) Did you find from the evidence that said buggy was at the time being drawn by one horse? Ans. Yes. (4) Do you find from the evidence that the horse attached to said buggy at the time was being driven by T. C. Griffith? Ans. Yes. (5) Do you find from the evidence plaintiff at the time had any control over said vehicle, the horse, or the driver? Ans. No. (6) Do you find from the evidence Johnson avenue to be a street in the city of Parsons much used and traveled by the public, where it crosses over defendant’s right of way and

Missouri, etc., Ry. Co. v. Bussey

tracks? Ans. Yes. (7) Do you find from the evidence the tracks of defendant crossing over Johnson avenue to be much used by defendant in the switching and in the operation of its trains, engines, and cars? Ans. Yes. (8) Do you find from the evidence the buggy in which plaintiff was riding was struck by the rear car of a train being pushed northward by defendant over Johnson avenue? Ans. Yes. (9) Do you find from the evidence that defendant was in the exercise of ordinary care in the speed with which it was at the time pushing its said cars over Johnson avenue? Ans. Yes. (10) Do you find from the evidence that defendant gave reasonably sufficient signals or warnings to plaintiff as its said cars approached said Johnson avenue? Ans. Not in sufficient time to avoid accident. (11) Do you find from the evidence that defendant exercised ordinary care in the giving of signals or warnings to plaintiff as its said cars approached Johnson avenue? Ans. No. (12) Do you find from the evidence there was negligence on the part of plaintiff, Sadie E. Bussey, contributing to her injury? Ans. No."

The findings made upon defendant's request are as follows: "(1) Were the plaintiff and one Thomas C. Griffith riding together Thursday evening, October 11, 1900? Ans. Yes. (2) During the ride of the plaintiff with said Griffith, did she hold the lines and drive the horse; and, if so, for what length of time? Ans. No. (3) About what time did the plaintiff and said Griffith start upon their ride? Ans. About eight o'clock. (4) How many times, if at all, did the plaintiff and said Griffith cross the railroad tracks at the Johnson avenue crossing prior to the time of plaintiff's injury? Ans. Not at all. (5) Was said ride of said plaintiff and said Griffith purely a pleasure ride? Ans. Yes. (6) Did the plaintiff or said Griffith have any other object in taking said ride than that of pastime or pleasure? Ans. No. (7) What was the character of the vehicle in which they were riding? Ans. One-house buggy, with top down. (8) Was the plaintiff at the time of said ride in possession of all her faculties of sight and hearing, and were they in their normal condition? Ans. Yes." "(10) What is the distance from the point opposite the Alfred Hotel, on Johnson avenue, where plaintiff and said Griffith stopped, to the west track of the railway crossing said avenue? Ans. About 75 feet. (11) What is the distance from the west rail of the west track to the east rail of the east track across said avenue? Ans. About 127 feet. (12) What is the distance from the west rail of the west track to the point on Johnson avenue where the collision between the buggy in which the plaintiff was riding and the train occurred? Ans. About 67 feet. (13) How fast were the plaintiff and said Griffith traveling at the time of, and just immediately before, said collision? Ans. About five miles an hour. (14) How fast was said train going at the time of, and just immediately before, said collision? Ans. About five miles an

Missouri, etc., Ry. Co. v. Bussey

hour. (15) Did not said train pull south across Johnson avenue just before said collision? Ans. Yes. (16) After pulling south, did not said train come to a full stop? Ans. Yes. (17) If you answer the last question in the affirmative, state how far south of the south walk on Johnson avenue was the point at which said train came to a full stop? Ans. About 180 feet. (18) Was not said train at the time of said collision traveling north over Johnson avenue? Ans. Yes. (19) How many cars were there in said train at the time of said collision? Ans. About eleven cars. (20) How far had said train traveled from the point at which it came to a full stop, south of Johnson avenue, to the point of collision with the buggy in which the plaintiff and said Griffith were riding? Ans. About 220 feet. (21) How far did said train travel, before coming to a stop, after said collision? Ans. About 90 feet. (22) Was said train stopped as quickly as it could be after the signal to stop was given? Ans. Yes. (23) As said train proceeded north to Johnson avenue from the point where it had come to a stop south of Johnson avenue, was not Switchman Denny riding on the rear end of the rear car? Ans. Yes. (24) Did not Switchman Denny have in his hand, in plain view, a lighted lantern? Ans. Yes. (25) Could not said lantern of Switchman Denny have been seen by the plaintiff if she had looked in the direction of said train while it was being moved toward and over Johnson avenue? Ans. No. (26) If you answer the above question 'No,' you may then state what there was to prevent said plaintiff and said Griffith from seeing said lantern light. Ans. Car. (27) Could not the plaintiff have seen said train at any time after crossing the second track from the west? Ans. Yes." "(29) What is the distance from the east rail of the second track from the west over Johnson avenue to the point where the collision occurred? Ans. About 42 feet. (30) Did not said collision between said train and the vehicle in which said plaintiff and said Griffith were riding occur on the north side of Johnson avenue, at the point where the tracks of the defendant cross the same? Ans. Yes; close to center. (31) Did the plaintiff see the moving train at any time prior to the collision with the vehicle in which she was riding? Ans. Yes; immediately before collision. (32) Did the plaintiff warn said Griffith of the approach of said train prior to the collision? Ans. No." "(34) Did the plaintiff attempt to grab the lines from the hands of said Griffith just prior to the collision? Ans. No. (35) Did the plaintiff seize the lines and attempt to take them from said Griffith just prior to the collision? Ans. No. (36) What, if anything, did the plaintiff do to avoid the collision? Ans. Nothing. (37) Did not Night Yard Master Dean warn the plaintiff and said Griffith of the approach of said train prior to the collision? Ans. No. (38) Did the plaintiff pay any attention whatever to the warning given them by said night yard master, Dean? Ans. None given.

Missouri, etc., Ry. Co. v. Bussey

(39) Was Night Yard Master Dean on the crossing, and west of the track on which the collision occurred, at the time he gave the warning? Ans. No. (40) Did not the night yard master, Dean, have in his hand a lighted lantern at the time he gave the warning? Ans. Did not give any warning. (41) Did not said night yard master, Dean, signal the plaintiff and said Griffith with said lantern? Ans. No. (42) Did not said night yard master, Dean, also call to said plaintiff and said Griffith in a loud voice? Ans. No. (42) Did not Switchman Denny call to the plaintiff and said Griffith, in a loud voice, to stop? Ans. Yes. (43) Did not Switchman Denny also signal said plaintiff and said Griffith with his lantern? Ans. No. (44) Were not the warnings given by both Switchman Denny and the night yard master, Dean, in ample time, if they had been heeded, to have prevented the injury? Ans. No. (45) Did the plaintiff pay any attention to the warnings or signals given by either said night yard master, Dean, or said Switchman Denny? Ans. No. (46) Did the plaintiff see Night Yard Master Dean and his lantern as they were approaching the crossing? Ans. No. (47) If you answer 'No' to the last above question, you may then state what there was to prevent the plaintiff from seeing him? Ans. Not there. (48) Did the plaintiff see Switchman Denny riding on the rear end of the rear car of the train with which the buggy collided, as they were approaching and crossing over the tracks of the defendant, immediately before the collision? Ans. No. (49) If you answer the last question 'No,' you may then state what there was to prevent them from seeing him. Ans. Being on the east side of train. (50) Could not the plaintiff and said Griffith, immediately after crossing the east rail of the second track from the west, see track No. 1, or the high-line track, as far south as the passenger depot of the defendant? Ans. Yes." "(53) Was not engine No. 101 standing south of Johnson avenue at the time of the collision? Ans. Yes. (54) If you answer the above question 'Yes,' you may then state how far said engine was standing south of the south sidewalk on Johnson avenue? Ans. About 50 feet. (55) Was not engine No. 102 standing south of Johnson avenue at the time of the collision? Ans. Yes. (56) If you answer the above question 'Yes,' you may state how far south of the south sidewalk of Johnson avenue said engine was standing. Ans. About 70 feet. (57) Did not Engineer Morris signal the plaintiff and said Griffith with his engine as they were crossing over the two west tracks of the defendant on said Johnson avenue? Ans. No. (58) Did the plaintiff and said Griffith pay any attention to the signals or warnings given by said Morris with his engine? Ans. No. (59) What is the distance between the Neosho main line, or loop track and track No. 1, or high-line track? Ans. About 15 feet. (60) Was not said train which collided with the buggy in which the plaintiff and said Griffith were riding passing over

Missouri, etc., Ry. Co. v. Bussey

said Johnson avenue crossing on the lead track? Ans. Yes. (61) At the time of the accident, were there any cars standing on track No. 1, or high-line track, north of the switch stand and south of Johnson avenue? Ans. No. (62) Were there any cars standing on the puzzle lead north of the switch stand and south of Johnson avenue at the time of the accident? Ans. No. (63) Was not said train which collided with the buggy in which plaintiff and said Griffith were riding moving north as said plaintiff and said Griffith approached the west track on said crossing? Ans. Yes. (64) How far south on Johnson avenue was said train which collided with the buggy in which plaintiff and said Griffith were riding, south of the south sidewalk over said crossing on Johnson avenue, as the plaintiff and said Griffith crossed the second track from the west on said avenue? Ans. About eight feet. (65) Did plaintiff exercise ordinary care to discover whether or not any trains were approaching as the buggy drove on the tracks over said crossing? Ans. Yes. (66) Was the horse which was driven by said Griffith a gentle and reliable driving horse? Ans. Yes. (67) Was said horse in the habit of being frightened by the trains or cars when in their vicinity? Ans. No. (68) Did the plaintiff, just before the collision between the train and the buggy in which she and said Griffith were riding, attempt to get up from the seat? Ans. No.” “(70) Did her attempt to get up attract the attention of her companion, Mr. Griffith? Ans. She did not make any attempt to get up.” “(72) State whether or not defendant was guilty of negligence, and, if it was, state in what particular it was negligent? Ans. Guilty in not giving signals in sufficient time to avoid accident.”

The general verdict and judgment were in favor of plaintiff. Defendant brings error.

In construing these findings, it is our duty to harmonize the special findings with the general verdict, in support of the judgment rendered, if possible. *Anderson v. Pierce*, 62 Kan. 756, 64 Pac. 633; *Kansas City v. Slangstrom*, 53 Kan. 431, 36 Pac. 706; *Railway Co. v. Fray*, 43 Kan. 750, 23 Pac. 1039; *Railway Co. v. Ritz*, 33 Kan. 404, 6 Pac. 533. Can this be done? The train and the conveyance in which plaintiff was riding were approaching a common point at the same rate of speed. The jury finds defendant's negligence consisted in its not giving signals in sufficient time to avoid the accident, but it is also found plaintiff could have seen the approaching train at any time after crossing the second track from the west. This track is found to be about 42 feet from the point of collision. The plaintiff is found to have been in full possession of all her mental faculties. It was her positive legal duty to make a diligent use of her senses of sight and hearing in crossing these railway tracks, to avoid injury to herself and danger to others. It is found she could have seen the approaching train at any time when within 42 feet from

the track upon which it was approaching. Hence, if she had performed her legal duty and looked, she would have seen the train. It is also found she did not see it until immediately before the collision. Hence it must be held, from these findings, we think, plaintiff did not exercise that reasonable care and diligence for her own protection and the safety of others which the law requires to permit a recovery by her of damages for the injury. In *Railway Co. v. Adams*, 33 Kan. 427, 6 Pac. 529, it was held by this court: "It is the duty of a person about to cross a railroad track to make a vigilant use of his senses, as far as there is an opportunity, in order to ascertain whether there is a present danger in crossing. A failure to listen or look, when by taking these precautions the injury might have been avoided, is negligence that will bar a recovery, notwithstanding the negligence of the railroad company in failing to give signals contributed to the injury." In *Roach v. Railroad Co.*, 55 Kan. 654, 41 Pac. 964, it is held: "A person who drives a team onto a railroad crossing at a time when a regular passenger train is about due, and neglects to look for an approaching train which he might have seen in time to have avoided injury to himself if he had looked, is guilty of contributory negligence barring a recovery for an injury received from such train." The same rule is declared in *Clark v. Railway Co.*, 35 Kan. 350, 11 Pac. 134, 2 Am. & Eng. R. Cas., N. S., 460; *Railroad Co. v. Davis*, 37 Kan. 743, 16 Pac. 78, 1 Am. St. Rep. 275; *Railroad Co. v. Townsend*, 39 Kan. 115, 17 Pac. 804; *Same v. Priest*, 50 Kan. 16, 31 Pac. 674; *Young v. Railway Co.*, 57 Kan. 144, 45 Pac. 583; *Railroad Co. v. Holland*, 60 Kan. 209, 56 Pac. 6; *Railroad Co. v. Willey*, 60 Kan. 819, 58 Pac. 472. As the special findings are in direct conflict with the general verdict, it cannot stand.

A more serious question, however, is, are the special findings made by the jury consistent with each other, and destructive of plaintiff's right of recovery? If so, the court erred in not sustaining the motion of the defendant for judgment upon the findings. The jury finds, in response to question 12 requested by plaintiff, there was no negligence on the part of plaintiff. This, however, is not a specific finding of an issuable fact, but is a general conclusion drawn from all the evidence upon the subject, which inheres in the general verdict, and is no stronger than the general finding. It is also found plaintiff had no control over the vehicle, the horse, or the driver. As she could have seen the train at any time after she was within 42 feet of the track upon which the collision occurred, had she looked, and as it was her duty to look, the jury must have found the plaintiff free from negligence upon the theory that, as she had no control over the conveyance, she could not have prevented the collision, even though she had seen the train when at the distance of 42 feet or less from the track over which the train was passing, for in no other way can the finding be reconciled. In *Bush v. Railroad*

Missouri, etc., Ry. Co. v. Bussey

Co., 62 Kan. 709, 64 Pac. 624, this court held: "Where one person is riding with another for the mutual pleasure of both, with equal opportunity to see and ability to appreciate the danger, and is in fact looking out for herself, but makes no effort to avoid the danger, she is chargeable with the want of care which results in injury." In the opinion it is said: "It is contended by plaintiff in error that, if Bowhay was guilty of contributory negligence in driving upon the track without looking or listening for approaching trains, such negligence is not imputable to the plaintiff in error. The want of care which resulted in injury to the plaintiff in error is chargeable to her. They were both engaged in a common purpose,—mutual pleasure. Her opportunity and ability to see and appreciate the danger were equal to his. She was in no way relying upon him. It is true, he furnished the vehicle, and he did the driving, but she seems to have acted independently of him. When they started from the point where they had stopped for the freight train, she saw the track, knew they intended to cross it, appreciated the danger, and did not advise or suggest that they be more cautious, but did look for an approaching train, and was in fact the first to see it." In the light of this authority, does the finding that plaintiff had no control over the vehicle, the horse, or the driver tend to acquit her of contributory negligence in this case? We think not. In the absence of the express findings, it would have been presumed, in support of the general verdict, that plaintiff did look and could not see the approaching train. The express finding, however, that she could have seen the train, controls. Again, in harmony with the special finding that she had no control over the vehicle, the horse, or the driver, in the absence of other findings, it might be presumed, in support of the general verdict, she looked and saw the train after crossing the second track, but that the time was too short in which to warn her companion and cause the horse to be stopped before the collision occurred. But this presumption cannot be indulged in the light of the finding that she did not see the train until immediately before the occurrence of the accident, and the further finding that she did nothing to avoid the collision. As the only negligence found against the defendant in response to the direct question as to the negligence of defendant consists in not giving signals in sufficient time to warn plaintiff of the danger and avoid the injury, and as it was the duty of plaintiff, in crossing over the switch yards, to keep a vigilant lookout to avoid danger, and as she was in possession of all her mental faculties, and could have seen the train if she had looked at any time within 42 feet of the track on which the injury occurred, and as she did not look, or she would have seen the train, it is apparent the only consistent and harmonious construction which may be placed upon the findings made is that the plaintiff was guilty of contributory negligence in not

Barry v. Burlington Ry. & Light Co

looking, and, notwithstanding the fact she was not driving or controlling the vehicle in which she was riding, she should have seen the train, and taken steps to avoid the collision, which she did not do. In the light of the only construction that may be given the findings, plaintiff was guilty of contributory negligence which was the direct and proximate cause of the injury, and which avoids a recovery in this action.

It follows, the court erred in overruling the motion for judgment in favor of defendant upon the findings made, for which the case must be reversed, and judgment entered in favor of defendant.

HINES v. TEXAS & P. RY. CO.

(*Circuit Court of Appeals, Fifth Circuit, December 9, 1902.*)

[119 Fed. Rep. 157.]

Railroads—Injury at Crossing—Contributory Negligence.*

The driver of a team who, after crossing a side track filled with box cars, which obstructed the view, drove upon the main track of a railroad 50 feet distant, without looking or listening for a train, was guilty of negligence as matter of law.

In Error to the Circuit Court of the United States for the Western District of Texas.

Millard Patterson and C. N. Buckler, for plaintiff in error.

B. G. Bidwell and T. J. Freeman, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and BOARMAN, District Judge.

PER CURIAM. Fifty feet north of the main track of the Texas & Pacific Railway at Pecos City was a side track occupied to the westward of the public crossing with box cars. The plaintiff's driver, intending to cross both tracks from the northward, stopped, and looked and listened, just behind the box cars, but heard nothing. After safely crossing the side-track he attempted to cross the main track, and, although the view of the main track was clear and unobstructed, he neither looked nor listened until it was too late. He was certainly guilty of negligence.

The judgment of the circuit court is affirmed.

BARRY v. BURLINGTON RY. & LIGHT CO.

(*Supreme Court of Iowa, Jan. 21, 1903.*)

[93 N. W. Rep. 68.]

Accident on Track—Contributory Negligence and Negligence after Discovery of Peril.†

Though one is negligent in getting struck by a street car, yet if

*See foot-note appended to *Knot v. Philadelphia & R. Ry. Co. (Pa.)*, 4 R. R. R. 371, 27 Am. & Eng. R. Cas., N. S., 371.

†As to the care required of those in charge of street cars to avoid collisions with persons, animals, or vehicles, see foot-notes appended to *Memphis St. Ry. Co. v. Wilson (Tenn.)*, 4 R. R. R. 708, 27 Am. & Eng. R. Cas., N. S., 708.

Barry v. Burlington Ry. & Light Co

the motorman sees his danger long enough before the accident to prevent it, and negligently fails to do so, the railway company is liable.

Sufficiency of Evidence.†

A finding that the motorman of an electric street car saw a person who was struck by the car in time to have avoided accident to him (it being possible to stop the car within from 5 to 12 feet) is authorized by evidence that from the front platform, where he was, he could easily see the surface of the street immediately in front; that it was his duty, not only under the rules of the railway company, but also under the general requirement of the exercise of care in operating the car, to be on the lookout to avoid injuring persons in the street; and that deceased was carried 20 feet, while clinging to the dashboard, before he was run over.

Appeal from district court, Des Moines county; W. S. Withrow, Judge.

Action by an administrator to recover damages for the death of his decedent, a boy of about 16 years of age, alleged to have been caused by the negligence of servants of defendant operating an electric street railway car, whereby the said car, being operated on the tracks of the defendant, was run against and over the deceased, causing his death. At the close of the evidence for plaintiff, defendant's motion to direct a verdict in its favor was sustained, and judgment was thereupon rendered for defendant, from which plaintiff appeals. Reversed.

J. M. Mercer and S. L. Glasgow, for appellant.

Stutsman & Stutsman and Walsh Bros., for appellee.

McCLAIN, J. The evidence for plaintiff tended to show that the deceased attempted to cross defendant's street car track on one of the public streets of the city of Burlington in front of one of defendant's electric cars, moving at the rate of about six miles an hour; that there was nothing to prevent deceased from seeing the approaching car, had he taken any precaution for his own safety; that he was struck by the car while on the track; that he threw up one arm, and with it caught the front part or dashboard of the car, and was carried some distance (perhaps 20 feet), when the car passed over him; and that the car might have been stopped in from 5 to 12 feet. The testimony of witnesses as to the distance from where the car struck deceased to the point where the body was found is conflicting, but it is sufficient to say that the evidence tends to show the deceased to have been struck a few feet west of a certain street crossing (the car going west), and that his body was found some 20 or 25 feet west of the crossing, after having been run over by the car. The contention for appellant is that it should have been left to the jury to determine whether, in the exercise of reasonable care on the part of the motorman, the danger to deceased could have

†As to the duties and liabilities of a railroad company after discovering a person in a perilous situation upon its track, see monograph attached to *Cottrell v. Southern Ry. Co. (Miss.)*, 2 R. R. R. 641, 25 Am. & Eng. R. Cas., N. S., 641.

Barry v. Burlington Ry. & Light Co

been discovered in time to stop the car before the deceased was run over, while for appellee the contention is that there is no evidence that the motorman knew of the danger of deceased in time to have stopped the car before the fatal injury was inflicted. It is well settled in this state, and by the weight of authority generally, that where one is injured by being run over by a railroad train, and his own negligence has contributed to bring about the injury, the railroad company is liable only in case its employees, after becoming aware of the danger, have been negligent in not using reasonable care to avoid the injury. *Keefe v. Railway Co.*, 92 Iowa, 186, 60 N. W. 503, 54 Am. St. Rep. 542, and cases cited; *Orf v. Railway Co.*, 94 Iowa, 423, 62 N. W. 851; *Kelley v. Railroad Co. (Iowa)* 92 N. W. 45, 1 Am. & Eng. R. Cas., N. S., 239. But those cases, so far as they hold that the duty to exercise care to avoid injury to one who is guilty of contributory negligence in putting himself in danger arises only when the danger becomes actually known to the employees of the railroad company, do not relate to circumstances involving a duty to look out in general for the safety of others. The distinction between the care required in connection with the running of a railway train operated on a right of way, as to which the railway company enjoys the exclusive right of possession, and the care which should be exercised in the running of a street car operated in the public streets of a city, is manifest. Those operating a street car under such circumstances are bound to do so with regard to the safety of persons rightfully upon the public streets, for the street car track, notwithstanding its additional use, remains a part of the street. This distinction is well recognized by the authorities. See *Railway Co. v. Cooney*, 87 Md. 261, 39 Atl. 859; *Railway Co. v. Arnreich*, 78 Md. 589, 28 Atl. 809; *Bergman v. Railway Co.*, 88 Mo. 678; *Weitzman v. Railroad Co. (Sup.)* 53 N. Y. Supp. 905; *Kelly v. Railroad Co. (Ky.)* 46 S. W. '688; 2 *Thomp. Neg.* §§ 1476, 1477.

In view of the duty which therefore rested on the motorman of defendant's car, in the case before us, to be on the lookout to avoid injury to persons using the public street, we think that in determining whether he did see the deceased in front of his car long enough before the fatal injury was inflicted to have avoided it by the exercise of reasonable care, which, under the circumstances, would be the great care and foresight which a reasonable and competent motorman should use to avoid such an injury when the danger thereof was apparent to him, the jurors might take into account what would have been necessarily apparent to the motorman in the exercise of such care. See *McDivitt v. Railway Co.*, 99 Iowa, 141, 68 N. W. 595. And if, under all the circumstances, including the fact, which the evidence tends to establish, that the deceased was carried some 20 feet, while clinging to the dashboard of the car, after it came in contact with

Barry v. Burlington Ry. & Light Co

him, before he was run over, they found that the motorman did see the deceased in danger in time to have avoided the fatal injury to him, they would have been justified in returning a verdict for the plaintiff, notwithstanding the conceded negligence of the deceased in placing himself in danger. Even in railway cases we have held that it is not necessary to show by the testimony of the employees in charge of the train that they actually saw the danger of one who was imperiled by reason of his contributory negligence, but that their knowledge of such danger could be found from circumstances indicating that they must have been aware of such danger. *Purcell v. Railroad Co. (Iowa)* 91 N. W. 935. And in this case the finding of the jury that the motorman, who was shown to have been on the front platform of the car, from which he could easily see the surface of the street immediately in front, as he was advancing,—and the fact that it was his duty, not only under the rules of the company, which were admitted in evidence, but also under the general requirement of the exercise of care in operating the car,—did see the deceased in time to have avoided the fatal injury to him, would have had support in the evidence.

We are not to be understood as making any departure from the well-settled rule, recognized in this state and by a majority of the authorities in other states, that contributory negligence will defeat recovery notwithstanding the concurrent negligence of the defendant. The effect of our holding is simply to say that, under the circumstances, the jury could have found that the motorman had knowledge of the danger of deceased, due to his contributory negligence, in time to have avoided the fatal injury to him. If, instead of using the means within his control to stop the car after the danger to the deceased became apparent, he negligently failed to do so, or, as indicated by the testimony of one witness, became spell bound with fright, and allowed the car to run on, after seeing danger of deceased, without shutting off the power or reversing it, and thus an injury was inflicted which might have been avoided, then the liability of the defendant would be sufficiently shown. The controlling consideration for the court, when asked to direct a verdict for the defendant, was whether it appeared from the evidence that the motorman, in the exercise of the care required under the circumstances, was not aware of the danger in time to have avoided the fatal injury; and we are constrained to say that it was error to hold that there was no evidence tending to show that the injury could thus have been avoided.

Reversed.

MISSOURI PAC. RY. CO. *v.* DIVINNEY.*(Supreme Court of Kansas, March 7, 1903.)*

[71 Pac. Rep. 855.]

Carriers—Assault by Employee—Liability.*

Where the petition and evidence in an action against a carrier show sufficient facts to constitute plaintiff, in law, a passenger at the time he was assaulted by defendant's station agent, the carrier is liable in damages, even though at the time such employee was not engaged in the discharge of his duties.

In Banc. On rehearing. Former opinion reversed, and judgment below affirmed.

For former opinion, see 69 Pac. 351.

Waggener, Doster & Orr and Park B. Pulsifer, for plaintiff in error.

G. M. Culver and F. W. Sturges, for defendant in error.

PUR CURIAM. Division No. 2 of this court, at its July, 1902, sitting, reversed the judgment of the lower court upon a consideration of the special findings of fact made by the jury. 69 Pac. 351. A rehearing was granted. The case has been reargued, and is now before us upon the rehearing granted.

At the former hearing the case was not presented in oral argument by counsel for defendant in error. It was contended in the brief filed that special finding No. 1, requested by plaintiff, which reads, "Was the plaintiff a passenger over defendant's road from Ames to Concordia on the morning of August 7, 1900?" answered, "Yes"—established the right of plaintiff to the protection accorded a passenger from assault made by an agent or employee of a common carrier. As it was conceded by the defendant at the trial that plaintiff was a passenger on defendant's train from Ames to Concordia on the morning of the day mentioned, after his encounter with the agent at Ames, and as the question was not directed to the time of the affray between plaintiff and the agent of the company at Ames, the finding was deemed wholly immaterial, and as the jury further found the agent was not engaged in the performance of any duty imposed upon him, by virtue of his employment at the time of the assault made upon plaintiff, the judgment was reversed.

It is now earnestly contended by counsel for defendant in error that the facts alleged in the petition are sufficient in law to constitute plaintiff a passenger at the time of the assault made upon him, and as there is evidence in the record to support the facts alleged, and as there is no special finding of the jury to the contrary, the general verdict of the jury must be upheld notwithstanding the special findings. While there is no direct allegation found in the petition that plaintiff was a passenger at the time of the assault, made upon him by the agent of the defendant company at Ames,

*See generally, monograph appended to Birmingham Ry. & Electric Co. *v.* Baird (Ala.), 22 Am. & Eng. R. Cas., N. S., 909.

Fitzgibbon v. Chicago, etc., Ry. Co

and while the plaintiff was not in fact a passenger upon one of the trains of the defendant at the time of his assault, and while the petition is unskillfully drawn, and the real issue obscured, yet, from a careful re-examination of the petition and the evidence found in the record, we are now of the opinion sufficient facts are stated in the petition, and sustained by the evidence, to constitute plaintiff, in law, a passenger at the time he was assaulted, and to entitle him to that protection from the company which the law affords a passenger to guard him from an assault made by an employee or agent of the carrier, whether at the time such employee or agent is engaged in the discharge of his duties to the company or not; such wrongful act of the agent being a violation of the contract of his company to carry its passengers safely, and accord them proper treatment. *Steam-Boat Co. v. Brockett*, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049; *The Wabash Railway Co. v. Savage*, 110 Ind. 156, 9 N. E. 85; *Stewart v. Brooklyn and Crosstown R. R. Co.*, 90 N. Y. 588, 43 Am. Rep. 185; *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549.

In this view of the case, it follows, both from authority and the principles of law as declared in the former opinion, the general verdict of the jury and judgment thereon must be upheld, notwithstanding the special findings.

Judgment affirmed.

FITZGIBBON v. CHICAGO & N. W. RY. CO.

(*Supreme Court of Iowa, Jan. 28, 1903.*)

[93 N. W. Rep. 276.]

Carrier and Passenger—Existence of Relation—Special Excursion Train.*

Where plaintiff went on a special excursion train in good faith, believing that the conductor knew he was not a member of the excursion, but had a right to accept him as a passenger, and that the conductor did so accept him, the relation of carrier and passenger was established.

Same—Same—Evidence.

On the issue whether plaintiff was a passenger, he could testify with reference to his belief as to his right to ride on the train.

Appeal from district court, Monona county; F. R. Gaynor, Judge.

This is an appeal from a second judgment for plaintiff in an action to recover damages for personal injuries received by plaintiff while a passenger on defendant's train. The facts are sufficiently set out in the opinion on a former appeal. Affirmed.

See 108 Iowa, 614, 79 N. W. 477.

Hubbard, Dawley & Wheeler, for appellant.

M. F. Harrington and Frank Tamisiea, for appellee.

*See generally, foot-note appended to *Spence v. Chicago, R. I. & P. Ry. Co. (Iowa)*, 3 R. R. R. 822, 26 Am. & Eng. R. Cas., N. S., 822.

Fitzgibbon v. Chicago, etc., Ry. Co

McCLAIN, J. The case was retried on the issues which were involved in the former appeal, and the principal question now before us is whether there was evidence to support a verdict for the plaintiff on those issues, in view of the law of the case as then established. The question of fact on which the case has been made to hang is whether plaintiff was a passenger. The evidence on this question is substantially the same as contained in the record on the former appeal, save that plaintiff on the second trial testified to a more definite recognition of him by the conductor as an acquaintance than was shown on the first trial. Counsel for defendant now argue that, if plaintiff knew the train to be a special train, he knew that the conductor had no authority to allow him to ride thereon; and also that he expressly avoided asking the conductor whether or not he could ride, well knowing that permission would be refused if asked. The first of these points is ruled against the defendant by the opinion on the former appeal, wherein it is held that, "even if the train was not made up for the carriage of passengers in general, the defendant, through its conductor, had the right to accept such [other] passengers, and, if the conductor did accept the plaintiff as such passenger, he will be treated as such, in the absence of notice or knowledge on his part of any limitations upon the conductor's authority." The evidence as to whether plaintiff did have notice of limitation of the conductor's authority, or did know that he would not be accepted if he asked permission to ride, was peculiarly for the jury. There is no such lack of evidence in support of plaintiff's claim as to justify our interference. The evidence tended to show that plaintiff desired transportation on this special train, and that he went upon the train with the assent of the conductor, who was aware that he expected to be transported thereon as a passenger. The real question of difficulty is as to whether the conductor knew that plaintiff was not a member of the excursion party, and whether plaintiff had reason to know that the conductor knew it. If plaintiff was seeking transportation in good faith as a passenger, and believed, as he had a right to believe, that the conductor had authority to accept him as a passenger, although the train was a special excursion train, and further believed in good faith, relying on the conduct of the conductor, that the conductor knew he was not a member of the excursion, but nevertheless accepted him for transportation as a passenger, then we cannot see why the relation of passenger did not arise. This conclusion is predicated, of course, on good faith on the part of the plaintiff. Whether there was fraud on his part was a question for the jury. Therefore there was no error in allowing the plaintiff to testify, over defendant's objection, with reference to his belief as to his right to ride upon that train, with the consent of the conductor.

The judgment is affirmed.

KIRD *v.* NEW ORLEANS & N. W. RY. CO.*(Supreme Court of Louisiana, June 21, 1902.)*

[33 So. Rep. 587.]

Carriers—Injury to Passenger—Gross Negligence.*

To have its freight platform constructed so near to its track that the elbow of a passenger may come in contact with freight on the platform as the passenger is seated inside of a passing car, with his elbow resting for comfort on the sill of one of the windows of the car and protruding but slightly, is gross negligence on the part of a railway company, rendering it responsible in damages to a passenger injured under the above circumstances.

(Syllabus by the Court.)

Appeal from judicial district court, parish of Morehouse; W. J. Gray, Judge.

Action by Edmond Kird against the New Orleans & North Western Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Jonathan N. Luce, for appellant.

E. Tyler Lamkin, for appellee.

PROVOSTY, J. The plaintiff's wife boarded the defendant's train at Oakridge station on her way to Monroe. She took a seat next to a window, another woman of her own race occupying the other half of the seat at her left. The car moved on, and had gone about 150 feet, when plaintiff's wife's right arm was broken in two places, above and below the elbow, by coming in contact with a bale of cotton that stood on the freight platform of the defendant company, alongside of which the train was passing. Plaintiff sues in damages for the injury, and the defendant company answers that the accident was brought about by the negligence of the plaintiff's wife in putting her arm out of the car window.

The plaintiff's wife says that she and her seat companion were eating pinder candy, of which the supply was in a paper bag in her lap; that she was holding a piece of candy in her left hand, while her right was on her lap, her elbow resting on the window sill, when the window was darkened by the bale of cotton, and her arm was broken by being crushed against the jamb of the window; and that the broken arm dropped in her lap.

She is a talkative witness, given to details, and her testimony has about it an air of ingenuousness; but she says that she did not put her arm out of the window and wave good-by to her friend as the car was leaving the station, and that her arm at the moment of the accident was wholly inside of the car, no part of it projecting outside, whereas all the other witnesses who saw the accident testify that she did wave and that her arm was projecting.

Two of these witnesses testify that her arm was still ex-

*See monograph attached to Chicago, etc., Ry. Co. *v.* Durand (Kan.), 3 R. R. R. 519, 26 Am. & Eng. R. Cas., N. S., 519.

Kird v. New Orleans & N. W. Ry. Co

tended out of the window in the act of waving at the moment of the accident; but the weight of the testimony is that she had ceased waving, and had drawn in her arm, and was merely resting it on the window sill.

The defendant's witness Brodnax, who had had his head out of one of the windows of the front car and had drawn it in just in time to avoid the cotton, testifies, as follows: "After she ceased waving, she placed her arm on the window sill, with the elbow sticking six or seven inches out of the window. * * * A portion of the hand was out of the car window, I think, as best I remember."

The defendant's witness Drew, who was at the station looking at the train as it moved off, and watching the arm, and within 150 feet of it, testifies as follows: "Q. Is it not a fact, Mr. Drew, that Melissa Kird's elbow, at the time the injury was inflicted upon her, extended over the car window, or out of the car window, only a very short distance or space? A. That's what I stated. Q. Is it not a fact that the elbow did not project or extend over the window sill two inches? A. I can't say that exactly. I say it extended over the window sill no further than the width of the arm. It was almost directly straight. Her arm was straight with the car when I saw it. Q. Her arm was almost straight with the window sill upon which it was resting? A. Yes, sir. Q. With the hand extending inward, or the inside of the car? A. I could not tell whether the hand was inside the car or hanging directly down. I couldn't see the arm at all, but just the elbow. Either the hand was bent inside the car, or down. I couldn't tell which."

Drew was in the better position for observation, and his attention was concentrated on the arm at the moment of the collision; hence we adopt his statement that the elbow was extending outside no further than the thickness of the arm.

Our conclusion from this testimony, taken in connection with that of plaintiff's wife, is that when the accident happened plaintiff's wife had ceased waving to her friends and had turned her attention to her candy, and that her arm had been drawn in and was resting on the window sill merely for comfort. So much for the proof of the alleged contributory negligence.

The bale of cotton, on the other hand, was so close to the passing car that, if it had been set there on purpose to catch any protruding elbow, or hand, or head, it could hardly have been stationed closer. If we go by the testimony of the mechanic, who, after the accident, was employed by the defendant's agent to saw off a part of the platform, and who says that he was instructed to cut off 2 feet, and that he did so after exact measurement, the space between platform and passing train was 1 $\frac{1}{4}$ inches at the north end of the platform, 3 $\frac{1}{4}$ inches at the south end, and 4 $\frac{1}{4}$ inches at the middle; and the bale of cotton may well have grazed the passing car, espe-

Kird v. New Orleans & N. W. Ry. Co

cially if the same witnesses, Brodnax and Drew, are not mistaken in their statements that it projected beyond the edge of the platform, or if some allowance is made for the vacillation of the train. If we base ourselves on the inference that the planks of the curtailed platform were originally of the same length as those of the east platform, and that therefore the curtailment was of 15 $\frac{1}{2}$, instead of 24, inches, then the space between platform and passing train was from 9 to 10 inches, and between passing train and bale of cotton that same distance, less the projection of the bale of cotton, which projection was not less than 1 inch, and according to the witness Brodnax 4 inches. As the train pulled out the second time, it having backed to the station to put off the wounded woman, the two witnesses, Brodnax and Drew, observed closely to see how near it would pass to the bale of cotton. Drew was occupying his same position at the station, and Brodnax was on the train. According to the latter it passed very close, less than 6 inches; according to the former, it missed the bale of cotton by about 4 inches. Whether the collision had pushed the bale of cotton in, or had drawn it further out, is not known. Certain it is that this platform and this bale of cotton were close enough for their presence there to constitute on the part of the defendant company gross and culpable and inexcusable negligence.

And now the question occurs whether the defendant company is absolved from the consequences of this negligence by the alleged contributory negligence of the plaintiff's wife in letting her elbow project beyond the window sill.

Doubtless passengers should keep their persons within the car; there is abundant room for them to do so, and there is no necessity for them to stick their elbows outside; but the fact of the matter is that railway companies so construct their cars that the window sill at the passenger's side offers an inviting support to the arm, and in warm weather, when the sash is up, allures the arm to stretch along its airy surface, and notoriously passengers do yield to this temptation, and almost habitually do rest their elbow on the window sill, even at the risk of some part of it protruding beyond the line of the car. We do not think that an elbow protruding slightly under these circumstances ipso facto forfeits the protection of the law and becomes free game to the negligence of the railway company. We think that a passenger has a right to rely upon there being a clearance space for the train of at least the thickness of an arm, and that the question whether the exposure of the arm to that extent shall constitute contributory negligence must be left to be decided according to the circumstances of each particular case.

In the instant case, we are satisfied that the plaintiff's wife was unaware of the danger,—nay, perhaps, unconscious of the fact that her elbow was protruding; so that her fault, if any, was slight, and only such as any passenger might in a

Mendenhall v. Atchison, etc., Ry. Co

moment of forgetfulness lapse into, and, even if her act had been deliberate, she had a right to rely upon there being a clearance space for the train of at least the thickness of an arm, whereas the platform was thus dangerously near without necessity or reason, or even excuse, and the defendant has confessed that much by having it cut. The dangerous closeness was the result of the unmitigated negligence of the defendant,—was a constant threat and menace to the safety of the passengers. It maimed the plaintiff's wife, and on the same occasion came near proving a death trap to the witness Brodnax, and no telling how many like casualties it may have made imminent in the past. To absolve the defendant from responsibility under these circumstances would be to carry too far, we apprehend, the law of contributory negligence. In a recent case, where the negligence of the railway company was not near so direct or grave as in the instant case, this court held that the alleged contributory negligence of the passenger in permitting his elbow to protrude did not preclude recovery. *Clerc v. Morgan Railroad & Steamship Company* (not yet officially reported) 31 South. 886.

As to the amount of the damages, \$1,500, we have considered carefully the reasons adduced on one side for an increase, and on the other side for a reduction, and have come to the conclusion that, while the amount, perhaps, is somewhat scant, yet that, everything considered, justice has been done.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed at the cost of the appellant,

MENDENHALL v. ATCHISON, T. & S. F. Ry. Co.

(Supreme Court of Kansas, March 7, 1903.)

[71 Pac. Rep. 846]

Who Are Passengers—Riding by Permission of Brakeman.*

One who pays a brakeman on a passenger train a sum of money to be carried to a certain point, and is told to ride upon the platform of the baggage car, and get off the train at all stops, and keep out of sight, and who follows such instructions, is not a passenger.

Same—Same—Minors.

Allegations that a minor, 15 years of age, did not know that he was doing wrong in making such an arrangement as that referred to in the preceding paragraph, and did not know that he was exposing himself to any great danger in following such directions, are not sufficient to take the case out of the rule stated, or to relieve the minor from responsibility for his own negligence.

(Syllabus by the Court.)

In Banc. Error from District Court, Barton County; Ansel R. Clark, Judge.

*As to who are passengers, see foot-note appended to *Travelers' Ins. Co. v. Austin* (Ga.), 5 R. R. R. 433, 28 Am. & Eng. R. Cas., N. S., 433.

Mendenhall v. Atchison, etc., Ry. Co

Action by Omer H. Mendenhall, by his next friend, W. I. Mendenhall, against the Atchison, Topeka & Santa Fe Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Nimocks, Swartz & Hess, for plaintiff in error.

A. A. Hurd and O. J. Wood, for defendant in error.

MASON, J. The only question presented in this case is whether the district court erred in sustaining a demurrer to the petition. The petition alleged that plaintiff, a boy 15 years of age, agreed with the brakeman of one of defendant's passenger trains to pay him 25 cents to carry him from Great Bend to Hutchinson; that plaintiff paid the brakeman this amount, and the brakeman told him to get upon the platform of the baggage car, and to get off at the stopping places on the way for the purpose of keeping out of sight; that plaintiff rode upon the car platform as far as Ellinwood, and in getting off the train while it was still in motion, on the opposite side from the depot, stumbled over a semaphore board, fell under the train, and received injuries requiring the amputation of both feet. The plaintiff places his right to recover upon the acts of the brakeman in instructing him to ride on the car platform, and to get off at the stopping places for the purpose of keeping out of sight, and upon the negligence of the company in permitting the semaphore board to remain exposed above the surface of the ground.

The demurrer was properly sustained. The plaintiff was not a passenger. It has often been held that one does not become a passenger by the payment of money to the brakeman of a freight train, the collection of fare not being within the real or apparent scope of his authority. *McNamara v. Great Northern Ry. Co.* (Minn.) 63 N. W. 726; *Janny v. Great Northern Ry. Co.* (Minn.) 65 N. W. 450; *Texas & P. Ry. Co. v. Black* (Tex. Sup.) 27 S. W. 118; *Railway Co. v. Johnson* (Okl.) 4 Pac. 641; *Brevig v. Railway Co.* (Minn.) 66 N. W. 401. Whether the rule is the same in the case of the brakeman of a passenger train or not, the plaintiff in this case was not a passenger, because, in the absence of specific allegations to the contrary, it must be presumed that the fact that he was told to ride on the car platform, and keep out of sight, informed him, even if he would not otherwise have known it, that he was not received or considered as a passenger by the company or its authorized agents. His minority does not affect the matter, except so far as it is a mark of capacity. *Bess v. Railway Co.*, 62 Kan. 299, 62 Pac. 996. A boy of 15, having ordinary intelligence for his age, would presumably understand, under the circumstances stated, that the directions given him were unusual, and were intended to prevent his discovery by the person in charge of the train. It is true that the petition alleges that the plaintiff did not know that he was doing wrong in making the arrangements referred to

Sambuck v. Southern Pac. Co

with the brakeman, and that he did not know that he was exposing himself to any great danger in following the instructions given him. But it is not alleged that he had not ordinary intelligence for his age, or that he lacked capacity to understand the nature of the transaction, or that he believed that the brakeman took the money in behalf of the company, or that he did not know that the reason he was told to ride on the platform and keep out of sight was in order that the conductor should not see him. As he was not a passenger, but a trespasser, the company owed him no duty with regard to the construction of its semaphore or otherwise, except to avoid willful and wanton negligence. The plaintiff was injured, not because he was riding on the platform, but because he got off the train while it was in motion, and on the other side of the car from the depot. It is not alleged that the brakeman told him to get off before the train stopped. The exact language of the petition in this regard is that the brakeman told the plaintiff "that as the train pulled up at the different stopping places between Great Bend and Hutchinson he should get off, and keep out of sight." The allegations are insufficient to show defendant to have been guilty of any willful or wanton neglect, or to relieve plaintiff from the responsibility for his own obvious recklessness.

The judgment is affirmed. All the Justices concurring.

SAMBUCK v. SOUTHERN PAC. CO.

(Supreme Court of California, Jan. 3, 1903.)

[71 Pac. Rep. 174.]

Evidence—Physical Examination of Plaintiff's Person.

Where, in an action for injuries, plaintiff's physician testified that on examination there were no objective signs of injury on his body, and no bruises, and that his injuries were subjective, rather than objective, and defendant's physician had thoroughly examined plaintiff, and fully detailed his condition, as a witness, defendant was not prejudiced by the court's refusal to compel plaintiff to submit to an examination of his person at the trial.

Injury to Passenger—Collision—Presumption of Negligence*—Rebuttal.

In an action for injuries to a passenger from a railroad collision, it is presumed in the first instance that the collision was the result of the carrier's negligence, to rebut which defendant must affirmatively show that the collision was the result of inevitable casualty, or of some cause which human care and foresight could not prevent.

Same—Degree of Care.

In an action for injuries to a passenger, the carrier is liable for the slightest negligence.

Department 1. Appeal from superior court, Santa Cruz county; Lucas F. Smith, Judge.

Action by Nicholas Sambuck against the Southern Pacific

*See foot-note appended to *Howe v. Northern Pac. Ry. Co.* (Wash.), 5 R. R. R. 624, 28 Am. & Eng. R. Cas., N. S., 624.

Sambuck v. Southern Pac. Co

Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Charles B. Younger and Foshay Walker, for appellant.
John H. Leonard, for respondent.

PER CURIAM. The plaintiff brought this action for damages for personal injuries of a permanent nature received in a collision and train wreck while traveling as a passenger on defendant's railroad train. On a trial with a jury, plaintiff had a verdict and judgment for \$6,000. The defendant appeals from said judgment and from an order denying it a new trial.

1. The principal contention of appellant is based on an alleged error of the court in refusing to compel the plaintiff to submit his body to an examination, on motion of appellant. Conceding that the plaintiff refused to permit an inspection of his person at the trial, and for the purposes of the argument that the court erred in refusing to order him to submit, yet we think it is plain, from the record before us, that defendant was not injured thereby. The most that such an inspection could disclose in aid of defendant would have been to establish the fact that there was no external evidence of any injury; but this fact was subsequently fully established, and without conflict, by one of plaintiff's own witnesses. W. R. Congdon, the doctor who was still treating plaintiff at the time of the trial, testified that he examined him about the 5th or 6th of December, 1899, which was more than 11 weeks after he was hurt and about 3 months before the trial, and that he had him stripped, "his clothes all taken off of him," and that "there were no objective signs on his body, no bruises." This was uncontradicted, and, coming from the plaintiff's witness, the plaintiff was bound by it; and an inspection of plaintiff's body could have added nothing to it more favorable to the defendant. The plaintiff, in his testimony, did not claim, nor was there any evidence to show, that at the time of the trial there were any marks, scars, or other evidences of injury to be discovered by an inspection or examination of any particular part of plaintiff's person; but, on the contrary, the testimony of the physicians in the case shows that evidence of plaintiff's injury was, as they term it, "subjective," rather than "objective." In addition to this, it also appears that the defendant's physician had examined plaintiff thoroughly at least twice, and had reported the result thereof to the defendant, and detailed it fully as a witness upon the trial of the case. He said that on his examination at the time of the injury he found some scratches and a slight puff of the skin in the lumbar region, between the ribs and the hip bone, about two inches to the right of the spine. He examined him a day or two later, and these scratches and this puff were entirely gone, and he was in a normal condition, so far as the doctor could see. Without intimating what the rule would be in a case where a motion is squarely made

for an order compelling the plaintiff to submit to an examination, and where it appears that such an examination might result in some evidence beneficial to the moving party, we must hold that it appears affirmatively here that the appellant could not have suffered any injury from the action of the court in refusing to order any further examination or inspection of plaintiff's body.

2. There is some substantial evidence tending to show that plaintiff's injuries were not slight, but severe, and of a permanent nature, and this evidence prevents us from saying that as a matter of law the verdict for \$6,000 is excessive.

3. The rule that an injury to a passenger in a railroad collision is presumed in the first instance to be the result of the carrier's negligence is well established in this state. It is equally well established that, to rebut the presumption of negligence arising from a collision, the defendant must affirmatively show, where a passenger is plaintiff, that the collision was the result of inevitable casualty, or of some cause which human care and foresight could not prevent, and that the law holds the carrier responsible in such cases for the slightest negligence. The instructions complained of by appellant involve the foregoing principles, and two of them are copied from the case of *Mitchell v. Railroad Co.*, 87 Cal. 62, 25 Pac. 245, 11 L. R. A. 130, in which the court says: "We have carefully examined the instructions of the court to the jury, and find no error in any of them." The other instruction complained of is copied from the language of the opinion in *Bush v. Barnett*, 96 Cal. at page 204, 31 Pac. 2. This latter case has since been cited in an opinion of the court in bank in *McCurrie v. Southern Pac. Co.*, 122 Cal. 558, 55 Pac. 324, and in the very recent case of *Bosqui v. Railroad Co.*, 131 Cal. 390, 63 Pac. 682; and it must now be regarded as the settled rule in this state that (in the language of the instruction), "the presumption that the injury was caused by the negligence of the carrier, which is raised upon the proof by the plaintiff that he was injured while being carried as a passenger, is itself a fact which the jury must consider in determining its verdict, and which, in the absence of any other evidence in reference to the negligence, necessitates a verdict in favor of the plaintiff."

The judgment and order appealed from are affirmed.

CHICAGO, B. & O. R. CO. v. WINFREY.

(*Supreme Court of Nebraska, Jan. 8, 1903.*)

[93 N. W. Rep. 526]

Appeal—Review.

The finding of a jury on a disputed question of fact, when supported by sufficient competent evidence will not be disturbed by a reviewing court, even though, from an examination of the record, the evidence seems to preponderate to the contrary.

Chicago, etc., R. Co. *v.* Winfrey**Injury to Passenger—Liability—Defenses.**

It is the settled law of this state that when, in the operation of a train carrying passengers, an injury results to one of them, the imputation of negligence arises, and the liability to respond in damages becomes fixed, unless it is made to appear that the injury arose from the criminal negligence of the passenger, or was the result of the violation of some express rule or regulation of the carrier, actually brought to the notice of the party injured.

Same—Defenses—Question for Jury.

Ordinarily the existence of negligence such as will justify or defeat a right of recovery for damages for an injury received by a passenger while being transported by a railway company is for the jury to determine as it determines other questions of fact.

Contributory Negligence—Question for Jury.

Where, upon an issue of fact raised by a plea of contributory negligence, the testimony is conflicting, or where the evidence, as a whole, is of such a character as that reasonable minds might fairly draw different conclusions therefrom, it is for the jury, and not the court, to determine the question of contributory negligence.

Negligence—When Question of Law.

It is only where the facts are not in controversy, or the evidence is of such a character as but one rational inference can be drawn therefrom, that the court is warranted in determining the question of negligence as a matter of law.

Passengers—Gross Negligence—Alighting from Moving Train.*

It is not necessarily gross negligence in every case for a passenger to attempt to leave a train, even though at the time it be in motion.

Same—Contributory Negligence—Statute.

Contributory negligence on the part of a passenger which will avoid a recovery must be an act committed under such circumstances as to render it obviously and necessarily perilous, and to show a willful disregard of the danger incurred thereby.

Same—Same—Alighting from Moving Train.

Plaintiff was a passenger on defendant company's train. When she had reached her destination, and while attempting to leave the car in which she was riding, and before she had reached the door, the train began to move; and she was compelled to choose instantly, and without time for reflection, as to her course of action, and continued the act of alighting from the train, and in doing so was injured thereby: *held*, that such action would not of itself necessarily bar a recovery, and that the question of contributory negligence was properly submitted to the jury, and its determination thereof was final.

Same—Same—Criminal Negligence—Statute.

"Criminal negligence," as used in the statute, which will defeat a recovery for an injury received by a passenger is defined to mean gross negligence, such as amounts to a reckless disregard of one's own safety, and a willful indifference to the consequence liable to follow. *Chicago, B. & Q. R. Co. v. Porter*, 56 N. W. 808, 38 Neb. 226.

Sufficiency of Evidence.

Evidence examined, and *held* sufficient to support the verdict of the jury.

Instructions.

Certain instructions complained of, given to the jury, examined, and *held* not to be prejudicially erroneous.

(Syllabus by the Court.)

Error to district court, Nemaha county; Stull, Judge.

Action by Lucie M. Winfrey against the Chicago, Burling-

*See generally, foot-note appended to *La Pointe v. Boston & M. R. R.* (Mass.), 5 R. R. R. 464, 28 Am. & Eng. R. Cas., N. S., 464.

Chicago, etc., R. Co. v. Winfrey

ton & Quincy Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

J. W. Deweese, F. E. Bishop, and B. Frank Neal, for plaintiff in error.

H. A. Lambert, E. B. Quackenbush, and W. C. Lambert, for defendant in error.

HOLCOMB, J. Plaintiff began an action and recovered a judgment for damages against the defendant railroad company because of alleged personal injuries sustained by her in alighting from one of its passenger cars, which had begun to move from the station before she alighted, where plaintiff left the train. The defendant company prosecutes error. It appears that the plaintiff purchased from the defendant company, through one of its agents at a station on its road in Iowa, a ticket to carry her to the station of Bracken, in Nemaha county, this state. When she asked for a ticket to Bracken, for some reason she was informed by the station agent in Iowa that he could not sell her a ticket to that station, but could to Auburn, which was the next stopping place immediately west of Bracken, and that, by informing the conductor of her desire to leave the train at Bracken, she would be allowed to get off at that place, as desired. Under this arrangement the ticket was purchased, and her baggage checked to the town of Auburn; and the plaintiff thereupon became a passenger having for her destination the station of Bracken, instead of Auburn, as her ticket and baggage check seemed to indicate. The pith of the controversy becomes apparent by reading the following excerpts from the pleadings. In the petition it is alleged "that, as soon as said train had stopped at said station of Bracken, this plaintiff gathered up her baggage and personal effects, and started to the front end of said car, to leave the same and alight therefrom; that plaintiff had reason to expect and did expect that said conductor would be at said point to aid her in alighting from said car; that at or about the time plaintiff reached the front end of said car, and but a few moments after the same had stopped, the said defendant, its agents, and employees, negligently and carelessly continued to move the same, and while said train was moving slowly, as plaintiff thought, and had moved but a short distance forward, and becoming suddenly convinced that said train had started on its journey to the next station, plaintiff passed down the steps of said car, and stepped therefrom to the ground; * * * that in alighting from said train as aforesaid, without any fault, carelessness, or negligence on her part, plaintiff was violently thrown to the ground, and then and there and thereby was seriously and permanently injured." To this it is answered by the defendant: "The defendant further alleges that while the plaintiff was riding as a passenger on the defendant's train, and before she reached her destination, and between the stations of Bracken and Auburn, in the state of Nebraska, and

Chicago, etc., R. Co. v. Winfrey

while the train was running, she, without any notice to the conductor or trainmen, went out of the coach in which she was riding, and jumped off on the ground, and that, in thus jumping off while the train was running, she was thrown off her feet, and fell onto the ground; but this defendant is not advised as to whether she was injured by said fall, or the extent of such injury, but alleges the fact to be that whatever injuries she sustained, if any, the same were sustained and caused by her own willful misconduct and carelessness, and without any fault or negligence on the part of this defendant." It is disclosed by the evidence that between the starting point and the destination of the plaintiff there were two conductors in charge of the train on which plaintiff was riding as a passenger, a change having taken place at Nebraska City. It further appears that the plaintiff informed the conductor to whom she first presented her ticket of her arrangement with the station agent at the time of its purchase, and of her destination being Bracken, regarding which there is no controversy in the evidence. There is, however, a very sharp and irreconcilable conflict as to whether she informed the Nebraska conductor, who was in charge of the train when it reached the station where she designed to leave it, of the circumstances relating to the purchase of her ticket, and of her wish to leave the train at the point mentioned. Regarding this phase of the case, the court instructed the jury unqualifiedly that, before the plaintiff could recover, they must find from the evidence "that between Nebraska City and Bracken, on the train in question, the plaintiff notified conductor in charge of the train that she was riding on that she desired to leave the train at Bracken." The evidence, to us, seems to preponderate in favor of the company's contention, to the effect that the conductor had no knowledge or notice that the defendant was a passenger, otherwise than as her ticket indicated, whose destination was Auburn. There was, however, positive and direct testimony that she did notify the conductor last in charge of the train of her desire to get off at Bracken; and the jury having resolved the disputed point in her favor, and they being the judges of the credibility of the several witnesses, and of the weight to be attached to the testimony of each and all of them, it is not the province of the court to overturn the jury's finding in this respect, when supported by sufficient competent evidence, as we think it was in the present instance. Assuming, then, as we must do under the jury's finding on the court's instruction, that the conductor was notified of the plaintiff's desire to leave the train at the station of Bracken, and that in attempting to leave it at that place she received injuries in alighting therefrom, by its being moved forward before she had safely stepped off the car in which she was riding, we pass to the consideration of some of the other alleged errors complained of in brief of counsel for defendant company.

Counsel say: "The principal error relied upon is the fact, disclosed by the petition and the evidence, that the plaintiff below voluntarily jumped off defendant's train while it was in motion." The facts, as gleaned from the record, prove, or tend to prove, that as the train neared the station the plaintiff gathered her baggage, and placed it in the aisle of the car, by the seat in which she was sitting. Whether she was acquainted with the country, and knew that she was nearing the station, or whether she was advised of that fact by a traveling companion who sat in the seat with her, it is manifest that she was cognizant of the fact that she was nearing the station, and made preparations to leave the car accordingly. The conductor passed through the car, called out the station, and, as the train slowed up or stopped at the station, the plaintiff gathered up her baggage, and started to leave the car through the front door. Before or about the time she reached the door, the train began to move, and she passed on out, and down the steps, attended by a gentleman passenger, who apparently was endeavoring to assist her to alight. She stepped from the platform and steps of the car, and in doing so was thrown on the ground, and received the injuries of which she complains. The conductor had left the train, stepped on the depot platform, and re-entered from the rear platform of the car. Upon entering, he was advised that a lady was endeavoring to get off in front; but, before he could reach the front end of the car, the plaintiff had alighted in the manner stated. There is some conflict in the evidence as to whether the plaintiff left the train promptly when it stopped, but an examination of the evidence satisfies us that her movements justify a finding that she acted with all the promptness in leaving the car that could be asked for by the most exacting. In fact, some of the evidence tends to show that she started to leave the car before it came to a full stop. Other evidence fully warrants the inference that at least immediately upon the stopping of the train, and without any appreciable delay, she started to leave the car. While there is some evidence that after the train stopped, and about the time it began to move on to the next station, plaintiff made a remark indicating that she had forgotten that that was the place where she had intended to get off, and then attempted to leave the car, other evidence of prompt action on her part is in the record, sufficient to overcome the testimony of this character. We are satisfied that an examination of the whole of the evidence on the subject warrants the inference that the plaintiff, immediately upon the stopping of the train, and with all reasonable dispatch, started to leave the car when she had reached her destination, of which she was fully cognizant. Further than that, it is a reasonable inference from the evidence that she started to leave the car before the train came to a standstill.

Another important item of evidence having a material bear-

Chicago, etc., R. Co. v. Winfrey

ing on the case is with respect to the period of time the train was stopped at the station. Some of the testimony indicates that it did not come to a complete stop. Some of the witnesses testify that it stopped but for a few seconds. The testimony of others varies in time from 8 or 10 to 30 seconds. It is evident that the stop was very brief, and, under the theory of the defendant, we can readily believe that in view of the fact that the place was a small way station, with no passengers to get off or on, and probably but little, if any, mail or baggage matter, it was regarded as unnecessary by those in charge of the train to more than merely stop at the station, and to scarcely allow the train to come to a standstill before starting onward again. The very brief period the train stopped, if it stopped at all, manifestly was the real cause of the injury. The train scarcely stopped at the station, and the plaintiff, however active and prompt, was unable to alight before the train continued on its journey.

Should the defendant be held liable to respond in damages under the facts as narrated in the resume of the testimony just given? It is manifest the plaintiff knew that the train was in motion when she attempted to step from the car, and must have, in the nature of things, known that some risk attended her action in thus alighting. It is, we think, equally clear that she relied upon the train being stopped for sufficient time to allow her to alight, and was, when the train started on, compelled to choose, on the spur of the moment, between carrying out her previously formed intention to leave the train, under the belief that the opportunity would be afforded her to do so, and of remaining on the car until the train could be stopped, because she had failed to get off, or remain thereon until she had reached the next station, and thus be carried that distance beyond her destination. It will not, we apprehend, be seriously controverted that it was the duty of the defendant company, through its servants in charge of the train, as a common carrier, to afford to its passengers at each station, when their destination is reached, and they desire to leave the train, a reasonable time to do so, and to afford a reasonable opportunity to alight therefrom before the train is moved on to its next stopping place, and that the failure to do so, from which an injury resulted, would constitute negligence, for which, and the damages resulting therefrom, the carrier would be held responsible. The rule of law is practically conceded by the defendant company in the two following instructions to the jury, requested by it to be given at the trial, which was done. As the instructions present clearly the theory of the defense, we incorporate them here in full. They are as follows: "(4) If the jury find from the evidence that the plaintiff did notify the conductor who had charge of the train running through the station of Bracken that she wanted to get off at that station, then you are instructed that it was the duty of the conductor to stop the train at said

station the usual and reasonable length of time to allow the plaintiff to alight in safety from said train, but that there was no legal obligation or duty on his part that he should personally take hold of the plaintiff to assist her in alighting from the train. If the plaintiff intended to stop at Bracken, it was her duty when the train stopped to promptly leave the car, and step out on the platform of said station while the train was standing at said station.” “(7) If the jury believed from the evidence that although the plaintiff held, and presented to the conductor having charge of the train running through the stations of Bracken and Auburn, a ticket to the station of Auburn, and you find from the evidence that she notified him that her destination was the station of Bracken, and that she wanted to get off there, and you are convinced that that is true, then it was the duty of the conductor to stop said train at said station of Bracken, as heretofore explained to you, so as to allow the plaintiff to safely alight therefrom. But you are further instructed that if the conductor did not do his duty in that respect, and the plaintiff did not have sufficient time to alight from said train at the said station of Bracken, this failure of duty on the part of conductor would not, of itself, justify the plaintiff in jumping from the moving train.”

But it is insisted by the defendant that the proximate cause of the injury was not, in fact, the starting of the train as it left the station, but the act of the plaintiff in stepping from the car after it had commenced to move, and while in motion, which act constituted such gross negligence on her part as to preclude a recovery for the damage resulting therefrom. To draw the distinction a little clearer, if it may be done, the contention is, as we understand counsel, that if the plaintiff, while in the act of stepping from the car platform to the station platform, had been thrown down and injured because the train began to move before she had alighted therefrom, and without a reasonable opportunity being given therefor, this would constitute negligence for which an action would lie; but if the train was in motion at the time she attempted to leave the car, and her effort was to step from the platform of the car while the train was in motion, she being aware of that fact, then the proximate cause of the injury was the act of stepping from a moving train, which in itself would constitute contributory negligence of a gross or criminal character, under our statute, and thereby absolve the carrier from liability. The statute referred to (section 3, art. 1, c. 72, Comp. St.) has been frequently considered and construed by this court. It is a well-settled rule that when, in the operation of a train carrying passengers, an injury results to one of them, the imputation of negligence arises, and the liability to respond in damages becomes fixed, unless it is made to appear that the injury arose from the criminal negligence of the passenger, or was the result of the violation of some express rule or regulation of the carrier, actually brought to the

Chicago, etc., R. Co. v. Winfrey

notice of the party injured. Union P. R. R. Co. v. Porter, 38 Neb. 226, 56 N. W. 808; C., R. I. & P. Ry. Co. v. Zernecke, 59 Neb. 689, 82 N. W. 26, 55 L. R. A. 610; C., B. & Q. R. Co. v. Wolfe, 61 Neb. 502, 86 N. W. 441.

In Railroad Co. v. Porter, supra, it is said: "The existence of negligence, as justifying or defeating a right of recovery, is for the jury to determine as it determines any other question of fact. If the jury find negligence, as against the defendant, such as to justify a recovery, or find contributory negligence, such that a recovery cannot be had, such finding must stand, unless it has no support in the evidence considered, just as must any other essential finding of fact. It is useless, therefore, to urge that the presiding judge is the proper trier of questions of this kind, and that as to such he should find the presence or absence of negligence upon the weight of the testimony, or instruct the jury to find its presence or absence according as a given fact or group of facts shall be proved or disproved. The court can but state to the jury the law applicable to the facts in respect to which evidence has been introduced. It thereupon remains with the jury to determine the existence of the essential facts. If there is no evidence such as the jury should act upon in its province, the court should instruct accordingly, or set aside the verdict as unsupported by the proofs." Whether the plaintiff was guilty of negligence of a gross and willful character, within the meaning of the statute, was a question of fact, to be determined by the jury from the evidence. Where the testimony is conflicting, as it is in the case at bar, or where, from a conceded state of facts, the evidence is of such a character as that reasonable minds might fairly draw different conclusions therefrom, it is for the jury, and not the court, to determine the question. It is only where the facts are not in controversy, or the evidence is of such a character as but one rational inference can be drawn therefrom, that the court is warranted in determining the question of negligence as a matter of law. In the case at bar we entertain no doubt but that the question of contributory negligence, such as would avoid a recovery against the defendant, was a question of fact, to be determined by the jury under proper instructions from the court. It is not necessarily gross negligence in every case for a passenger to attempt to leave a train, even though at the time it be in motion. This is the settled doctrine in this jurisdiction, as announced by the prior decisions of the court. Whether or not such an act constituted gross negligence, such as would prevent a recovery for damages sustained, must depend upon the facts and circumstances surrounding each individual transaction. If the act be one showing a willful disregard of one's own safety, and a deliberate assumption of the risk and danger consequent thereon, unattended by circumstances calculated to create excitement or alarm, and regarding which every one of common sense must know is

Chicago, etc., R. Co. v. Winfrey

fraught with danger, then no recovery can be had. C., B. & Q. R. Co. v. Martelle (Neb.) 91 N. W. 364. It is said in Chicago, B. & Q. v. Landauer, 36 Neb. 642, 54 N. W. 976: "Where it is impossible to infer negligence from the established facts without reasoning irrationally and contrary to common sense and the experience of average men, it is not a question for the jury, and the court should direct a verdict." In the same case it is further held that contributory negligence on the part of a passenger which will avoid a recovery must be an act committed under such circumstances as to render it obviously and necessarily perilous, and to show a willful disregard of the danger incurred thereby.

The plaintiff in the case at bar was proceeding to alight from the train, when it had stopped at her destination, under the belief that she would be afforded a reasonable opportunity to accomplish the act in safety. While engaged in the performance of the act, by the starting of the train, or the failure to allow her a reasonable time to alight, which can be regarded only a wrongful and negligent act of the carrier, she was placed in a position where she had to choose instantly, and without time for reflection, between two lines of action,—one a continuation of the act of alighting, and the other a retracing of her steps, and remaining on the train till the next station was reached. Acting under such circumstances, and compelled to so act because of the negligent act of the carrier, she left the train, and in doing so received the injury for which she seeks a recovery in damages. Such action would not, in our judgment, amount to gross negligence, such as would preclude a recovery for the damages received as a result thereof. In any view of the subject, under the controverted facts in the case, the question was one for the jury, and its determination thereof, when properly submitted, becomes final. The case at bar is somewhat analogous to that of C., B. & Q. v. Hyatt, 48 Neb. 161, 67 N. W. 8, where a verdict for the plaintiff was upheld under facts less favorable to a right of recovery than those disclosed by the record herein. It appears from the opinion in that case that the passenger having arrived at her destination, and the train making its usual stop, the plaintiff immediately went out upon the platform of the car in which she was riding, for the purpose of getting off; and finding that the car had not reached the station platform, and the ground being covered with water, which, with the height of the car step, prevented her from there alighting, she then, at the suggestion of a passenger, passed through the coach immediately in front, in order to reach the platform, and by the time she had reached the center of it she ascertained the train was moving slowly toward the next station, yet she hurried through the car, and, on reaching the front platform thereof, jumped off, receiving an injury, for which a recovery in damages was sustained. The case cited but followed and adhered to the rule announced in Railroad Co. v. Porter, *supra*. In the Hyatt Case, "criminal

Atlanta Ry. Co. v. Randall

negligence," as used in the statute, was defined to mean gross negligence, such as amounts to reckless disregard of one's own safety, and a willful indifference to the consequences liable to follow. To the same effect are *Omaha & R. V. R. Co. v. Chollette*, 33 Neb. 143, 49 N. W. 1114; *M. P. R. Co. v. Baier*, 37 Neb. 236, 55 N. W. 913; *Chicago, B. & Q. R. Co. v. Hague*, 48 Neb. 97, 66 N. W. 1000.

From what has been said, we reach the conclusion that whether or not plaintiff was guilty of gross negligence in attempting to alight from the train under the circumstances was a question of fact, to be determined by the jury, and that their verdict thereon cannot be controlled by the court, and the question determined as one of law. We are also of the opinion that the evidence regarding the issue of fact as to the alleged contributory negligence on the part of the plaintiff is sufficient to sustain the finding of the jury as evidence by its verdict, and that it cannot rightfully be disturbed on the ground that her action and conduct was gross negligence, *per se*.

Some complaint is made as to some of the instructions of the court given to the jury. Upon the whole, we are constrained to believe that the instructions were as favorable to the defendant as could rightfully be asked for. The case seems to have been submitted to the jury very largely on the theory of the defendant as to the law applicable to the evidence. When all the instructions are considered and construed together, as should be done, they appear to have fairly submitted the issues of fact to the jury for its determination. An instruction given by the court, and which is excepted to, stated the law correctly, as an abstract proposition, and appears to have been copied from the syllabus in *C., B. & Q. R. Co. v. Landauer*, *supra*. The instruction was not entirely applicable, under the evidence, but it could not, nor did it, we apprehend, mislead the jury, or operate to the prejudice of the defendant.

An examination of the entire record, having in mind the errors assigned for reversal of the judgment, leads to the conclusion that no prejudicial error is apparent, and that the judgment should be affirmed, which is accordingly done. Affirmed.

ATLANTA RY. CO. v. RANDALL.

(*Supreme Court of Georgia, Feb. 10, 1903.*)

[43 S. E. Rep. 412.]

Street Railway—Injury to Passengers.*

It is the duty of a street railway company to exercise extraordinary

*As to the degree of care required of carriers of passengers, see monograph appended to *West Chicago St. R. Co. v. Tuerk* (Ill.), 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1.

As to the care required in receiving and discharging passengers, see monograph appended to *Phillips v. St. Charles St. R. Co.* (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

Atlanta Ry. Co. v. Randall

care for the safety of its passengers. As an incident to this obligation, where, in compliance with a city ordinance, street cars are brought to a full stop just before reaching a crossing of tracks, and it is customary on such occasions to stop long enough for passengers to get on and off without giving any signal therefor, it is the duty of the proper servant of the company to exercise extraordinary diligence, before signaling the car ahead, to ascertain if any passengers desire to alight from the car, and, if so to give such passengers a reasonable opportunity to alight in safety.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by I. J. Randall against the Atlanta Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Payne & Tye, for plaintiff in error.

Westmoreland Bros., for defendant in error.

CANDLER, J. Mrs. Randall obtained a verdict against the street railroad company for damages growing out of personal injuries received by being thrown from one of its cars as she was in the act of alighting therefrom. The company made a motion for a new trial, which was overruled, and it excepted. In our opinion, the point dealt with in the head-note is the only one raised by the motion which it is necessary to discuss in this opinion. It seems that the plaintiff was a passenger on one of the defendant's cars, which she had boarded to go to her home. The car was very much crowded, and passengers were standing in the aisle and on the rear platform. At the corner where she wished to alight the track of the line on which she was riding crossed another track, and by municipal ordinance of the city of Atlanta, as well as the rules of the company, motormen were required to bring their cars to a full stop before crossing the track of another line. The defendant's conductor testified: "When this car stopped at this crossing, it was a regular stop. People get on and off without giving a signal. Don't give any signal to stop there, because you have to stop anyhow." As the car neared the plaintiff's corner, the conductor was in another part of the car. The plaintiff looked for him, but could not see him, and requested another passenger to ring the bell to stop the car. As to what followed the testimony of the various witnesses is conflicting, but there was evidence to support a finding that the conductor did not make any effort to ascertain whether or not any passengers wished to leave the car at that corner, and that, after stopping the car, the motorman did not wait a sufficiently long time for the plaintiff to alight in safety, but moved his car suddenly forward, throwing her to the ground as she was in the act of getting off, and inflicting the injuries on account of which she sued.

Among the assignments of error in the motion for a new trial is one to the effect that the following portion of the charge of the court was erroneous: "If you believe that this was a crossing of tracks, and that under the practice and custom

Atlanta Ry. Co. v. Randall

of the movement of those cars that cars stop at crossings, and while being stopped passengers get on and off without signal, that it was the duty of the conductor in charge of the car to ascertain for himself, when the car stopped, whether passengers wanted to get off or not, and if he could, by extraordinary care, have discovered who wanted to get off,—whether they wanted to get off,—that would be equivalent, so far as the discharge of his duty was concerned, to actual knowledge on the subject.” We see nothing objectionable in the charge which we have quoted. That it is the duty of a street railroad company to exercise extraordinary diligence for the safety of its passengers is too well settled to need argument; and incident to this obligation is the duty, when cars are stopped for the purpose of discharging or taking on passengers, to give sufficient time for such passengers to get on or off in safety. It is true that the conductor cannot be expected to wait indefinitely when he does not know whether or not there is any one desirous of getting on or off the car; but it is also undeniably true that the duty rests upon him to take what means are in his power to acquire that information for himself; and where the ascertaining of that fact involves the safety of the passengers on his car the proper measure of diligence required of him under the law to find out the wishes of his passengers is the one laid down by the judge below in his charge. Especially is this so at places where passengers customarily get on and off cars without any signal, either from themselves to the conductor or from the conductor to the motorman,—which the evidence shows was the case at the place where the plaintiff was injured. This case is easily distinguishable from that of *Central of Georgia R. Co. v. Dorsey*, 106 Ga. 826, 32 S. E. 873, relied upon by counsel for the plaintiff in error, where it was held that, while it is the duty of a conductor to ascertain, before reaching a flag station, whether or not there is on board a passenger ticketed thereto, there is a corresponding duty upon the passenger who has purchased a ticket to such station, upon discovering that he has been overlooked by the conductor, to call the latter’s attention to the fact, and surrender his ticket, in order that the conductor may know the passenger’s destination, and have the train stopped for him to alight; and that the failure of a passenger to observe this duty is material in determining whether or not, in a given instance, carrying the passenger beyond his station was wholly attributable to the negligence of the railroad company, or whether the passenger, by exercising the proper diligence, could have avoided being carried beyond such station. That was a suit against a railroad company for carrying a female passenger beyond her station, and had in it no element of damage to the person growing out of the negligent failure to give sufficient time for the passenger to alight at a station at which it had stopped. The question there dealt with was as to the diligence or negligence of the

Kansas City, etc., R. Co. v. Little

conductor in finding out if a passenger desires to alight at a place where it is not customary to stop at all, with reference to the contract of carriage. Here it is as to the diligence of the conductor in ascertaining if the passenger wishes to alight at a place where it is required by law to stop, with reference not so much to the contract of carriage as to the duty to exercise extraordinary diligence to provide for the safety of the passenger.

As indicated in the outset, the other grounds of the motion disclose no reason why a new trial should be granted. There was no error in any of the charges complained of. The evidence, while conflicting, fully warranted the verdict, and the judgment of the court below will therefore be affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

KANSAS CITY, FT. S & M. R. CO. v. LITTLE.

(Supreme Court of Kansas, March 7, 1903.)

[71 Pac. Rep. 820.]

Passenger's Right to Rely upon Ticket Agent.*

A passenger going upon a railroad train has a right to rely upon the representations of a local ticket agent, and upon those of the railroad company's agent in charge thereof, that such train will stop at a certain point to which he has purchased a ticket and desires to ride. And the company is liable to such passenger in damages if he is compelled to leave the train before arriving at his destination, because by the general rules of the company, unknown to the passenger, such train is not scheduled to stop at such station.

Punitive Damages.†

Exemplary or punitive damages may be awarded where a wrong has in it the element of negligence which is gross or wanton, or willfully oppressive.

Damages—Humiliation.

An indignity need not be done to one in the presence of a number of people, in order to entitle the person wronged to recover damages for the humiliation and disgrace suffered.

(Syllabus by the Court.)

In Banc. Error from District Court, Johnson County; John T. Burris, Judge.

Action by John T. Little against the Kansas City, Fort Scott & Memphis Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Defendant in error, desiring to go from Olathe to Hillsdale, a station about 20 miles south on the railroad of plaintiff in error, inquired of the ticket agent in charge of its station at Olathe at what time he could obtain a train, and was told that there would be a freight train leaving that point at 6:35 p. m. This was train No. 27. Shortly after 6 o'clock, he went to the

*See generally, *Gulf, C. & S. F. Ry. Co. v. Moorman* (Tex.), 11 Am. & Eng. R. Cas., N. S., 157, and note, 162 et seq.

†See generally, foot-note appended to *Lexington Ry. Co. v. Cozine* (Ky.), 23 Am. & Eng. R. Cas., N. S., 624.

Kansas City, etc., R. Co. v. Little

ticket office at Olathe, purchased his ticket, and, as a train pulled into the station, the agent said to Mr. Little, "The train is now coming." He proceeded to board the caboose, and, as he did so, told the man in charge that he wanted to go to Hillsdale, and this man, who afterwards turned out to be the rear brakeman, said, "That is all right; this train takes the place of 27 to-night, and carries passengers." Thereupon Mr. Little took his seat in the caboose, and, after the train had started, the brakeman took up his ticket, as also that of another passenger, who was his companion. The train stopped at Ocheltree, the first station, and also at Springhill, the second station. Upon his arrival at Springhill, the conductor came into the car for the first time, and inquired of Mr. Little in a boisterous manner, "What are you doing on this car? You can't ride on this car. This car doesn't carry passengers." After being ordered off the car, he obeyed. This was about 9 o'clock at night, at a point about one-fourth of a mile from the station, on a steep embankment. After he had left the car and gone some distance, the brakeman came running after him and tendered back his ticket, which he refused to accept. Upon the trial, the jury returned a general verdict in behalf of the plaintiff for \$225.58, and at the same time returned their special findings, which are as follows: "Special Questions Asked by Plaintiff. (1) Did plaintiff, about 11 a. m., October 6, 1901, call up the ticket agent, Ferguson, at the company depot, and make inquiry about going to Hillsdale that evening, and was he informed that, if he would call at the office about 6 o'clock p. m., he could go on a freight train to Hillsdale? Answer. Yes. (2) Did plaintiff go to the depot about 6 o'clock, and did the ticket agent sell him a ticket to ride on a freight train to Hillsdale? Answer. Yes. (3) Did the ticket agent, after he had sold the ticket to plaintiff, inform him that the train was then coming? Answer. Yes. (4) What was the price of the ticket? Answer. 58 cents. (5) Did a freight train about 6:35 arrive at the depot at Olathe? Answer. Yes. (6) Did plaintiff inquire of an employee of the company, who just got off the caboose, if that freight train would carry him to Hillsdale? Answer. Yes. (7) Did the person inquired of say to plaintiff that this train takes the place of number 27 and carries passengers, and that he could go to Hillsdale? Answer. Yes. (26) When plaintiff approached the caboose, was there an employee of the company standing on the rear platform, who afterwards took up the plaintiff's ticket? Answer. Yes. (27) Did plaintiff state to this person that he wanted to go to Hillsdale, and did such person then inform plaintiff that he could go, and that this train takes the place of number 27, and that number 27 did not go to-night? Answer. Yes. (8) Did the person who informed plaintiff that he could ride to Hillsdale take up his ticket after traveling about eight miles? Answer. Yes. (9) Did the person who took up the plaintiff's ticket appear to be acting as conductor? Answer. Yes. (10) From the time

Kansas City, etc., R. Co. v. Little

that plaintiff entered the car until his ticket had been taken up, was there any other person in this car except passengers? Answer. No. (11) Did the person who took up plaintiff's ticket take up the ticket of any other passenger, and, if so, what was the passenger's name? Answer. Yes; Adams. (12) Did the plaintiff, while on the train, act in a quiet and peaceable manner? Answer. Yes. (13) Did the train stop at Ocheltree, Kan., and did Adams get off? Answer. Yes. (14) Did the train then move on to Springhill, and then stop? Answer. Yes. (15) While the train was at rest at Springhill, did an officer or employee of the company approach the plaintiff, and in a boisterous manner ask the plaintiff, 'What are you doing on this car?' Answer. Yes. (16) Did plaintiff inform said person that he had purchased a ticket from the agent at Olathe, and that the agent informed him that he could ride on that train? Answer. Yes. (17) Did the said person then say, 'This train doesn't carry passengers, and you must get off'? Answer. Yes. (18) Did not plaintiff then in a quiet manner insist on going to Hillsdale, and did not the person say, 'I told you to get off this car'? Answer. Yes. (19) Did plaintiff then get off the car and walk to Springhill? Answer. Yes. (20) While plaintiff was then walking along the side of the car, did the person who took up the ticket come up to him, with his lantern, and request the plaintiff to take back his ticket and tear it up? Answer. Yes. (21) Did the plaintiff take back his ticket? Answer. No. (22) What hour of the night was it when plaintiff got off the train? Answer. About 9 o'clock p. m. (23) What was the distance from where plaintiff got off the car to Hillsdale? Answer. About eight miles. (24) Where did plaintiff stay that night? Answer. Springhill. (25) Was the defendant, through its agents and servants, guilty of gross negligence toward the plaintiff? Answer. Yes." "Special Questions Asked by Defendant. (1) In assessing plaintiff's damages, how much, if anything, do you allow plaintiff for expenses? Answer. 58 cents. (2) How much do you allow plaintiff, if anything, for loss of time? Answer. Nothing. (3) How much do you allow plaintiff, if anything, for exemplary or punitive damages? Answer. \$175. (4) How much, if anything, do you allow plaintiff for humiliation or disgrace? Answer. \$50." The plaintiff in error claims that the train which plaintiff boarded was not No. 27, which carried passengers, but No. 35, upon which passengers were not allowed to ride, and that the conductor could not stop the train at Hillsdale without disobeying his orders. Judgment was rendered upon the general verdict, and a motion for a new trial was overruled.

Pratt, Dana & Black, for plaintiff in error.

J. P. Hindman and Parker & Hamilton, for defendant in error.

CUNNINGHAM, J. (after stating the facts). It is claimed that the railroad company is not liable for any sum

Kansas City, etc., R. Co. v. Little

whatever, because the plaintiff was riding upon a train which, under the rules of the company, was not permitted to stop at Hillsdale, or even carry passengers at all, and that the conductor was required to obey the regulations of the company in running its trains; that the company has the right to make reasonable rules for the running of its trains, and the carrying of passengers; that it is not bound to carry passengers on all trains, or to stop at all stations, and that the traveling public must conform to these rules. These claims are without fault, but do not fit the facts of this case. It was shown in the evidence that train No. 27, due in Olathe at 6:35 p. m., regularly carried passengers, and it appears from finding 5 that this train on which plaintiff took passage did actually arrive there at about that time. The ticket agent, who was the company's representative at Olathe at the time for this purpose, told the plaintiff, knowing where he was going, that the train was coming. Acting upon this suggestion, he went to the caboose, and, before getting on, inquired of the company's employee, who appeared to be in charge of it, and who afterwards took up plaintiff's ticket, if "that freight train would carry him to Hillsdale," and was informed that it would; that it took the place of No. 27, which was the one that ordinarily carried passengers, and he could go to Hillsdale on it. If all of these representations were untrue, and the train which plaintiff boarded was not, under the rules of the company, scheduled to stop at Hillsdale, there is nothing to show that he had knowledge of such fact. He made all reasonable inquiry, of those whom the company had put there to furnish such information, to ascertain if he might rightfully enter the train, and acted upon the information thus received. He had a right to rely upon all of these representations and assurances. They were made by the agents of the company within the scope of their agency, in the execution of their duties, and bound the company. Acting upon them, the plaintiff had a right to go upon that train and be carried to the specified destination. To be ejected from the train before this was accomplished was a wrong for which a recovery might be had.

This case is clearly distinguishable from *A. T. & S. F. Rly. Co. v. Gants*, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780, relied upon by the plaintiff in error, where it was held probable that the plaintiff did not take "the next train," as directed by the local agent, or, if he did, opportunity was given him to ascertain the fact that the train upon which he had taken passage did not stop at the station to which he had purchased his ticket, if he had paid attention to the warning of the brakeman to that effect. More than this, it was there held, page 621, 38 Kan., and page 61, 17 Pac., 5 Am. St. Rep. 780: "If a passenger has suffered in his business or been put to expense by the delay or refusal of the railroad company to carry him as promised by its ticket agent, he would be entitled to ample damages therefor."

Haselton v. Portsmouth, K. & Y. St. Ry

It is contended, however, that under the circumstances no recovery of exemplary or punitive damages should be allowed. This court has, in *S. K. Rly. Co. v. Rice*, 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766, at page 402, 38 Kan., and page 819, 16 Pac., 5 Am. St. Rep. 766, laid down the rule relating to damages for the wrongful expulsion of a passenger from a train as follows: "If the expulsion be malicious, or through negligence which is gross and wanton, then exemplary damages may be awarded." In *Cady v. Case*, 45 Kan. 732, 26 Pac. 448, it is said, page 734, 45 Kan., and page 448, 26 Pac.: "Whenever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law allows the jury to give what is called exemplary or vindictive damages." This case collects and cites a large number of cases decided by this court to the same point. The court instructed the jury that before they could allow exemplary damages they must find in the transaction complained of either malice, wantonness, willful oppression, or violence. The jury must, therefore, have found some one or more of these elements present, and we think the evidence warranted them in so doing. Besides this, the jury specifically find that the acts of the agents of the company were such as would make it "guilty of gross negligence toward the plaintiff." The case was therefore, under the findings and authorities, one for vindictive damages.

It is further insisted that damages for humiliation or disgrace should not have been allowed, because, at the time of the expulsion, no one was present besides the conductor, brakeman, and plaintiff, and, the expulsion being thus private, there was no indignity, insult, or injury to plaintiff's feelings, by being publicly expelled. We are not disposed to go into a consideration of how much of publicity must accompany a wrong in order to humiliate or disgrace. A rule could hardly be formulated. What would humiliate one would not affect another. In this case, the plaintiff was on his way to Hillsdale to fill an appointment to make a political speech. He was, of necessity, compelled to notify the public why he was unable to keep the appointment. It is a matter of common knowledge that he has occupied the office of attorney general of this state. To have it go out that he had been expelled from a railroad train was certainly well calculated to humiliate and disgrace him, and was such an injury for which damages might be awarded.

We find no error in the judgment; hence must affirm the same. All the Justices concurring.

HASELTON v. PORTSMOUTH, K. & Y. ST. RY.

(Supreme Court of New Hampshire, Merrimack, Dec. 18, 1902.)

[53 Atl. Rep. 1016.]

Street Railways—Adoption of Platform—Injury from Fall.

Where a person was injured by falling off a platform which was

Haselton v. Portsmouth, K. & Y. St. Ry

built by the side of a street railway, and used by it, and at which the company regularly stopped its cars to take on and discharge passengers, a finding that the company had adopted the platform, and invited the public to use it in getting on and off the cars, was justified.

Same—Same—Same—Duty to Keep in Safe Condition.*

Where a street railway company has adopted a platform, and invited the public to use it in getting on and off the cars, it is its duty to keep the platform in a reasonably safe condition for that purpose; and it is immaterial whether or not the platform was built by the company, or is in a public street.

Who Are Passengers.

Where a person, for the purpose of taking a street car, went to the platform at which the car stopped, and, after assisting his aged companion to a seat, walked along the platform to take the next seat, and fell off the unguarded end of the platform, which did not extend back to such seat, he was a passenger, and entitled to the care due to that relation, though he had not come in physical contact with the car.

Question for Jury.

The questions whether the platform was in a reasonably safe condition, and, if not, whether plaintiff was injured in consequence of his own negligence, were for the jury.

Exceptions from superior court.

Action by John B. Haselton against the Portsmouth, Kittery & York Street Railway. Verdict for plaintiff, and defendants bring exceptions. Exceptions overruled.

The defendants operate a street railway from Portsmouth to York Beach, Me. Along the beach there is a plank sidewalk, 5 feet in width, which is elevated above the ground from 6 to 20 inches, and is unrailed throughout its entire length. At a place called the "Willows" there is a sharp grade and curve in the railway. Just beyond the Willows, and at the end of the grade and curve, the company regularly stopped its cars to take on and discharge passengers; and at this point there is a platform which extends from the sidewalk toward the railway. The platform is about 20 inches wide and 22 feet long, and is not railed. It did not appear by whom the platform was constructed or maintained, but the evidence showed that it was used by the street railway. On the afternoon of July 24, 1899, the plaintiff, with others, was waiting at the platform for a car. When the car arrived, the plaintiff, who was accompanied by an aged friend, looked for seats; and, not finding any in the front of the car convenient to his purpose, he walked along the platform toward the rear end. The plaintiff did not observe that the car, which was 41 feet long, extended back about 19 feet beyond the end of the platform. After assisting his companion to a seat, the plaintiff walked further back, in order to take a seat behind him; and in so doing he stepped off the end of the platform, was thrown to the ground, and received the injuries complained of. The plaintiff knew there was no railing at any part of the sidewalk along the beach, and was acquainted with the situation

*As to the carrier's duties with respect to stations and stopping places, see monograph attached to *Muhlhouse v. Monongahela St. Ry. Co.* (Pa.), 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131.

Haselton v. Portsmouth, K. & Y. St. Ry

and elevation of the walk in a general way. He went over the walk and passed by the place of the accident on the day previous. The planks of the walk and the running-board of the car were not of the same color. The conductor made no announcement when the car stopped or afterward, and gave no warning to passengers. The defendants' cars stop at any point on signal, grades and curves excepted. At the close of the plaintiff's evidence the defendants moved for a nonsuit, and, at the close of all the evidence, that a verdict be directed in their favor. Both motions were denied, subject to exception. The defendants requested the following instructions, which were denied, subject to exception: "The plaintiff, not having come in physical contact with the car at the time he fell, was not a passenger, and the law is that the defendants were bound to use only ordinary care for his safety. If you find that the defendants did not construct the platform, and that it was a part of the highway, then, it being the place at which the plaintiff chose to wait for and board the car, the street railway company had a right to suppose he knew where he was, and the character of the place, and owed him no duty, except not to willfully or negligently do him some active injury. Hence, if you so find, your verdict should be for the defendants. If you find that the cars stopped at signal anywhere, except on the grade, and the plaintiff chose his own place to board the car, the company was not responsible for the condition of the place, if it was a part of the highway, and the plaintiff cannot recover."

Martin & Howe, for plaintiff.

Samuel W. Emery, for defendants.

REMICK, J. 1. The platform in question was "used by the street railway." There "the company regularly stopped its cars to take on and discharge passengers." The jury were warranted in finding, upon the evidence, that the defendants had adopted the platform, and invited the public to use it in getting on and off their cars. *Railroad Co. v. Trautwein*, 52 N. J. Law. 169, 175, 176, 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. Rep. 442; *Hulbert v. Railroad Co.*, 40 N. Y. 145, 146, 152, 153. Having adopted the platform, and invited the public to use it, it is too elementary to require discussion or citation of authority that they were bound to maintain it in a reasonably safe condition, having reference to the purposes for which they had adopted it, and the uses they had invited the public to make of it. Whether it was in a reasonably safe condition for such purposes and uses, and, if not, whether the plaintiff was injured in consequence, or as a result of his own negligence, were, upon the facts disclosed, questions for the jury. *Bass v. Street Railway*, 70 N. H. 170, 172, 173, 46 Atl. 1056. It follows that the defendants' motions for nonsuit and verdict were properly denied.

2. The requests for instructions were also properly denied.

Oliver v. Columbia, N. & L. R. Co

Physical contact with the car was not necessary to constitute the plaintiff a passenger, and entitle him to the care due to that relation. *Rogers v. Steamboat Co.*, 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491; *Allender v. Railroad Co.*, 37 Iowa, 264; *Smith v. Railway Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550; 4 Elliott, R. R. 2460; *Booth, St. Rys.* § 326; *Joyce, Elec. Law*, § 528. Nor, having adopted and used, and invited the public to use, the platform, as shown, was it important whether the company actually built it or not. No more was it material whether the platform was within or without the limits of the highway. *Tobin v. Railroad Co.*, 59 Me. 183, 8 Am. Rep. 415; *Skottowe v. Railway Co.*, 22 Or. 430, 30 Pac. 222, 16 L. R. A. 593, 598; *Hutch. Carr.* (2d Ed.) § 519.

Exceptions overruled. All concurred.

OLIVER *et al.* v. COLUMBIA, N. & L. R. Co.

(*Supreme Court of South Carolina, Dec. 8, 1902.*)

[43 S. E. Rep. 307.]

Injury to Passenger—Backing Train without Warning—Evidence.

In an action against a railroad company for injuries to a passenger caused by the train backing without any signal, it was competent to permit a bystander to testify that he holloed to the engineer when he saw the danger of the passenger whether the engineer heard him or not.

Res Gestæ.*

Evidence as to exclamations of pain by a party injured, immediately after the injury, are admissible as *res gestæ*.

Witnesses—Examination.

A question embodying a fact already testified to by a witness is not leading.

Passengers—Reasonable Time to Change Cars—Evidence.

In an action for injury to a passenger while changing cars, the accommodations for passengers, the crowded condition of the cars, and the possibility of getting on another coach, may be shown in evidence to determine whether a reasonable time was given passengers, under the circumstances, to change cars.

Personal Injuries—Evidence.

In an action by the wife for damages, the amount which her husband paid a physician for his services is admissible to show the condition of the wife.

Purchase of Ticket—Evidence.

A passenger can testify that he bought a ticket from one place to another without producing it.

Personal Injuries—Damages—Evidence.

An injured party may testify as to his own estimate of the amount of his damages.

*See *Missouri, K. & T. Ry. Co. of Texas v. Johnson* (Tex. Civ. App.), 3 R. R. R. 178, 26 Am. & Eng. R. Cas., N. S., 178; *Louisville & N. R. Co. v. Carothers* (Ky.), 3 R. R. R. 750, 26 Am. & Eng. R. Cas., N. S., 750; *Beath v. Rapid Ry. Co.* (Mich.), 15 Am. & Eng. R. Cas., N. S., 793; *Williams v. Great Northern Ry. Co.* (Minn.), 7 Am. & Eng. R. Cas., N. S., 230; *St. Louis & S. F. R. Co. v. Burrows* (Kan.), 17 Am. & Eng. R. Cas., N. S., 678; *Mott v. Detroit, G. H. & M. Ry. Co.* (Mich.), 15 Am. & Eng. R. Cas., N. S., 113.

Oliver v. Columbia, N. & L. R. Co

Same.

A party cannot testify as to statements of a witness at a former trial.

Depositions.

There is a sufficient prima facie evidence of nonresidence of a witness to justify the taking of his deposition where the notice to take the testimony states that he is a nonresident, and the witness had previously stated he lived in another state, and the deposition so states, as does also the return.

Same.

A deposition de bene esse for one trial is competent for any subsequent trial of the case.

Expert Testimony.

Where a physician has examined a patient, he may state as an expert what was the matter with the patient and what, in his opinion, was the cause of the trouble.

Witnesses—Examination.

The relevancy of a question is largely in the discretion of the trial court.

Same—Same—Objections.

An objection to a question which states no ground therefor will not be considered.

Injury to Passenger on Connecting Line—Limiting Liability.

A railroad company sold a ticket for itself and as agent of a connecting line, limiting its liability for any injury to a passenger to its own line: *held*, that it was responsible to a passenger for an injury caused by negligence on a track of a connecting line, over which it was accustomed to run its cars for a short distance before turning them over to the connecting line.

Same—Notice to Change Cars.

In an action for injuries to a passenger, whether a carrier gave him sufficient notice to change cars and sufficient time for so doing is a question for the jury.

Negligence—Burden of Proof.

In an action for personal injuries, the burden is on plaintiff to show that the injury was due to the negligence of defendant, and on her doing so the burden was on defendant to show contributory negligence.

Contributory Negligence—Erroneous Instruction—Failure to Object.

Any error in treating contributory negligence as an issue in the case, and instructing as to the same, cannot be considered where the attention of the court was not called to such error.

Exemplary Damages.

In an action for personal injuries, exemplary damages may be recovered, not as a penalty for a public wrong, but in vindication of a private right which has been willfully invaded, and as a warning to others.

Injury to Passenger—Punitive Damages.

A passenger has no cause of action against a railroad company for punitive damages unless he has been injured by its negligence.

Exemplary Damages.†

To sustain a claim for exemplary damages against a railroad company, there must be not only gross negligence, but a willful, reckless disregard of the rights of a party injured.

Statutory Duty to Stop at Stations—Excursion Trains.

Rev. St. 1893, § 1687, requiring trains to stop at stations for a suffi-

†Louisville & N. R. Co. v. Simpson (Ky.), 3 R. R. R. 513, 26 Am. & Eng. R. Cas., N. S., 513; Southern Ry. Co. v. Bunt (Ala.), 4 R. R. R. 786, 27 Am. & Eng. R. Cas., N. S., 786; Louisville & N. R. Co. v. Cooper (Ky.), 1 R. R. R. 230, 24 Am. & Eng. R. Cas., N. S., 230; Cincinnati, etc., Ry. Co. v. Cook (Ky.), 2 R. R. R. 321, 25 Am. & Eng. R. Cas., N. S., 321; Illinois Cent. R. Co. v. Stewart (Ky.), 21 Am. & Eng. R. Cas., N. S., 874.

Oliver v. Columbia, N. & L. R. Co

cient length of time to allow passengers to get on or off, applies to excursion trains.

Witnesses—Personal Interest.

An instruction that the jury should consider the personal interest of any witness in the result of a suit, and should endeavor to reconcile conflicting evidence, is not erroneous.

Appeal from common pleas, circuit court of Richland county; Benet, Judge.

Action by Alice E. Oliver and P. M. Oliver, her husband, against the Columbia, Newberry & Laurens Railroad Company. From judgment for plaintiffs, defendant appeals. Affirmed.

See 33 S. E. 584.

The following are the exceptions:

“(1) Because the court allowed the witness W. M. Fitch to state, over the objection of defendant’s counsel, that he shouted to the engineer when he saw this accident about to occur, and to state the reason for his shouting or hollering; whereas it is submitted that the statements of the witness to the engineer is not competent evidence, more especially when there is no proof that the engineer heard his call.

“(2) Because the court erred in allowing the witness W. M. Fitch, over the objection of defendant’s counsel, to state, after Mrs. Oliver had been placed on board the train after the accident, what she did, what she said; whereas, it is contended that her expressions at that time were not competent evidence.

“(3) Because the court allowed counsel for the plaintiff Mrs. Oliver, over the objection of defendant’s counsel, to ask the witness W. M. Fitch this question: ‘Can you state positively whether or not it was the same conductor, or whether they changed conductors at Clinton?’ whereas it is submitted that that form of questioning was leading.

“(4) Because the court allowed the witness Hill to testify, over the objection of defendant’s counsel, as to the accommodations for passengers at the place where Mrs. Oliver fell; whereas it is contended that the defendant company, having transported the passengers to Clinton, which was even beyond the terminus of its own line, was not called upon to furnish them accommodations with reference to their further journey.

“(5) Because the court allowed the witness Hill, over the objection of defendant’s counsel, to state to what extent the depth of the ditch or drainage way at the side of the track would increase the length of the step that would be taken from the platform to the ground; whereas it is contended that, inasmuch as this injury did not occur in stepping off of the platform to the ground, but in passing from one coach to another, that matter was irrelevant and incompetent.

“(6) Because the court allowed the witness Padgett to state, over the objection of counsel, that when he went from the train on which Mrs. Oliver was to another train that was

standing at the depot at Clinton, that he could get no further on that train than the platform; whereas it is submitted that with the condition of that other train the defendant in this case had nothing to do, and for its condition was not answerable.

“(7) Because the court allowed the witness P. M. Oliver to state what amounts he had paid physician for attending to his wife, over the objection of defendant’s counsel; whereas it is suggested that, this being a suit on the part of the wife, expenses borne by the husband could not form an element of damages.

“(8) Because the court allowed the witness P. M. Oliver to state the condition of Dr. Hildebrand, especially as it related to his tongue, when it is especially submitted that Dr. Hildebrand’s condition had nothing whatever to do with the issues presented in this case.

“(9) Because the court allowed the witness Thomas E. Campbell to state, over the objection of defendant’s counsel, and on the inquiry of the court itself, that he bought a ticket to Atlanta; whereas the ticket, being the highest evidence, should have been produced, to show to what point it entitled the purchaser to a passage.

“(10) Because the court allowed Mrs. Alice E. Oliver, over the objection of defendant’s counsel, to state that: ‘Ten thousand dollars seems to be a pretty paltry sum. I do not consider it enough money to recompense,’—whereas it is respectfully submitted that she should only have been allowed to state her condition, and that the jury were the ones to fix the amount of damages she had sustained.

“(11) Because the court refused to allow defendant’s counsel to cross-examine and bring out the fact that Mrs. Alice E. Oliver, the statements of Judge Jones that she had herself introduced as testimony to support her case on the former trial of it.

“(12) Because the court allowed the deposition of Dr. Roy to be read to the jury, over the objection of defendant’s counsel, when it is respectfully submitted that this would not be done unless it had also been proven that Dr. Roy was, at the time of the trial, beyond the jurisdiction of this court, or a resident of another state, and because these depositions were taken for the purpose of a former trial, and were not valid for the purpose of this trial.

“(13) Because the court erred in admitting, over defendant’s objection, the testimony of Dr. Roy, taken under commission, because, said testimony being taken under a special notice, the notice should have stated the reason for which the testimony was taken; second, it was only good for the trial for which the notice was given; and because no reason was given for the nonattendance of the witness himself.

“(14) Because the court erred in allowing Dr. Roy, over the objection of defendant’s counsel, to answer the question, ‘State what you found to be the matter with her’; whereas it

is suggested he should only have been allowed to detail the symptoms.

“(15) Because the court erred in allowing Dr. Roy to answer, over the objection of the defendant: ‘19th Direct. Doctor, suppose that a woman in the early stages of pregnancy should be standing on the platform of a railway car, and by the sudden movement of the car should be thrown from the platform to the ground; and suppose that, prior to the said fall, there were no physical indications of injuries of any character on this woman; and suppose that, shortly after this fall, an examination by a physician should disclose bruises on the hip and back of this woman, and the displaced condition of her uterus,—what in your opinion, as a medical expert, would you say was the cause of said injuries?’ Whereas it is submitted that that was a question for the jury, and not for the witness.

“(16) Because the court erred in allowing Dr. Roy to answer the question, over the objection of defendant’s counsel: ‘23d Direct. State what danger, if any, there would be of a miscarriage? (Defendant objects as not being pertinent to the facts of the case.)’ Whereas it is submitted that that question was not relevant to this case.

“(17) Because the court erred in allowing, over the objection of the defendant, Dr. Roy to answer the question: ‘31st Direct. Doctor, what is the amount of your bill for attending Mrs. Oliver at the above-mentioned time? (Defendant objects as being incompetent.)’ Whereas it is submitted that, inasmuch as there was no proof that Mrs. Oliver paid this bill, or was liable therefor, it is not competent.

“(18) Because the court erred in allowing the witness Mrs. Dunlap to state what other parties said, to wit, ‘You can’t get any seat; there is no light; you can’t get out,’—over the objection of defendant’s counsel, thereby allowing hearsay evidence to go to the jury.

“(19) Because, upon the motion for a nonsuit, his honor the presiding judge should have ruled that the action was based upon an allegation of a special contract made between the plaintiff Mrs. Oliver and the defendant by the purchase of a ticket; that the testimony on the part of the plaintiff showed that her passage from Columbia to Clinton was made in part on the defendant road only as far as Dover Junction, and thence over the line of a connecting road, which was a part of the line which was to transport them on to Atlanta; that the liability of the defendant as a common carrier is only for that part of the journey on its own line; and that, if it was liable for anything that happened at Clinton, its liability was due to some special contract, and the plaintiff had failed to introduce any testimony tending to prove any special contract; and, consequently, that there was no testimony to go to the jury to establish that at the time of the alleged accident the defendant was under liability to the plaintiff, and should have granted the nonsuit.

“(20) Because, upon the motion for a nonsuit, his honor should have held that, if the testimony tended to prove that the accident to the plaintiff happened immediately after the arrival of the train at Clinton, it was both alleged in the complaint and proven by plaintiff's testimony that notice had been given by the conductor and other officers of the train of the purpose of the railroad company to shift the car in question from that train, and therefore passengers should have been on the lookout for the separation of the cars, and there was no breach of duty, and no testimony tending to show any breach of duty, on the part of the defendant, in separating its train at the time stated, there being no testimony tending to show that there was any jerk, but simply a gentle moving off of the car.

“(21) Because, upon the motion of a nonsuit, his honor should have held that the testimony tended to prove that the accident happened some time after the arrival of the train at Clinton, and after notice had been given of its arrival, and, if the plaintiff had retained her seat in that car for any purpose of her own, then the relation of carrier and passenger between the plaintiff and the defendant had ceased, and the plaintiff could not recover under the allegations of her complaint.

“(22) Because in his charge to the jury his honor used the following language: ‘In one view of this case, it may be regarded as a three-cornered contest. It is primarily a suit brought by Mrs. Alice E. Oliver against the Columbia, Newberry & Laurens Railroad Company, but incidentally, in defense against that action by that railroad, arises the question whether, if Mrs. Oliver was actually injured in the manner she alleges, or to any extent, whether the railroad company sued is the right one to have been sued,—whether the liability should be put on the C., N. & L. or upon the S. A. L. Consequently, a great deal of testimony that would not be proper to the ordinary suit for damages has properly come into this case. The answer of the defendant is, therefore, twofold: First. That Mrs. Oliver was not injured at all, and therefore not entitled to damages. Second. Even if she was injured, and entitled to damages, that the defendant the C., N. & L. R. R., should not be held liable, but that the responsibility lies at the door of the S. A. L.,’—when he had on the motion for a nonsuit used, in the presence of the jury, the following language: ‘There was no agent, and therefore no terminus of any road. * * * There is no doubt, if the accident had occurred on the other side of Clinton, the Seaboard would have been the proper defendant, just as much as if it had taken place in Atlanta. But in my mind there is no doubt that, happening where it did, and under the circumstances under which it happened, the C., N. & L. is the proper defendant under this evidence, just as much as if it had happened on this side of Dover Junction,’—thereby expressing

Oliver v. Columbia, N. & L. R. Co

his opinion on the facts in the presence of the jury, and charging thereon.

“(23) Because his honor charged the jury as follows, to wit: ‘And for a further defense, an affirmative defense, for the proof of which the defendant railroad company takes up the burden, it alleges this: “The defendant denies each and every allegation of the complaint with reference to the alleged negligence on the part of the servants and agents of this defendant corporation in the operating of the said train, and with reference to the alleged angry conversation or orders of the conductor, train hands, and servants of this defendant corporation upon the arrival of the said train at Clinton, and denies that the said train was negligently or carelessly divided or coupled together again, and alleged that upon the arrival of the said train at Clinton, the plaintiff [mark, gentlemen, what follows is a form of allegation by which the defendant railroad company desires to throw the blame upon Mrs. Oliver], while knowing that she had reached the junction with the Georgia, Carolina & Northern Railroad, where it was necessary for her to leave the car in which she had traveled from the city of Columbia, carelessly and negligently failed and refused to leave the same for an unreasonable length of time, and that, if such injury occurred, it occurred while the agents and servants of this defendant company were properly shifting the cars of said train in accordance with the purpose and object of this defendant corporation;” and alleges that the said injury, if any occurred, was due solely to the negligence of the plaintiffs aforesaid. In other words, the railroad company sets up the plea of contributory negligence, which, if successfully established, would relieve the defendant on that ground alone of any liability, because, where it is shown to the satisfaction of the jury, by the preponderance of the evidence, that the plaintiff injured was himself or herself careless or negligent, and that the plaintiff’s carelessness or negligence was the immediate or proximate cause of the injury, without which the injury would not have been sustained, then, in such case, the defendant would be entitled to a verdict, and such a plaintiff could not properly recover damages,’—thereby indicating that the burden was upon the defendant of proving what the plaintiff had alleged in her own complaint; that she remained in the car after orders had been given for her to leave the same.

“(24) Because his honor charged that: ‘Such damages are allowed in law, and they operate almost like fines imposed in the criminal court. They are allowed, not so much to compensate the plaintiff or to enrich the plaintiff, but for public good to punish the defendant. Therefore they are called punitive damages. Hence, also, they are spoken of as exemplary damages, that they may act as a warning, not only to the defendant, but to others occupied in the same business, by thus making an example of the defendant for the benefit of

Oliver v. Columbia, N. & L. R. Co

others,'—thereby indicating that it was competent for the jury, in a civil action between individuals, to visit punishment upon the defendant for the public good.

"(25) Because his honor charged the jury that: 'If you come to the conclusion that the plaintiff has proved to your satisfaction that the defendant was guilty of gross, wanton, or willful negligence, such as shows a thorough disregard of the rights of the plaintiff in this case, you will be allowed to find not only actual damages, but, in addition thereto, an amount sufficient, in your opinion, to punish the defendant,'—thereby indicating that it was competent for the jury, in a civil action between individuals, to visit punishment upon the defendant for the public good.

"(26) Because his honor charged: 'Such negligence,—gross, wanton, willful,—in the case of injury, will give the person injured a cause of action, not only for actual damages, but for punitive damages; indeed, might give him his right of action for punitive damages without claim for actual damages. This last form of negligence, as well as the first, is alleged in the complaint. Therefore, gentlemen, if in this case it is established to your satisfaction by the preponderance of the evidence; then your verdict would be a sum of money representing, not only actual injury sustained, or compensation for this injury, but also an additional amount, as I said before, to punish the defendant,'—thereby indicating: First, that an action for such damages might be maintained by a plaintiff who had established no claim for actual damages and had received no actual injury; and, second, that, if such negligence was established to the satisfaction of the jury, by the preponderance of the evidence, it would be their duty to give a sum of money representing, not only damages for actual injury sustained, but also an additional amount to punish the defendant.

"(27) Because his honor charged that: 'You are to require at the hands of the railroad in this case evidence to satisfy you that the railway was not the proximate cause in its negligence; that the railway was not to blame, but that Mrs. Oliver or Mrs. Oliver and her husband were to blame,'—thereby indicating that it was incumbent upon the plaintiff only to prove negligence on the part of the defendant, and not to prove that such negligence was the proximate cause of her injury, but that it was the duty of the defendant to prove that its negligence was not the proximate cause of the injury.

"(28) Because his honor charged the jury: 'It is conceivable that both sides may have been careless, but the burden of proof is upon the plaintiff to satisfy the jury that the carelessness of the defendant was the proximate and immediate cause of the injury, and it's just as incumbent upon the defendant to satisfy the jury that it was the carelessness and negligence of the plaintiff that was the proximate and immediate cause of the injury,'—thereby indicating that, where

Oliver v. Columbia, N. & L. R. Co

both sides were negligent, it was as much incumbent upon the defendant to prove that the plaintiff's negligence caused the injury, as it was upon the plaintiff to prove that the defendant's negligence caused the injury.

“(29) Because his honor charged the jury: ‘Such are some of the duties which the railroads owe to passengers, and the jury in each particular case is the judge to determine whether the railway company, defendant, has given sufficient notice, ample time, and whether the landing place afforded was safe and convenient,’—thereby indicating that it was for the jury to determine whether sufficient notice had not been given of the arrival of the train, and whether ample time had not been allowed for her removal from the car, and whether the landing place afforded was sufficient or convenient, when the complaint contained no allegation charging that the notice was insufficient, or that the time was not ample, or that the landing place was not safe or convenient.

“(30) Because, upon the request of the defendant, his honor refused to charge the jury: ‘That the provisions of section 1687 of the Revised Statutes of 1893 do not apply to excursion or other trains run upon an irregular schedule, and no duty is imposed by law upon a railroad company to stop such a train at any station not advertised as a stopping place for said train;’ but modified the same by charging: ‘That is good law to a certain extent. By that I mean that the whole of this section does not apply to excursion trains, but a part of it most certainly does. “Every railroad company in this state shall cause all its trains of cars for passengers to entirely stop upon each arrival at a station advertised by said company as a station for receiving passengers upon such trains.” That does not apply to special excursion trains. As we understand it, a special excursion train means a train upon which passengers are received to go from one point to another point. As to those passengers, therefore, on such train, there is no requirement to stop at any intermediate place, as is required of the railroads as to regular trains. But the next part applies to special excursion trains, where it says, “for a time sufficient to receive and let off passengers.”’

“(31) Because, in charging upon defendant's second request to charge, his honor charged as follows, to wit: ‘This ticket shows a contract on the part of the C., N. & L., on its first coupon, to transport the passenger who buys that ticket safely from Columbia to Clinton. The next coupon implies a contract entered into by the C., N. & L. for the benefit of the G., C. & N. to carry the passenger who buys that ticket from Clinton to Atlanta. Consequently, there is added to that second coupon the important addition, “On account of the G., C. & N.” The third coupon implies a contract to bring the passenger who purchased this ticket from Atlanta to Clinton, and that contract was made by the C., N. & L. for the benefit of the G., C. & N. The last coupon, the fourth,

Oliver v. Columbia, N. & L. R. Co

implies a contract between the C., N. & L. and the passenger who bought this ticket to convey that passenger safely from Clinton back to Columbia, of which part of the contract the G., C. & N. has nothing to do, according to this contract. So far as this ticket shows, the G., C. & N., as a part of the S. A. L., has nothing whatsoever to do with that part of the contract by which the C., N. & L. undertook to convey the passengers from Columbia to Clinton, or back from Clinton to Columbia, but the S. A. L., or part of it, has something to do with the other section, the distance from Clinton to Atlanta and from Atlanta back to Clinton, because the ticket shows that the contract for that part of the journey was made on account of the G., C. & N., and of that part the S. A. L. has a great deal to do, and any accident occurring on that part of the road might well be made a cause of action against the S. A. L., and not the C., N. & L. So much, then, for the second request to charge,'—thereby instructing the jury that the ticket and first coupon showed a contract of the defendant company to transport the plaintiff all the way to Clinton, and that under that contract the defendant company alone was liable for injuries suffered by the plaintiff even beyond the terminus of its own line at Dover Junction.

"(32) Because his honor, upon request of defendant to charge as follows, to wit: 'That the ticket introduced in evidence in this case does not constitute a joint contract between the C., N. & L. R. R. Co. and the G., C. & N. R. R. Co., or the Seaboard Air Line System of Railroads, for the carriage of plaintiffs to Atlanta,' said, 'I make the same remarks to that as before,'—thereby indicating the same instructions which had been given in connection with defendant's second request to charge as quoted above.

"(33) Because, upon request that his honor should charge: 'That where a passenger is upon a special excursion train, which has reached a station where he is informed that the car in which he is riding is to be detached from such train, he is bound to look out for the separation of the cars,' his honor charged as follows, to-wit: 'Why, certainly; just as, to the same extent, the railway company is bound to give him sufficient warning of such intended separation of the cars,'—when the allegations of the complaint showed that the plaintiff had received warning of the intended separation of the cars, and it was not alleged in the complaint that she had not received sufficient warning.

"(34) Because, upon defendant's request that his honor should charge: 'That where two railroad companies unite to run an excursion train over both of their lines, upon terms which make each of them responsible only for accidents occurring on its own line, and tickets are sold by one of them as the agent for both, expressing such limitation of liability, it matters not where, for the convenience of the parties, the point is established for the change of crews

Oliver v. Columbia, N. & L. R. Co

running the train, as to the passenger holding one of such tickets the liability is fixed by the point of actual junction of the lines,' he charged as follows, to-wit: 'Before charging you that, I have to explain to you that that would be the law unless part of the line or track of one railway is used in common by both railway companies, in which case the liability is fixed, not by the point of actual junction of the lines, but by the time when the control of the train is surrendered by one company and accepted by the other company. That fixes the liability.'

"(35) Because, upon request that his honor should charge: 'That where a railroad company, chartered under the laws of this state, has, under the franchises conferred upon it, built its line and established a depot, and allows another railroad company to run its trains over a part of such line and into such depot, the company owning such line is responsible to the public and passengers for all accidents happening on such trains by negligence,' he charged as follows, to-wit: 'I cannot charge you that, unless the evidence shows that the railway company owning such line had taken control of the train. One railroad company is not to be held responsible for the negligence of another railroad company. Each must bear its own burden. If, therefore, the company which is allowed to use a line is still in control of a train, and injures a passenger by negligence, the railroad company owning the line cannot be held liable for that negligence, but the railroad company controlling the train would be held liable for the negligence.'

"(36) Because, upon request that his honor should charge: 'That where two railroad companies unite to run an excursion train over both of their lines, upon terms which make each of them responsible only for accidents occurring on its own line, and tickets are sold by one of them as the agent of both, expressing such limitation of liability, it matters not whether the train is carried through to its destination by the conductor and train crew employed by the initial company or not. The company upon whose track the train is at the time of the accident, and under whose orders the conductor is running the train, is liable for the accident, and the conductor is to the passengers on such train as the conductor of the company owning the line and issuing the orders for the operating of the train,'—he charged as follows, to-wit: 'As to that, gentlemen, I charge you that with this explanation: that the test is not what railroad company owns the line where the accident may have occurred, but what railroad company controls the train, because the railroad line may lease the line or it may be allowed, as a matter of favor, to run its train on the line of another railway, but the railway company controlling the train on the line of another railroad is responsible for the injuries caused by its negligence;' and upon its being explained by one of the attorneys for the defendant

that 'that request was intended to develop the idea that the conductor who was controlling the train, if he be controlling it under the orders of the connecting line, that the fact of his employment by the initial line does not make it a train, at that time, of the initial line,' his honor charged as follows: 'Certainly not. Another line may employ the services of a conductor just as well as it may hire engines or engineers. The Seaboard may hire and pay for the services of a conductor of the C., N. & L. for that trip. He is no longer a conductor of the C., N. & L., but of the Seaboard. In this case you are to say from the testimony whether the conductor in charge was in the employment, for that time, of the C., N. & L. or the S. A. L., at the time the accident occurred,'—thereby indicating that, unless the services of such conductor had been actually employed by the Seaboard Air Line, so as to make him no longer the conductor of the defendant company, the Seaboard Air Line would not be responsible for his actions; whereas it is submitted that, even if still in the employment of the defendant company, and paid by it, if he was acting under the orders of the Seaboard Air Line, the defendant company would not be responsible for his actions.

"(37) Because his honor charged the jury as follows, to wit: 'You will ask yourselves whether any witnesses * * * had any personal interest in the event of the trial. * * * If there is a conflict of testimony, you will endeavor to reconcile this conflict,'—thereby indicating that, as a matter of law, it was the duty of the jury to inquire whether any witness had a personal interest in the event of the action, and that it was their duty to reconcile any conflicts in the testimony."

Wm. H. Lyles and George Johnstone, for appellant.

B. L. Abney and Andrew Crawford, for appellees.

SHAND, Special Judge. This was an action by Alice E. Oliver and her husband, commenced in November, 1896, to recover damages for injuries alleged to have been sustained by Mrs. Oliver by reason of defendant's negligence, at Clinton, in Laurens county, on 27th November, 1895, between the hours of 2 and 3 a. m. Judgment was demanded for \$10,000. The alleged cause of action was injury received by plaintiff in falling from a car on an excursion train by reason of the uncoupling of such car and the movement of the other portion of the train just as she was about to move from one coach to another, under orders of the conductor, at a station where the train was to be turned over to a connecting line of road. A demurrer was made to the complaint. It was overruled by Judge Ernest Gary in October, 1898, and upon appeal this order was affirmed. See 55 S. C. 541, 33 S. E. 584. In the opinion of the supreme court as then delivered by Mr. Justice Pope the complaint is stated in full. The ground of demurrer being that the com-

plaint did not state a cause of action, the court made a statement of the main elements thereof, but did not in such statement repeat all the particulars set forth in the complaint, nor intend that such synopsis should limit the issues to the facts there mentioned to the exclusion of the other facts alleged in the complaint.

The answer of the defendant was as follows:

"For a first defense: The defendant, by George Johnstone and William H. Lyles, its attorneys, by this, its amended answer answering the complaint in the above-entitled action:

"(1) Admits that it is now a corporation created by and existing under the laws of the state of South Carolina, with its principal place of business and office in the city of Columbia, county and state aforesaid; and that as such corporation, it now is the owner and operates the railroad known as the 'Columbia, Newberry & Laurens Railroad,' between the city of Columbia, in the county of Richland, in said state, and the town of Clinton, in Laurens county, in said state, and that it is a common carrier of passengers thereon for hire, and that at the time stated in said complaint, to wit, on the 26th day of November, 1895, and for some time before and after said date, it was a corporation, and owned a railroad extending from the city of Columbia, in said state, to Dover Junction, a station several miles east of the town of Clinton, over the railroad track of the Georgia, Carolina & Northern Railroad. This defendant denies each and every allegation contained in the second paragraph of the said complaint not herein specifically admitted.

"(2) It denies knowledge or information sufficient to form a belief as to the allegations contained in the first paragraph of the complaint.

"(3) It denies each and every allegation contained in said complaint.

"(4) This defendant alleges that on the 26th day of November, 1895, and for some time prior and subsequent thereto, all passenger trains operated over the line of defendant's railroad from the city of Columbia to Dover Junction, referred to in the first paragraph of this answer, were hired from the Georgia, Carolina & Northern Railroad Company, of the Seaboard Air Line System of Railroads, under an agreement whereby the Seaboard System of Railroads would furnish the said trains and engineers, conductors, and other members of the crew, at their own expense, and charge for the use thereof so much per mile; and that the train upon which it is alleged that the plaintiff was traveling at the time of the alleged injury was a special excursion train run from the city of Columbia, South Carolina, to the city of Atlanta, in the state of Georgia, by the said Seaboard Air Line System of Railroads, upon a round-trip excursion ticket at a specially low rate of fare; that the said train, and all other trains run over the line of defendant's road at said time, as soon as they

reached and passed Dover Junction, the station above referred to, passed immediately under the control of the officers of the Seaboard Air Line System of Railroads, and that all movements of said train and other trains after so passing said Dover Junction were under the direction of the said officers of the Seaboard Air Line System of Railroads.

“For a second defense: This defendant denies each and every allegation of the complaint with reference to the alleged negligence on the part of the servants and agents of this defendant corporation in the operating of the said train, and with reference to the alleged angry conversation or orders of the conductor, train hands, and servants of this defendant corporation upon the arrival of the said train at Clinton; and denies that the said train was negligently or carelessly divided or coupled together again; and alleges that upon the arrival of said train at Clinton the plaintiff, while knowing that she had reached the junction with the Georgia, Carolina & Northern Railroad, where it was necessary for her to leave the car in which she had traveled from the city of Columbia, carelessly and negligently failed and refused to leave the same for an unreasonable length of time; and that, if such injury occurred, it occurred while the agents and servants of this defendant company were properly shifting the cars of said train, in accordance with the purpose and object of this defendant corporation; and alleges that the said injury, if any occurred, was due solely to the negligence of the plaintiffs aforesaid.”

Upon the issues raised by the complaint and answer, the cause came on for trial before his honor Judge Benet and a jury at the April term, 1900. At the close of plaintiff's testimony, a motion for a nonsuit was made and refused. In his charge to the jury, his honor the circuit judge adverted to the two former trials of the cause, resulting in mistrials, and urged upon them the duty of rendering a verdict, if they could reach a conclusion without doing violence to their conscientious convictions. He then read to the jury the pleadings, explaining them, made his general charge, and charged upon the requests submitted to him. So much of this charge as is necessary to a full understanding of the case will be found quoted in the exceptions and in this opinion. A verdict was rendered in favor of plaintiff for \$7,000. A motion for a new trial having been refused, defendant appealed on 37 exceptions, which should be reported.

As to the first exception: The brief shows this witness (the first sworn) did not say that he holloed to the engineer when “he saw the accident about to occur,” but when “the train started back.” The judge did not permit the witness to say what he holloed—what words he used,—but did allow him to testify to the fact of the hollering, and his reason for so doing, which, the witness said, was because he felt the party would be killed, and that it was “a spontaneous effort of mine to

Oliver v. Columbia, N. & L. R. Co

stop—" not completing his sentence. All this was relevant to the fact of the train backing "without any signal, and without any regard whatsoever for the lives of the said plaintiff and her two children," as charged in the complaint. It clearly showed the impression made at the time upon the mind of the witness by what he then saw. It was testimony of an unpremeditated and contemporaneous substantive act of the witness that tended to throw light upon the actual condition as seen by him. Whether the engineer heard it or not was immaterial as to the action of the defendant down to that instant of time. This exception is overruled.

The second exception alleges error in receiving testimony as to what Mrs. Oliver did and said when put back upon the train after the accident. Exclamations of pain and actions indicating pain are part of the *res gestæ*, and may be proved by any by-stander. 2 Jones, Ev. §§ 347, 352; 1 Greenl. Ev. § 102; Williams v. Railway Co. (Minn.) 37 L. R. A. 199, notes (s. c. 70 N. W. 860). In Enicks v. Stansell, Judge Withers (as quoted in Welch v. Brooks, 10 Rich. Law, 125), speaking of the declarations of a negro slave, proved by witnesses, as to the nature, location, or symptoms of a malady as exhibited by complaints in words or by actions, says: "Such evidence has been received in our courts upon the ground that it was the drapery surrounding the truth; that it was part of the *res gestæ*; that it was, of necessity, receivable."

The third exception complains of this question: "Can you state positively whether or not it was the same conductor, or whether they changed conductors at Clinton?" The witness had previously said, without objection, that, "As far as I recollect, it was the same conductor." Then followed the question, to which the objection was made that it was leading. In the connection in which it was asked, we do not think the question was leading.

The fourth, fifth, and sixth exceptions may be considered together. The defendant company had bound itself by contract (as will be discussed later on) to transport the plaintiff to Clinton, and there deliver her safely, so that she might pursue her journey on the Georgia, Carolina & Northern road, of the Seaboard Air Line System, to Atlanta. That contract would be fulfilled if the coach in which she had her seat was delivered to the connecting road, or, in case of a change of car was contemplated at Clinton, if defendant was afforded reasonable time and a safe place for change from train to train. There was testimony that the conductor had, both before and after reaching Clinton, directed all of the passengers to leave that coach in which Mrs. Oliver was sitting, and it was an issue raised by the complaint and answer whether it was the duty of the plaintiff, under the circumstances, to promptly act upon the prior orders to vacate. The circuit judge ruled that it was competent, and responsive to these issues, to show the accommodations for alighting, the

Oliver v. Columbia, N. & L. R. Co

condition as to platform, ground, lights, and possibility of getting on another coach or the connecting train of the other road on which she was to proceed to Atlanta. In this we find no error. It is true that no injury resulted to plaintiff directly from any of these conditions, but their existence was relevant to the question before the jury as to how much time for vacating that coach was reasonable under the circumstances, and whether the parting of the train (an alleged cause of the injury) was negligent because carelessly made too soon, all of which were for the jury to decide.

The seventh exception complains that the trial judge improperly allowed Mr. Oliver, the husband, to testify as to the amounts paid by him for medical attention to his wife, inasmuch as such payment might be a loss to him, but not to his wife, for whose injury damages were demanded in this action. The judge allowed this testimony as "tending to show the woman's condition and the medical attention shown her, not on the ground that the money paid should be an element in making up the amount of damages"; and he further ruled that, "as a matter of damages, it must not be taken by the jury." For the purposes indicated, the testimony was admissible, for it threw light upon the extent of her injuries, just as testimony as to the length of time she was confined to her bed would be.

As to the eighth exception: Dr. Hildebrand, a witness for plaintiff, had been examined *de bene esse*, and his testimony was subsequently introduced and read. P. M. Oliver, when on the stand, was asked as to Dr. Hildebrand's condition "as to his tongue." Defendant objected, stating no ground of objection. The judge allowed the question, stating that he could not yet see its relevancy. The question was answered. A further question having been asked and answered, upon objection being again made by defendant, the judge ruled out all further testimony as to Dr. Hildebrand's condition; so this exception is not well taken.

The ninth exception: The witness said, without objection, that he bought a ticket to Atlanta. When next asked, "Your ticket went through?" defendant objected, claiming that witness could say nothing about the ticket unless he produced it. The judge then inquired of the witness, "You bought a ticket to Atlanta?" and the witness answered, "Atlanta." His honor then ruled that the witness could not say "what was on the ticket." The witness then said that he went that night on the excursion to Atlanta on the ticket he purchased in Columbia. All this was competent.

Mrs. Oliver, in answer to the question to what extent, in money, in her opinion, she had been damaged, was permitted to testify: "I could not put any money value on my health. \$10,000 seems a very paltry sum. I do not consider it enough money to compensate." This is made the ground of the tenth exception. We think the question was competent. See *Jones v. Fuller*, 19 S. C. 70, 45 Am. Rep. 761; *Gilman v. Railroad Co.*, 53 S. C. 210, 31 S. E. 224.

Oliver v. Columbia, N. & L. R. Co

Mrs. Oliver, on her cross-examination by defendant, was asked as to the movements of Judge Jones (a fellow passenger) at the time of the accident. She replied that she did not know, except as she saw him there. She was then asked if she had not introduced a statement from him as to his movements at Clinton on that occasion, as part of her testimony on a former trial of this case. Upon objection made by plaintiff, the judge ruled it out as hearsay; and this ruling is the basis of the eleventh exception. The ruling of the judge is approved, and the exception is overruled.

The testimony of Dr. Roy, a witness for plaintiff, was taken *de bene esse* in Atlanta, Ga., and read at a former trial of this cause, which resulted in a mistrial. At this trial the same testimony was again offered by plaintiff, when defendant objected, on the ground that it had been taken for a former trial, and could not be used at this; and, further, because it was proven that Dr. Roy was beyond the jurisdiction of this court. The twelfth exception claims that this deposition was not admissible for these reasons. As to the last objection urged in this ground of appeal, Mrs. Oliver had previously testified that Dr. Roy was a resident of Atlanta. He also testified in his deposition, and it was so stated in the return. It seems to this court that this was sufficient *prima facie* evidence of his nonresidence. *Stoddard v. Hill*, 17 S. E. 138, 38 S. C. 385. We also think that the other ground of objection was not well taken. It has been held in this state that testimony taken by commission may be read at a second trial of the cause. *Pulaski v. Ward*, 2 Rich. Law, 120. This rule of practice should not be overruled, and for the same reasons a deposition once taken may be read at any trial of that case. We agree with the circuit judge in so far as he says that "a deposition good for a first trial of a case may be introduced by counsel as they may see fit, just as they may put up some witness again as they see fit."

The thirteenth exception further complains of the admission of Dr. Roy's testimony because "the notice should have stated the reason for which the testimony was taken," and because no reason was given for his nonattendance. His residence in Atlanta was a sufficient reason for his nonattendance. The notice under which the testimony was taken is not before this court, but we gather from the colloquy between court and counsel that the notice stated that the witness lived outside of the state of trial, but did not specify that fact as the reason why the testimony was to be taken *de bene esse*. We agree with the circuit judge that the fact stated was a sufficient reason.

We cannot sustain the fourteenth exception. The medical expert makes his diagnosis of an ailment from the symptoms discovered by his skill and from other symptoms gathered from the statements as to her present condition made to him by the patient while under examination. See authorities cited

Oliver v. Columbia, N. & L. R. Co

under the rulings *supra* on second exception. From these symptoms, thus discovered, he determined what "is the matter" with his patient, and the jury may have this conclusion expressed to them as the opinion of an expert witness. There was no error, therefore, in permitting this question to be asked and answered for the consideration of the triers of fact.

To Dr. Roy was submitted a hypothetical question. Without the mention of Mrs. Oliver's name, it supposed the case of a woman in the condition in which Mrs. Oliver had been before the accident and after it, according to the testimony of some of the witnesses, and inquired, "What, in your opinion as a medical expert, would you say was the cause of the injuries?" To this interrogatory defendant objected upon the ground that it was a question for the jury; citing *State v. Senn*, 32 S. C. 400, 11 S. E. 292. The objection was overruled, and the witness answered, "I should naturally infer that the injuries were produced by the fall." This ruling is complained of in the fifteenth exception. We think the question objected to, submitted to medical expert, was competent, under the rules laid down in *Easler v. Railroad Co.*, 59 S. C. 318, 37 S. E. 938.

The sixteenth exception alleges error in permitting Dr. Roy to answer the question, "State what danger, if any, there would be of a miscarriage," upon the ground that no miscarriage had been proven, and therefore the question was irrelevant. The question of relevancy is largely left to the discretion of the trial judge. *Lynn v. Thomson*, 17 S. C. 134; *State v. Green*, 48 S. C. 136, 26 S. E. 234; *Pearson v. Spartanburg Co.*, 51 S. C. 480, 29 S. E. 193; *Marting v. Jennings*, 52 S. C. 371, 129 S. E. 807; *Watts v. Railroad Co.*, 60 S. C. 67, 38 S. E. 240. This physician had previously stated that soon after the accident he had found plaintiff to be two or three months advanced in pregnancy. Mrs. Oliver had testified that a child was born to her on 11th May after the accident. The complaint alleged "that, owing to her delicate condition, she received serious and severe nervous shock, causing her intense pain and anxiety." If there was any danger of miscarriage, plaintiff would perhaps be subjected to inconvenience in averting this danger, and this could be considered by the jury as one of the elements of the damage sustained by her from the fall. We find no error in the ruling of the circuit judge.

The seventeenth exception complains of the same question asked Dr. Roy which was propounded to Mr. Oliver, and made the ground of the seventh exception. But Dr. Roy did not answer this interrogatory, and therefore this exception need not be further considered.

The eighteenth exception relates to a question asked a witness by plaintiff, to which defendant interposed "We object," stating no ground of objection. This exception is overruled on

Oliver v. Columbia, N. & L. R. Co

the authority of *Youngblood v. Railroad Co.*, 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 824.

The three succeeding exceptions relate to the refusal of a nonsuit; they state the grounds upon which the motion was made and refused. The ticket was an excursion ticket from Columbia to Atlanta, purchased by Mrs. Oliver in Columbia from the agent of the Columbia, Newberry & Laurens Railroad Company, with the stipulation that the selling company acted only as agent, and was not responsible beyond its own line. Mrs. Oliver signed her name on the ticket, assenting to its conditions. The agent of the defendant stamped upon the back of the coupons attached to this ticket the name of the station at which issued, to wit, Columbia, S. C. These coupons were as follows:

1888. Columbia, Newberry and Laurens Railroad.
 Destination Atlanta, Ga., and Return.
 Clinton to Station stamped on back.
 C. S. & I. E. 22 A.
 Destination Atlanta, Ga., and Return.
 Subject to the above conditions.
 Void if detached.
 Via C. N. & L., G. C. & N.
 Columbia, Newberry and Laurens Railroad.
 On account of Georgia, Carolina and Northern Railroad.
 Atlanta to Clinton.
1888. C. S. & I. E. 22 A.
 Subject to the above conditions.
 Void if detached.
 Via C. N. & L., G. C. & N.
 Columbia, Newberry and Laurens Railroad.
 On account of Georgia, Carolina and Northern Railroad.
 Destination Atlanta, Ga., and Return.
 Clinton to Atlanta.
1888. C. S. & I. E. 22 A.
 Destination Atlanta, Ga., and Return.
 Subject to the above conditions.
 Void if detached.
 Via C. N. & L., G. C. & N.
 Columbia, Newberry and Laurens Railroad.
 Station stamped on back to Clinton.
1888. C. S. & I. E. 22 A.
 Subject to the above conditions.
 Void if detached.
 Via C. N. & L., G. C. & N.

The nineteenth exception claims that testimony for plaintiff showed that the Columbia, Newberry & Laurens road ran from Columbia only to Dover Junction, on the Georgia, Carolina & Northern road, two miles short of Clinton, and that there was no contract by defendant to carry plaintiff beyond the terminus of its own road. In refusing the motion of nonsuit the circuit judge said: "The complaint alleges that this plaintiff bought a first-class ticket, purchased from the C., N. & L., to Atlanta, by way of Clinton. There is evidence that the ticket was bought, that she traveled on that road, and when they got near Clinton, it seems from the testimony—Dover Junction, then a section of two miles of roadbed, which

Oliver v. Columbia, N. & L. R. Co

at that time was used in common by some arrangement between the S. A. L. and the C., N. & L. The evidence is that the conductor, the crew who took this plaintiff from Columbia, were still in charge of the train after passing Dover Junction. They were still in charge of the train. The evidence of Mr. Hill is clear that as an inspector he had not finished his inspection, and had not turned it over to the Seaboard, which was to take it on the next division. He had not turned over the train. He had not received the C., N. & L. train yet, and until his inspection was completed, and until he had received the C., N. & L. coaches, the Seaboard Air Line could not take them. So that is for the jury to say how true it is. How sufficient it is, is a matter for the jury,—that the C., N. & L. train had left Columbia, and had not been received by the Seaboard Air Line, although on a piece of roadbed which was used in common by both. Now, it strikes me merely as a fact, what portion of road between the place called 'Dover Junction,'—was it a station at all? Mr. Lyles: Only a junction. The evidence shows there was no agent there. The Court: Was no agent, and therefore no terminus of any road. Practically, the terminus of the C., N. & L., for all practical purposes, the evidence shows, was Clinton. Under what particular contract with the Seaboard, it matters not at this time. If there was no special contract, there was usage, custom, that the C., N. & L. had the use of that two miles of roadbed to complete its contract from Columbia to Clinton. There is no doubt that, if the accident had occurred on the other side of Clinton, the Seaboard would have been the proper defendant, just as much as if it had taken place in Atlanta; but in my mind there is no doubt that, happening where it did, under the circumstances under which it happened, the C., N. & L. is the proper defendant under this evidence, just as much as if it had happened on this side of Dover Junction. So far as the evidence goes, we need not look beyond Clinton to consider whether the ticket was good to Atlanta or not. A passenger from Columbia to Clinton by the C., N. & L. was entitled to be taken by the C., N. & L. from Columbia to Clinton. So far as this evidence shows, there was one section of the ticket taken up, upon which section of the ticket the passenger was taken from Columbia to Clinton. There is no evidence that the Seaboard had anything to do with that section of the ticket. It was taken by the C., N. & L. conductor, and entitled the passenger to be landed at Clinton. There is nothing to suggest that it could be stopped at Dover Junction, the terminus, so called, of the C., N. & L. The evidence, therefore, should go to the jury for them to determine whether the C., N. & L. was responsible to take the passengers to Clinton or to stop them at Dover. Whether the liability of the C., N. & L. stopped at Dover or went to Clinton, that must go to the jury. I cannot decide that." The excursion ticket in this case, issued by defendant, and

Oliver v. Columbia, N. & L. R. Co

signed and accepted by plaintiff, constituted a contract of carriage. *Bethea v. Railroad Co.*, 26 S. C. 97, 1 S. E. 372; *Samuels v. Railroad Co.*, 35 S. C. 501, 14 S. E. 943, 28 Am. St. Rep. 883. The defendant, by this contract, limited its liability to its own line, and contracted for passage from Clinton to Atlanta, and back from Atlanta to Clinton, only as agent for and "on account of G., C. & N. Railroad." But it contracted in its own name and on its own account for carriage from Columbia to Clinton, and back from Clinton to Columbia. The same train, same conductor, same engineer, same coupon, that took the passengers from Columbia to Dover Junction went on without interruption from Dover Junction to Clinton. The ticket and coupons issued to plaintiff by defendant gave to the plaintiff no right to ride upon a train of the Georgia, Carolina & Northern road from Dover Junction to Clinton. There was in this case a connecting road, but the ticket informed the holder that the change to connecting road was to be made at Clinton, and the conductor so notified the passengers. There was also testimony by witnesses for plaintiff that the railroad from Dover to Clinton was owned by the Georgia, Carolina & Northern road, and used by trains of that road between Munroe and Atlanta, but that this two miles of road was also used by the defendant's trains between Clinton and Columbia, with an agent and ticket office at Clinton and none at Dover Junction; and that through trains from Columbia to Atlanta were turned over by the Columbia, Newberry & Laurens road to the Georgia, Carolina & Northern road at Clinton, after inspection and accepted by the agent of the latter road. The circuit judge, therefore, properly refused the nonsuit upon the ground complained of in the nineteenth exception. *Kyle v. Railroad Co.*, 10 Rich. Law, 382, 70 Am. Dec. 231; *Piedmont Mfg. Co. v. Columbia & G. R. Co.*, 19 S. C. 369; *Railroad Co. v. Pratt*, 22 Wall. 131, 22 L. Ed. 827; *Railway Co. v. McCarthy*, 96 U. S. 266, 24 L. Ed. 693. And, as the ticket was a contract by defendant to deliver plaintiff safely to the connecting line at Clinton, the thirty-first and thirty-second exceptions are also overruled.

Upon the other two grounds relied on in the motion for nonsuit the circuit judge ruled as follows: "As for the other two grounds, I think, from the very phrasology of them, they must be overruled, as well as the first, because that depends whether ample time was given by the notice of the conductor to the passengers. That is a question for the jury. The court cannot take judicial notice as to whether the time was ample or not. This is not a question for judicial notice in this state. I have an idea, Mr. Abney, that in some states they have railroad laws in reference to this. Mr. Abney: We have a statute of our own requiring a sufficient length of time of stoppage to take on passengers. The Court: But not as to the number of moments? Mr. Abney: No, sir. In

Oliver v. Columbia, N. & L. R. Co

the case of Dozier v. Railroad, you will find that the court decides that is a question for the jury. The Court: The court cannot take judicial notice unless it is fixed by statute, and it is a question entirely for the jury. Now, if ample time was given by the conductor,—ample notice, I should say,—and sufficient notice as to the time given to the passengers by the conductor to apprise them that when he stopped at Clinton he was going to cut this certain coach loose from the others, so as to put them on their guard, then there might be some force in the argument, but the jury must say whether ample notice was given; whether insufficient instruction was given, and what instruction was given; whether they were instructed to go out on the ground, in the weeds, or some other hotter place (referring to the evidence, of course, entirely, gentlemen), or whether they were to go into any other car, because this coach was to go back to Columbia. I cannot say that the conductor gave sufficient notice. That is for the jury to say. I cannot say what notice he gave. It is sufficient to say that, if there is evidence that some notice was given, it is for the jury to say whether sufficient notice was given as to the intention, and whether it was that they were to stay in the car, or go into the other car, or to go out in the road. There is no doubt about the law requiring railroads to provide convenient and safe landing accommodations when they require passengers to get out. That is a matter for the jury to say,—as to whether the relation of passenger and common carrier has ceased after the action of the passengers. I do not recollect distinctly any evidence as to whether Mrs. Oliver defied the orders of conductor, and kept her seat. It seems to me she was trying to obey his orders, and, when leaving the car, was injured. It seems to me the motion for a nonsuit should be overruled on all grounds submitted, and that the case should go to the jury, and it is so ordered." The jury were not present in court when the judge announced the above rulings of the court on the motion for nonsuit. The twentieth and twenty-first exceptions complain of this ruling. They will be considered together. Clinton being the point at which defendant was to safely deliver plaintiff to the connecting road, the direction to change cars at this point was not prevented by the terms of this contract of through carriage; and it was the duty of the passenger to obey this proper direction from the conductor. But it was the duty of defendant to afford plaintiff a reasonable time, under all the circumstances, to make the ordered change. See 5 Am. & Eng. Enc. Law (2d Ed.) p. 577, and Keller v. Railroad Co., 27 Minn. 181, 6 N. W. 486. When the plaintiff closed in chief, there was testimony tending to show that three orders had been given to the passengers to change cars,—one before reaching Clinton, one after reaching Clinton, and the last a little later on. One witness testified that it was "some little while" after reaching Clinton; another said the conductor

gave the orders a minute or so after the train stopped; and still another said it was only a minute or so between the second and third orders. It was in the nighttime. There was testimony that it was dark, a lack of lights at the station, the coach and its steps crowded, and the other coaches full, no platform on the ground, and a ditch near the track; that when the last order of the conductor was given, Mrs. Oliver (who had moved to a seat near the door) got up to go into the next coach, and reached the platform, which was full, people standing also on the steps, and that she then fell between the cars as the train was parted. It was certainly the duty of the defendant to afford plaintiff a reasonable time to get out of the coach in which she was. What was a reasonable time depended upon the circumstances, and was a question to be passed upon by the jury, and not by the judge. "A railroad company is in duty bound to stop its train at the station to which it has agreed to carry a passenger, and give reasonable time and opportunity for a safe landing. It is also a breach of the carrier's duty to expressly or impliedly invite a passenger to alight from a moving train." *Cooper v. Railway Co.*, 56 S. C. 93, 34 S. E. 16. What time, in any case, is reasonable, is for the jury, where there is any disagreement in the testimony as to the surrounding conditions. *Wiggins v. Burkham*, 10 Wall. 129, 19 L. Ed. 884. After a train has stopped a reasonable time, particularly at a terminus, it may be assumed that all passengers intending to alight or change cars have already done so; but the trial judge should not grant a nonsuit on such an assumption, especially where the conductor, the master of the train, permits a parting of the cars immediately after giving orders to several passengers to promptly vacate the coach from which the train is uncoupled and moved. The judge properly held that these were matters to be passed upon by the jury.

For the same reason, the twenty-ninth exception is overruled. All of the matters referred to the jury in the sentence of the charge which is made the basis of this exception were matters to be considered by the jury in determining how much time to vacate was reasonable in this case.

The twenty-second exception in the printed "case" is marked "Ruled out." It is based upon a mistake, as shown by the record.

Counsel for appellant, in their argument, complain that the judge erred in charging upon an issue of contributory negligence, when no such issue was raised by the answer; and, further, that the definition given by him of the doctrine of contributory negligence was erroneous. In support of their right to make these objections they refer to their twenty-third, twenty-seventh, and twenty-eighth exceptions. There are certainly no others that make any reference to the matter of contributory negligence, and those just mentioned do not cover the grounds contended for in argument. They will now be considered.

The twenty-third exception quotes the charge where the judge states the defendant's second defense and comments upon it, and then the exception bases upon this charge a simple allegation of error, to wit: "Thereby indicating that the burden was upon the defendant of proving what the plaintiff had alleged in her own complaint,—that she remained in the car after orders had been given for her to leave the same." The complaint admits three successive orders by the conductor to the passengers to leave the car, and alleges a reason for failure by plaintiff to heed the first two orders, and narrates the accident that befell her while attempting to comply with the last. The answer alleges that she "carelessly and negligently failed and refused to leave the same for an unreasonable length of time, and that, if such injury occurred, it occurred while the agents and servants of this defendant were properly shifting the cars of said train in accordance with the purpose and object of this defendant corporation, and alleges that said injury, if any occurred, was due solely to the negligence of the plaintiff aforesaid." The judge treated this defense as alleging plaintiff's carelessness or negligence to be the proximate cause of the injury as a plea of contributory negligence, which must be established by the preponderance of evidence. But he certainly did not impose upon defendant the burden of proving what "plaintiff had alleged in her own complaint,—that she remained in the car after orders had been given for her to leave the same." The burden thrown upon defendant by the charge was to prove careless and negligent failure on the part of plaintiff to leave the car for an unreasonable length of time; but as to this there was no exception, and the correctness of this instruction is, therefore, not properly before this court.

The twenty-seventh quotes a part of a sentence, and imputes to that quotation the error of putting upon plaintiff the burden of proving only negligence by the defendant, relieving plaintiff of the burden of showing that such negligence was the proximate cause of the injury, and putting upon defendant the burden of proving that such negligence was not the proximate cause. An answer to this may be found in the quotation from the charge contained in the next succeeding exception and in other parts of the charge. But the whole charge upon the question of contributory negligence will be quoted in full. It was as follows: "I charge you also, gentlemen, that when a defendant, as in this case, in its answer, sets up an affirmative defense, such as contributory negligence, it takes upon itself the burden of proof, and you are to require at the hands of the railroad in this case evidence to satisfy you that the railroad was not the proximate cause in its negligence; that the railway was not to blame, but that Mrs. Oliver, or Mrs. Oliver and her husband, were to blame; and the same measure of proof would be exacted of the defendants, namely, proof to your satisfaction by the pre-

Oliver v. Columbia, N. & L. R. Co

ponderance of the evidence, the greater weight of the testimony. By setting up such a plea, a defendant, as it were, agrees that plaintiff's allegation may be true; but says, even if it be true to a certain extent, even though she may have been injured, it is not their fault; it is her own fault; and, being her own fault, she cannot recover. That, in brief, is what is meant by contributory negligence. In such a case there may be evidence that the defendant itself was to some extent negligent; but if defendant's negligence, supposing such to have existed, was not the primary—the proximate—cause, the immediate cause of the injury, but the plaintiff's own negligence was the proximate cause, then, even in that case, although defendant may have been negligent, the plaintiff cannot recover damages. It is conceivable that both sides may have been careless, but the burden of proof is upon the plaintiff to satisfy the jury that the carelessness of the defendant was the proximate and immediate cause of the injury; and it is just as incumbent upon the defendant to satisfy the jury that it was the carelessness and negligence of the plaintiff that was the proximate and immediate cause of the injury." Again: "I have explained to you already that the burden of proof is upon the plaintiff to make out her case by the preponderance of the evidence. It is also upon the defendant by the preponderance of the evidence to make out the affirmative defense of contributory negligence." Again, after recess for dinner: "If you find for the defendant, the railway company,—which means if you come to the conclusion that the plaintiff or the plaintiffs have not made out their case by the preponderance of the evidence,—or if you come to the conclusion that the defendant railroad company has made out its case to your satisfaction by the preponderance of the evidence as to contributory negligence, then you will say, 'We find for the defendant.'" At the conclusion of the charge the following occurred: "Mr. Lyles: After the charge your honor has given, I hate to call attention to one point, but I think there may be a misunderstanding on the part of the jury as to that,—that is, instructing them as to the defendant making out its case on the preponderance of evidence. That is,—inasmuch as there are two defenses pleaded, one of which is a denial of the plaintiff's complaint,—of course, we understand your honor to mean that the jury need not consider the defendant's defense at all, unless they first reach the conclusion that plaintiffs have overcome our denial by the preponderance of the evidence. In other words, we are entitled to both defenses. We are entitled to stand on our denial at first." "Mr. Crawford: Inasmuch as attention has been directed by counsel on the other side to the particular feature of the case, we request that the jury be asked in that connection to consider the testimony of Mr. Hasell Gibbes, one of their own witnesses." "The court must consider the testimony of all the witnesses. I can state to you, gentle-

men of the jury, that the answer of the defendant railroad company not only denies the allegations of the plaintiffs' complaint, and therefore puts the plaintiffs to prove all their allegations—all the material allegations—by the preponderance of the evidence, but it also sets up an affirmative defense, contributory negligence. As to the first,—the allegations of the plaintiffs' complaint,—the burden of proof is upon the plaintiffs. If the plaintiffs have established their allegations by the preponderance of the evidence, they would be entitled to a verdict, unless the defendant has established its defense of contributory negligence by a preponderance of evidence. Mr. Lyles: That is the idea. The Court: As you understand it, gentlemen, the effect of the pleadings in the answer is that they put the burden of the proof upon the plaintiffs as to the allegations of the plaintiffs' complaint, but they put the burden of the proof upon the defendant as to contributory negligence." It is manifest, therefore, that Judge Benet did not instruct the jury that, if any negligence was chargeable to defendant by the preponderance of the evidence in favor of plaintiff, the burden was upon the defendant to satisfy the jury that such "negligence was not the proximate cause of the injury."

The twenty-eighth exception quotes the concluding sentence of our first quotation, *supra*. "It is conceivable," etc., imputes to it error of requiring defendant, if both sides were negligent, to prove plaintiff's negligence as fully as plaintiff was called upon to prove defendant's negligence. It seems to us the charge fully informed the jury that the primary burden of proof was upon plaintiff to prove her case, and that was that her injury was due to the negligence of defendant; and, failing so to do, there was no necessity for defendant to prove anything. If, however, the plaintiff did so prove her case, then in like manner the burden of proving contributory negligence was upon defendant; and this is the law. *Kaminitsky v. Railroad Co.*, 25 S. C. 59; *Railroad Co. v. Horst*, 93 U. S. 298, 23 L. Ed. 898. But the matter was put beyond dispute by what was charged in reply to Mr. Lyles' suggestion. This exception is overruled.

We cannot find in any of these last three exceptions any suggestion of error in the definition of contributory negligence, except so far as we have considered the errors alleged. Nor can we find in them any imputation of error to the judge in treating contributory negligence as an issue in the case. If such error was committed, appellant cannot complain on appeal, as counsel did not call the presiding judge's attention to such error (*Bryce v. Cayce*, 62 S. C. 563, 40 S. E. 948), and it was harmless to defendant (*Sims v. Railway Co.*, 59 S. C. 246, 37 S. E. 836).

The charge of the judge as to damages was as follows: "I think, gentlemen, that you have some idea as to what are the main points of dispute between the C., N. & L. R. R. on

Oliver v. Columbia, N. & L. R. Co

the one hand, as defendant, and the plaintiff Mrs. Alice E. Oliver, on the other. She seeks at your hands a verdict for both actual and punitive damages. By actual damages is meant in law such damages as the testimony will justify the jury in awarding to recompense the plaintiff for loss of time or money,—incurred expenses, for bodily injuries, for mental pain and suffering, for being rendered less able to attend to the ordinary duties of life, for the permanency of the injuries, small hope of recovery, and the like; and a jury is justified in taking into consideration evidence of all such matters in awarding a verdict for actual damages, a sum of money to pay back to the plaintiff, in a measure, the loss which she has sustained. The second kind of damages, called ‘punitive damages,’ are sometimes spoken of as ‘vindictive damages’ and ‘exemplary damages.’ Indeed, they are sometimes referred to as ‘smart money’ and ‘blood money.’ They are called ‘punitive damages’ because of the theory that such damages will act as a sort of punishment of the defendant for such wrongdoing; not only as a punishment for past wrongdoing, but to deter the defendant and others in similar business from repeating such wrongdoing in the future. Such damages are allowed in law, and they operate almost like fines imposed in the criminal court. They are allowed not so much to compensate the plaintiff or to enrich the plaintiff, but for the public good, to punish the defendant. Therefore, they are called ‘punitive damages.’ Hence, also, they are spoken of as ‘exemplary damages,’ that they may act as a warning, not only to the defendant, but to others occupied in the same business, by thus making an example of the defendant, for the benefit of others. They are sometimes called also, ‘vindictive damages,’ as giving expression to the sentiment of just indignation which certain forms of wrongdoing are bound to excite in the breast of right-thinking men. I have said also they are called, but less happily, ‘smart money,’ or ‘blood money.’ You will bear in mind the fact that, while such damages are allowed in cases where only ordinary negligence is proved as a cause of the injury, before a jury can be justified in assessing punitive damages there must be clear proof by preponderance of the evidence of gross negligence, wanton, willful, reckless negligence, as shows an utter disregard of the rights of others, of the lives of persons or property. It is important, therefore, gentlemen, that it should be made plain to you what is meant by negligence, whether ordinary or gross and wanton negligence, because you ought to decide from the testimony whether the plaintiff in this case has proved to you whether the defendant was guilty of actual negligence, and also of wanton negligence or gross negligence, or of either and both. If you come to the conclusion that the plaintiff has proved that the defendant was guilty of ordinary negligence, and that negligence was the cause of the injury, then it would justify a finding of actual damages, an amount of money suffi-

Oliver v. Columbia, N. & L. R. Co

cient to recompense the plaintiff, and no more; but if you come to the conclusion that the plaintiff has proved to your satisfaction that the defendant was guilty of gross, wanton, or willful negligence, such as shows a thorough disregard of the rights of the plaintiff in this case, you will be allowed to find not only actual damages, but, in addition thereto, an amount sufficient, in your opinion, to punish the defendant; of course, not exceeding the amount claimed, \$10,000. All that the court can do in that matter is to explain what is meant by negligence, and define actual and ordinary negligence and gross and willful negligence. But you, as a jury, must decide the facts. You alone can decide whether the defendant was guilty of negligence at all, and, if so, whether it was ordinary negligence—want of care—or willful and wanton negligence. It is a mixed question of law and fact. The court will endeavor to define the law, and the jury must decide from the testimony whether negligence has been proven. Of course, the word 'negligence' simply means a want of care; 'ordinary negligence' means want of ordinary care. What is the measure of care which should be observed by a person or corporation under given circumstances? As to that, gentlemen, there is no hard or fast rule that can supply you with a definite measure to apply like a yardstick, or a bushel measure, to ascertain whether the defendant in a particular case has been guilty of such negligence. The measure of care must be decided by the jury in accordance with the evidence in the particular case. All that the court can say is that the amount of care which should be exercised by the defendant in a given case is just such an amount of care as common sense and reason would lead us to expect should have been exercised under the circumstances by a person of ordinary intelligence and prudence. That definition (if it can be called a definition) shows that the measure of care will vary in varying cases because of the varying circumstances. Hence a jury in each particular case must decide for itself what amount of care should have been exercised under the circumstances. This negligence may be shown by what was done by a defendant, but may also be shown by evidence of what was not done which ought to have been done by defendant. Negligence, shown by acts that have been done, may be defined in this way; doing that which a man of ordinary prudence and intelligence would or should not have done under the circumstances. Negligence by omission—by leaving undone what ought to have been done—may be defined thus: failing to do what a man of ordinary prudence and intelligence would or should have done under the circumstances. Thus far, gentlemen, for ordinary negligence. If one is injured because of such lack of care, then he has his cause of action for damages against the person or corporation thus negligent; but only in such case for actual damages,—damages that may recompense for loss or injury. But where

a plaintiff seeks damages for gross or wanton negligence, then the jury must look in the testimony for more than proof of ordinary negligence; must look for proof of more than ordinary want of care. It implies willfulness, recklessness, rashness, utter disregard of the rights of others,—it may be of their lives or persons or their liberty or their property. Thus gross negligence also may be shown by acts of commission as well as acts of omission: (1) By willfully or wantonly doing something which shows utter disregard. (2) It also may be shown by evidence of the recklessly omitting to do something, the failure to do which shows such gross or utter disregard. Such negligence,—gross, wanton, willful,—in case of injury, will give the person injured a cause of action, not only for actual damages, but for punitive damages; indeed, might give him his right of action for punitive damages without a claim for actual damages. This last form of negligence, as well as first, is alleged in the complaint. Therefore, gentlemen, if in this case it is established to your satisfaction, by the preponderance of the evidence, then your verdict would be a sum of money representing not only actual injury sustained, or compensation for this injury, but also an additional amount, as I have said before, to punish the defendant, to make an example, so as to keep the defendant and others in the same kind of business from such wrongdoing, if such be proven.” Portions of this charge are quoted in the twenty-fourth and twenty-fifth exceptions, to which the error is imputed of “thereby indicating that it was competent for the jury in a civil action between individuals to visit punishment upon the defendant for the public good.” In the case of *Duckett v. Pool*, 34 S. C. 324, 13 S. E. 542, Mr. Justice McIver thought the weight of argument sustained the view of Mr. Greenleaf,—that in no case should damages be awarded against a defendant in a civil action by way of punishment. But he says that a long line of cases have held otherwise, and that in proper cases exemplary damages may be allowed “by way of punishment to the defendant as a means of deterring him and others from committing like wrongful and wanton acts (*Johnson v. Hannahan*, 3 Strob. 432), where the idea of punishment of the defendant is plainly recognized as one of the elements entering into the assessment of damages.” Many other cases are there cited to show that these damages are to be inflicted as punishment, and to prevent such acts in future. And see, too, *Watts v. Railroad Co.*, 60 S. C. 73, 38 S. E. 240. In this last case this court said: “Exemplary or punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right which has been willfully invaded; and, indeed, it may be said that such damages in a measure compensate or satisfy for the willfulness with which the private right was invaded, but, in addition thereto, operating as a deterring punishment to a wrongdoer and as a warning to

others." While, therefore, exemplary damages are not awarded "as a fine or penalty for a public wrong," they are awarded as a "punishment" to the wrongdoer for the willful invasion of a private right, "and as a warning to others." And this, as Judge Benet charged, is "for public good,"—an example,—"for the benefit of others." These two exceptions are overruled.

The twenty-sixth exception imputes two errors to the portion of the charge quoted, the first being that the jury were instructed "that an action for such [punitive] damages might be maintained by plaintiff who had established no claim for actual damages and had received no actual injury." It is certainly true that no one has a cause of action against a railroad company for negligence unless such negligence injured him. But the jury were not instructed in this case as claimed in this allegation of error. The judge charged: "Such negligence,—gross, wanton, willful,—in case of injury, will give the person injured a cause of action not only for actual damages, but for punitive damages; indeed, might give him [i. e., the person injured] his right of action for punitive damages without a claim for actual damages." The judge was, in this last sentence, speaking of the character of the damages which the plaintiff, if injured, might claim as a recovery, but he made it very plain that there could be no recovery if the plaintiff had sustained no injury. And again, he further charged on defendant's request: "That this action is based upon an allegation of negligence on the part of the defendant company, and the plaintiff can recover only upon proof by a preponderance of the evidence of some act of negligence of the character alleged in the complaint which caused the injury." And that was the injury to plaintiff, alleged in the complaint.

The second alleged error complained of in this twenty-sixth exception is that this part of the charge indicated to the jury "that, if such negligence was established to the satisfaction of the jury by the preponderance of the evidence, it would be their duty to give a sum of money representing not only damages for actual injury sustained, but also an additional amount to punish the defendant." This alleged error has been disposed of in the consideration of the twenty-fourth and twenty-fifth exceptions, except so far as it involves, under the words "such negligence," as appellant in argument contends, an erroneous statement of what is necessary to constitute that degree of negligence which would justify exemplary damages. The charge, after speaking of ordinary negligence, proceeded: "But where a plaintiff seeks damages for gross or wanton negligence, then the jury must look in the testimony for more than proof of want of ordinary care. It implies willfulness, recklessness, rashness, utter disregard of the right of others, it may be of their lives, or their persons, or their liberty, or their property. Thus gross negligence also may be shown by

Oliver v. Columbia, N. & L. R. Co

acts of commission as well as acts of omission: (1) By willfully or wantonly doing something which shows such utter disregard. (2) It may also be shown by evidence of the recklessly omitting to do something, the failure to do which shows such gross or utter disregard. Such negligence,—gross, wanton, willful,—in case of injury, will give the person injured a cause of action not only for actual damages, but for punitive damages.” This charge is very far from stating that gross negligence alone will entitle plaintiff to exemplary damages, which would have been error, under the case of *Watts v. Railroad Co.*, 60 S. C. 73, 38 S. E. 240. On the contrary, the jury were clearly instructed that the jury must find evidence of “willfulness, recklessness, rashness, utter disregard of the rights of others.” It was “such negligence” on the part of the defendant that entitled plaintiff to punitive damages. And in this instruction there was no error of which appellant can complain. *Appleby v. Railroad Co.*, 60 S. C. 56, 57, 38 S. E. 237; *Brasington v. Railroad Co.*, 62 S. C. 331, 40 S. E. 665. The twenty-sixth exception is overruled.

We find no error in the portion of the charge complained of in the thirtieth exception. We think that section 1687 of the Revised Statutes of 1893 does apply to excursion trains, so far as it requires that trains stopping at a station “to receive and let off passengers” shall stop “for a sufficient time” for that purpose.

Exception 33 cannot be sustained. The qualification made by the judge to defendant’s request was proper, inasmuch as there was testimony to the effect that the uncoupling followed quickly the conductor’s last order to vacate at the time of his notification to them that the coach was going to be sidetracked. It was for the jury to say whether that was sufficient warning.

Exceptions 34, 35, and 36 may be considered together. Where two connecting railroad companies unite in running an excursion train, and the initial company uses two miles of the track of the terminal company before surrendering the control of the train to the terminal company, the conductor being an employee of the initial company, though moving his train for said two miles under orders of the owner of that track, the initial company is liable for negligence resulting in injury to a passenger, until the passenger is safely turned over to the terminal company at the point where the train is surrendered by the one and accepted by the other. These exceptions are overruled.

We find no error in submitting it to the jury to inquire whether any witness had a personal interest in the event of the trial, or in instructing them to endeavor to reconcile conflicts in the testimony, if any such conflict was found to exist.

It is the judgment of this court that the judgment of the circuit court be affirmed.

R. W. SHAND and LEROY F. YOUMANS sat in this case in place of POPE and JONES, JJ., disqualified.

NORTHERN PAC. RY. CO. *v.* MIX.*(Circuit Court of Appeals, Ninth Circuit, February 24, 1903.)*

[121 Fed. Rep. 476.]

Master and Servant—Railroads—Collisions—Injuries to Brakeman.

Plaintiff, who was head brakeman on a train known as "162 East," was injured by a head-end collision with another train known as "159 West." Train 162 East was started under an order which made no reference to train 159 West, and no effort was made by defendant's train dispatcher to inform the operatives of train 162 East of the other train until some time after the train had left B., and until after the lapse of time within which train 162 East should have been expected to pass the only station at which it could have received such information, when the dispatcher called the operator, who erroneously reported that the train had not yet arrived, he having been asleep when the train passed. The dispatcher then issued orders which resulted in the collision: *held*, that whether the train dispatcher was guilty of negligence in failing to timely send notice to train 162 East where to meet and pass 159 West was for the jury.

Same—Complaint—Negligence.

A complaint charging that defendant sent plaintiff, as brakeman on one of its trains, along a single track, and negligently omitted to give plaintiff, or any of the crew operating with him, notice that it was at the same time sending another train in the opposite direction on the same track, which must necessarily meet in a very short time, without making any provision for either train to take a siding, contained a sufficient averment of negligence.

Same—Instructions.

In an action for injuries to a brakeman, an instruction that it was defendant's duty to all operatives to prevent passing trains from colliding, and to exercise ordinary and reasonable care to cause to be notified the operatives on one train of the approach of a train in the opposite direction, and to give such orders as will insure the safe passage of the one by the other was not error.

Same—Train Dispatcher—Representative of Railroad Company.*

A railroad train dispatcher issuing orders for the movement of trains in the name of the superintendent represents the railroad company, which is liable for such dispatcher's negligence.

Same—Railroad Rules—Due Care.

The rules of a railroad directing the action of the train dispatcher are prima facie evidence of what is due care on his part, and a violation thereof is prima facie evidence of negligence.

Same—Appeal—Right to Allege Error.

Where a railroad collision in which plaintiff, a brakeman, was injured, was caused by a train dispatcher's negligence in failing to obtain seasonable information of the movement of a train and in issuing a train order on erroneous information received from a local telegraph operator that a train, which had passed his station while he was asleep, had not passed, defendant was not entitled to complain of an instruction that the local telegraph operator was a fellow servant of plaintiff, and, if the accident happened solely through his negligence, defendant would not be liable.

In Error to the Circuit Court of the United States for the District of Montana.

Wm. Wallace, Jr., for plaintiff in error.

T. J. Walsh, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

*See notes at end of case.

Northern Pac. Ry. Co. v. Mix

ROSS, Circuit Judge. The collision which gave rise to this action for damages occurred on the Rocky Mountain Division of the Northern Pacific Railroad, about $1\frac{1}{4}$ miles east of Hellgate station, between a train known as "162 East," consisting of 39 cars loaded with freight, and one known as "159 West," consisting of a car of horses and a caboose. Both trains were extras, and were, therefore, operated not according to the regularly prescribed schedule, but under special orders of the train dispatcher, acting for and in the name of the superintendent of the road. Missoula, Mont. was the division headquarters, at which was located the chief dispatcher for the division, although it seems that for convenience in train dispatching the division was divided into different dispatching districts; that part of the main line between Helena and Missoula being called the "First District," that part west of Missoula the "Second District," and the branch leaving the main line at Garrison and running to Silver Bow and Butte, Montana, being called the "Montana Union Branch." In the early part of the night of December 24, 1899, train 162 East, on which the plaintiff below (defendant in error here) was head brakeman, was at Missoula, east-bound, and train 159 West was at Silver Bow, west-bound. 162 East was, therefore, the superior, and 159 West the inferior, train. Eastward of Missoula, to and including Garrison, the stations, sidings, and distances are as follows: Bonner, 7.4 miles east of Missoula; Bonita, 18.1 miles east of Bonner; Carlan, 7.6 miles east on Bonita; Bearmouth, 7.8 miles east of Carlan; Hellgate, 5.3 miles east of Bearmouth; Drummond, 6.9 miles east of Hellgate; Garrison, 20.9 miles east of Drummond. Silver Bow is on the branch line 44.4 miles from Garrison. At the time in question the only night telegraph offices between Missoula and Garrison were at Bonita and Drummond, and there were none on the branch line between Garrison and Silver Bow.

The evidence shows without conflict that train 162 East was started from Missoula under "Train Order No. 91," to "run extra Missoula to Helena, and meet 2nd No. 53 and extra 153 West at Missoula, and meet extra 155 West at Bonner." That order was made "complete"—that is to say, it had been correctly repeated by the local operator to the dispatcher, and by him signed and entered of record, at 9:38 p. m.—and about 10:40 p. m. of December 24th train 162 East left Missoula, east-bound. Order No. 91 was the only order the conductor or engineer or any other of the crew of train 162 East received prior to the collision. It made no mention, as will have been seen, of train 159 West. Shortly after train 162 East left Missoula, to wit, at 11:21 p. m. of December 24th, the train dispatcher at that place sent "Order No. 98" to the conductor and engineer of train 159 West at Silver Bow to run 159 West extra from Silver Bow to Garrison. Shortly after 1 a. m. of the 25th of December, and just before

Northern Pac. Ry. Co. v. Mix

train 159 West arrived at Garrison, the dispatcher called the local operator at Bonita, and asked him about train 162 East. The response was, "Not here yet." At 1:05 a. m. of December 25th, train 159 West arrived at Garrison, and at 1:10 a. m. the local operator there reported to the dispatcher at Missoula that it would be ready in 10 minutes to start west. About 1:10 a. m. the dispatcher again called the local operator at Bonita, and asked if there was any sign of 162 East, to which inquiry he replied, "No sign." Thereupon, and at 1:19 a. m., the dispatcher sent to Bonita "Train Order No. 3" to 162 East to meet 159 West at Carlan. This order was also given, at 1:20 a. m., to train 159 West at Garrison. Shortly after train 159 West left Garrison, the dispatcher instructed the operator at Drummond to put out the "red signal," so that he could reach the train in the event he wished to change the place of its meeting with train 162 East. On receiving notice of the arrival of 159 West at Drummond about 1:57 a. m., the dispatcher called the operator at Bonita again, asking for train 162 East, the latter replying, "Not here yet." The dispatcher then asked if he was sure they had not gone by, and the local operator replied, "Yes." The dispatcher asked, "Yes what?" and the operator replied, "Yes, I am certain that 162 East has not passed." Thereupon the dispatcher issued "Train Order No. 4," to the effect that train 162 East and train 159 West should meet at Bonita instead of Carlan, which latter order became complete to train 162 East at Bonita at 2 a. m., and to train 159 West at Drummond at 2:02 a. m. of December 25th. Neither order No. 3 nor order No. 4 was ever delivered to train 162 East, the evidence being that prior to the issuance of either of those orders train 162 East had passed Bonita station. Having passed extra 155 West at Bonner, as directed in the order under which it was running, train 162 East reached Bonita, about 12:35 a. m. of December 25th, found the white signal out, indicating its right to continue its journey, and, after stopping at the water tank at that station for about 15 minutes, proceeded eastward without any knowledge on the part of its conductor, engineer, or any other member of its crew that train 159 West was coming westward on the same track, until the collision occurred. Such is the undisputed evidence in the case.

The evidence further shows without conflict that the local operator at Bonita was asleep when train 162 East passed that station, which accounts for his answers to the two inquiries made of him by the dispatcher concerning that train. But according to the evidence the dispatcher did not even attempt to notify train 162 East of the fact that train 159 West was traveling westward, nor did he make any inquiry concerning train 162 East until after the latter had not only actually passed, but until after the lapse of time within which it should have been expected to pass, the only station at

which it could, by any possibility, have received such information, namely, Bonita; for, as has been seen, train order No. 3, sent by the dispatcher from Missoula, was not sent to the operator at Bonita until 1:19 a. m., nor was any inquiry made of him until after 1 a. m. of the 25th, prior to both of which times train 162 East had passed Bonita, having arrived there at 12:35 a. m. and left at 12:50 a. m. of the 25th. Of course, if the operator at Bonita had been awake, as he should have been, and had informed the dispatcher, in answer to his inquiries concerning train 162 East, that it had already passed Bonita, the dispatcher might have held train 159 West at Drummond, or perhaps have put it on some other siding, and thus have avoided the collision. But even if, giving his untrue answers to the dispatcher's inquiries, the operator at Bonita could properly be regarded as a fellow servant of the crew of train 162 East, that would not relieve the defendant company of the charge of negligence committed by its representative, the train dispatcher, in failing to send timely notice where to meet train 159 West. He knew that train 162 East was at Bonner about 11:35 or 11:40 p. m. of the 24th, for train 155 West passed it there, and reported that fact to him on its arrival at Missoula at 12:10 a. m. of the 25th. The distance from Bonner to Bonita is but 18.1 miles, and the chief dispatcher himself testified that, according to his figures, train 162 East must have left Bonner about 11:35 or 11:40 p. m., and that according to his experience it would take it about 1 hour and 15 minutes to run to Bonita, although freight trains of that class, said the witness, "have made the run in much less than that time—an hour or less." The plaintiff's testimony is to the effect that the average running time of such trains between those stations is 1 hour and 5 minutes, and that on the occasion in question it was about 1 hour. There was no error in permitting the usual running time between Bonner and Bonita to be shown, for it bore directly upon the question of what was timely notice by the dispatcher to train 162 East where to meet train 159 West. Taking the running time as 1 hour and 15 minutes, and the time of departure of train 162 East from Bonner as 11:35 or 11:40 p. m. of the 24th, it should have been expected to reach Bonita at 12:50 or 12:55 a. m. of the 25th. That station, it is well to repeat, was the only station at which it was possible for the dispatcher to notify train 162 East that it must necessarily meet train 159 West going in the opposite direction. Yet it was after 1 a. m. of the 25th before the dispatcher made any effort to get into communication with train 162 East.

In respect to these matters there is, as has been said, no conflict in the evidence. The court below was not only justified in submitting the question of negligence to the jury, but we are of opinion that the evidence is amply sufficient to sustain the verdict against the defendant company on the

Northern Pac. Ry. Co. v. Mix

ground of the negligence of the company's representative, the train dispatcher. Moreover, because we held, in *Oregon Short Line & U. N. Ry. Co. v. Frost*, 21 C. C. A. 186, 74 Fed. 965, as have other courts, that a local operator, in delivering orders from the train dispatcher to the trainmen, is a fellow servant of the latter, it by no means follows that in answering the inquiries of the train dispatcher, upon which he may or may not issue orders, the local operator is to be regarded as a fellow servant of the trainmen. That question, however, we find unnecessary to decide in this case, for the reason already suggested.

It will be observed that every order issued to either of the trains in question was issued by the dispatcher in the Missoula office, so that the circumstance urged by counsel for plaintiff in error that the Rocky Mountain Division was divided into different dispatching districts is without significance. So far as these particular trains are concerned, at least, their movements were directed entirely by the dispatcher at Missoula.

In the view we take of the case, it is unnecessary to consider the ruling of the trial court in excluding the letter of the local operator at Bonita, written the day after the collision, confessing that he was asleep when train 162 East passed his station, and endeavoring to explain his action in running away immediately after hearing of the accident.

The objection that the complaint does not charge the defendant company with any negligence is without merit. It charges that the defendant sent the plaintiff, as brakeman on one of its trains, along its single track, and negligently omitted to give the plaintiff, or any of the crew operating with him, notice that it was at the same time sending another train in the opposite direction on the same track, which trains must necessarily meet within a very short time, and without making any provision for either train to take a siding. That is a sufficient averment of negligence.

It is contended on behalf of the plaintiff in error that the trial court erred in instructing the jury that it was the duty of the defendant company "to give such orders as will insure the safe passage of the one [train] by the other." The court, after stating that the plaintiff alleged, in effect, that the defendant company negligently omitted to inform him, or any of the operatives on his train, that the other train was approaching, and that the collision occurred by reason of the negligence of the defendant in that regard, instructed the jury as follows:

"It is the duty of the defendant company to all operatives upon its road to take all reasonable care and precaution to prevent opposing trains on its line of railway from colliding, and to exercise ordinary and reasonable care to notify, or cause to be notified, the operatives upon one train of the approach of a train in the opposite direction, and to give such orders as will insure the safe passage of the one by the other.

"With regard to the movement of trains, the train dispatcher

Northern Pac. Ry. Co. v. Mix

stands in the place of the defendant. His orders are issued in the name of the superintendent, representing the defendant, and for any negligence on the part of the train dispatcher the defendant is liable. If, accordingly, you find from the evidence that the failure of the operatives on train 162 East to receive notice of the approach of 159 West was due wholly or in part to any negligence on the part of the train dispatcher, then the defendant company was negligent, and your verdict should be for the plaintiff. It is not necessary, in order that the plaintiff may recover, that the negligence of the train dispatcher should be the sole cause of the collision; if his negligence contributed to—that is to say, had a share in producing—the injury, the company was liable, even though the negligence of the telegraph operator at Bonita also contributed to the collision.

“It was the duty of the defendant railway company, when it put the two trains in motion in opposing directions on the same track, if it did so, to make suitable provision and to exercise ordinary and reasonable care for their safe management, guarding against danger of accidents. This was a positive duty upon the part of defendant, which it owed to its employees; and if this duty was delegated to any particular agent, such as a train dispatcher, and such agent was negligent in the performance of that duty, his negligence in that respect is the negligence of the defendant.

“It was the duty of the defendant company to regulate the time and manner of running its trains so as to avoid collisions, and to exercise reasonable care to enable all its servants engaged in operating any particular train upon its line of railway, and who would be imperiled by a collision, to know when a train might be expected, which would be likely to collide with the other train. As to what is ordinary and reasonable care depends upon the circumstances and upon the danger to be apprehended. The greater the danger to be apprehended, the greater should be the care exercised.

“In considering the question as to what is due care on the part of the train dispatcher, you are advised that the rules of the defendant company, so far as they purport to direct the action of the train dispatcher, are prima facie evidence of what is due care on his part; and a violation of these rules by the train dispatcher would be prima facie evidence of negligence on his part. The position of train dispatcher of a railway company is one calling for the exercise of a high degree of care and caution. * * * One [who] enters in the service of another and engages in a particular employment is presumed to do so with a knowledge of and a taking of the risks of its ordinary hazards and dangers, in which the negligence or carelessness of a fellow servant or fellow servants is included.

“The duty alleged as owing by defendant to plaintiff in paragraph 4 of the complaint was to advise the servants operating any particular train as to where it would be met

Notes

or overtaken by any other train; and, second, to give train crews orders where they should await other trains to pass them. The law does not demand that the railway company shall see to it, under all circumstances, that such directions actually reach the train crew.

"The standard system of train movements, as in force upon the Northern Pacific Railway, is a reasonably safe system for the movements of trains, and in this respect, as to the adoption of the system, the defendant has complied with its duty. Under this system the dispatcher gains his information of the whereabouts and of the arrival and departure of trains from the local telegraph operator. The local telegraph operator is a fellow servant of the plaintiff, and, if an accident happens solely through the carelessness or fault of the local operator, the defendant would not be responsible to the plaintiff in damages therefor. If the collision in the present instance was due solely to the local operator Laird's failure to report the passage of extra 162 East to the dispatcher, then the defendant is entitled to a verdict in this action."

Whether the instruction last quoted concerning the local telegraph operator was entirely correct, in view of the facts of this case, we need not decide, for the reason already stated; but certainly the plaintiff in error has no cause to complain of it. The other instructions above quoted embody, we think, a full and correct statement of the law applicable to the evidence in the case. There was no error in refusing the instructions requested by the plaintiff in error, nor do we find any error prejudicial to the rights of the plaintiff in error in any of the rulings of the court below.

The judgment is affirmed.

NOTES.

**TRAIN DISPATCHERS AND TELEGRAPH OPERATORS,
WHETHER FELLOW SERVANTS OF OTHER RAIL-
ROAD EMPLOYEES.**

- I. General Rule.
- II. Train Dispatchers Not Fellow Servants.
 1. Of Engineers.
 2. Of Firemen.
 3. Of Other Employees.
 4. Of Track Repairers.
 5. Of Trainmen.
- III. Train Dispatchers as Fellow Servants.
 1. Of Brakemen.
 2. Of Engineers.
 3. Of Firemen.
- IV. Telegraph Operators Held to Be Fellow Servants.
 1. Of Engineers.
 2. Of Firemen.
 3. Of Trainmen.
- V. Telegraph Operators Held Not to Be Fellow Servants.
 1. Of Brakemen.
 2. Of Conductors.
 3. Of Engineers.
 4. Of Firemen.
 5. Of Section Hands.
 6. Of Trainmen.

Notes

I. GENERAL RULE.

Although the decisions upon the question as to whether train dispatchers and telegraph operators are fellow servants of other railroad employees do not appear to be always reconcilable, it may be stated as a general rule, prevailing in nearly all jurisdictions where the common law is in force, that a train dispatcher or telegraph operator, having control of the movement of trains, is, in exercising such authority, a vice principal, representing the railroad company, for whose negligence, when causing injury to a trainman or other employee, the railroad company is liable.

United States.—Baltimore, etc., R. Co. *v.* Camp, 65 Fed. 952, 31 U. S. App. 213, 13 C. C. A. 233; Gravelle *v.* Railroad Co., 10 Fed. 711; Chicago, M. & St. P. R. Co. *v.* Ross, 112 U. S. 377, 28 L. Ed. 787, 5 Sup. Ct. 184; Clyde *v.* Richmond, etc., R. Co., 69 Fed. 673; Crew *v.* St. Louis, etc., R. Co., 20 Fed. 87; Gilmore *v.* Railroad Co., 18 Fed. 866; Railway Co. *v.* Frost, 44 U. S. App. 606, 21 C. C. A. 186, 74 Fed. 965.

Arkansas.—Little Rock, etc., R. Co. *v.* Barry, 58 Ark. 198, 23 S. W. 1097.

California.—McKinne *v.* Railroad Co. (Cal.), 21 Am. & Eng. R. Cas. 539.

Connecticut.—Darrigan *v.* New York, etc., R. Co., 52 Conn. 285, 52 Am. Rep. 590, 23 Am. & Eng. R. Cas. 438, 24 Am. L. Reg. 453.

Idaho.—Palmer *v.* Utah, etc., R. Co., 2 Idaho 290, 13 Pac. 425.

Illinois.—Chicago, B. & Q. R. Co. *v.* Young, 26 Ill. App. 115; Chicago, B. & Q. R. Co. *v.* McLallen, 84 Ill. 109.

Indiana.—Robertson *v.* Terre Haute, etc., R. Co., 78 Ind. 77, 8 Am. & Eng. R. Cas. 175; Railway Co. *v.* Heck, 151 Ind. 293, 306-315, 50 N. E. 988.

Kansas.—Hannibal, etc., R. Co. *v.* Kanaley, 39 Kan. 1, 17 Pac. 324; Railway Co. *v.* Dwyer, 36 Kan. 58, 12 Pac. 352.

Kentucky.—McLeod *v.* Ginther, 80 Ky. 399.

Maine.—Lasky *v.* Canadian Pac. R. Co., 83 Me. 461, 22 Atl. 367.

Maryland.—Moran's Case, 44 Md. 283.

Michigan.—Hunn *v.* Railroad Co., 78 Mich. 513, 44 N. W. 502, 7 L. R. A. 500.

Mississippi.—Chicago, etc., R. Co. *v.* Doyle, 60 Miss. 977, 8 Am. & Eng. R. Cas. 171.

Missouri.—Dowling *v.* Allen, 74 Mo. 13; Blessing *v.* St. Louis, etc., R. Co., 77 Mo. 410, 15 Am. & Eng. R. Cas. 298; Smith *v.* Wabash, St. L. & P. R. Co., 92 Mo. 359, 19 Mo. App. 120, 4 S. W. 129.

New York.—Booth *v.* Boston & A. R. Co., 73 N. Y. 38, 29 Am. Rep. 97; Sutherland *v.* Troy, etc., R. Co., 125 N. Y. 737, 35 N. Y. St. 853; Sheehan *v.* New York Cent. & H. R. R. Co., 91 N. Y. 334; Rose *v.* Boston, etc., R. Co., 58 N. Y. 217; McChesney *v.* Panama R. Co. (Sup. Ct.), 21 N. Y. Supp. 207, 66 Hun (N. Y.) 627, approved 74 Hun (N. Y.) 150; Malone *v.* Hathaway, 64 N. Y. 5; Hankins *v.* New York, etc., R. Co., 142 N. Y. 416, 40 Am. St. Rep. 616, reversing 55 Hun (N. Y.) 51, 37 N. E. 466, 25 L. R. A. 396; Flike *v.* Railroad Co., 53 N. Y. 549; Dana *v.* New York Cent. & H. R. R. Co., 92 N. Y. 639; Sutherland *v.* Troy & B. R. Co., 28 N. Y. S. R. 201; Slater *v.* Jewett, 85 N. Y. 62, 39 Am. Rep. 627, 5 Am. & Eng. R. Cas. 515.

North Carolina.—Cowles *v.* Railroad Co., 84 N. Car. 309; Dobbin *v.* Railroad Co., 81 N. Car. 446.

Ohio.—Pittsburgh, etc., R. Co. *v.* Henderson, 37 Ohio St. 552, 5 Am. & Eng. R. Cas. 529.

Pennsylvania.—Kennelty *v.* Baltimore, etc., R. Co., 166 Pa. St. 60, 36 W. N. C. (Pa.) 50, 25 Pittsb. L. J. N. S. 316; Lewis *v.* Seifert, 116 Pa. St. 628, 2 Am. St. Rep. 631, 11 Atl. 514.

Rhode Island.—Healy *v.* New York, etc., R. Co., 20 R. I. 136, 37 Atl. 676.

Tennessee.—Washburn *v.* Nashville, etc., R. Co., 3 Head (Tenn.) 638, 75 Am. Dec. 784; Railway Co. *v.* De Armond, 86 Tenn. 75, 5 S. W. 600; Haynes *v.* East Tennessee, etc., R. Co., 3 Coldw. (Tenn.) 222.

Notes

Texas.—Galveston, etc., R. Co. *v.* Smith, 76 Tex. 611, 18 Am. St. Rep. 78; Galveston, H. & S. R. Co. *v.* Arispe, 5 Tex. Civ. App. 611, 23 S. W. 928, 24 S. W. 33; Hogan *v.* Missouri, etc., R. Co., 88 Tex. 679.

West Virginia.—Flannegan *v.* Chesapeake, etc., R. Co., 40 W. Va. 436, 21 S. E. 1028; Madden *v.* Chesapeake & O. R. Co., 28 W. Va. 610, 57 Am. Rep. 695.

Wisconsin.—Phillips *v.* Chicago, etc., R. Co., 64 Wis. 475, 25 N. W. 544, 23 Am. & Eng. R. Cas. 453.

Canada.—Murphy *v.* Smith, 19 C. B. (N. S.) 361.

II. TRAIN DISPATCHERS NOT FELLOW SERVANTS.

I. Of Engineers.

In Clyde *v.* Richmond & D. R. Co. (C. C.), 69 Fed. 674, it was held that a train dispatcher of a railway company in the possession of receivers is the alter ego of the receivers, in respect to a locomotive engineer injured through his negligence in directing the running of trains. In this case it is said in the opinion: "The only legal question involved is as to the finding of the special master that the train dispatcher is the alter ego of the defendant. The correctness of this finding is too clear for discussion. He is not, either upon principle or authority, a fellow servant of the engineer, and there is no difficulty whatever in the case on that ground. Railroad Co. *v.* Camp, 13 C. C. A. 233, 65 Fed. 952, citing the following authorities on pages 959 and 960, 65 Fed., and page 240, 13 C. C. A.: Hankins *v.* Railroad Co., 142 N. Y. 416, 37 N. E. 466; Dana *v.* Railroad Co., 92 N. Y. 639; Sheehan *v.* Railroad Co., 91 N. Y. 342; Slater *v.* Jewett, 85 N. Y. 62; Darrigan *v.* Railroad Co., 52 Conn. 285; Lewis *v.* Seifert, 116 Pa. St. 628, 11 Atl. 514; Hunn *v.* Railroad Co., 78 Mich. 513, 44 N. W. 502; Railroad Co. *v.* Barry, 58 Ark. 198, 23 S. W. 1097; Railroad Co. *v.* McLallen, 84 Ill. 109; Smith *v.* Railway Co., 92 Mo. 359, 4 S. W. 129; Washburn *v.* Railroad Co., 3 Head 638; Railway Co. *v.* Arispe, 5 Tex. Civ. App. 611, 23 S. W. 928, and 24 S. W. 33; McKin. Fel. Serv. § 143."

In Little Rock & M. R. Co. *v.* Barry, 58 Ark. 198, 23 S. W. 1096, it was held that a train dispatcher, who controls the movement of trains, represents the company, and is not the fellow servant of an engineer injured in a collision resulting from his negligence.

In Darrigan *v.* New York & New England R. Co., 52 Conn. 285, 52 Am. Rep. 590, it was held that a railway train dispatcher and a locomotive engineer are not fellow servants. In this case it was said in the opinion: "The train dispatcher then, in respect to the matter of moving these trains, was supreme. The whole power of the corporation, whose duty it was to move them safely, was delegated to him. He was the agent through whom the corporation attempted to perform its duty. He acted in its name, by its authority, and in its stead. The engineer was bound to obey his order. Disobedience or deviation would have been subversive of order and discipline, destructive in its consequences, and just cause for immediate dismissal."

In McChesney *v.* Panama R. Co., 21 N. Y. Supp. 207, it was held that a train dispatcher, vested with discretionary power as to the running of trains, and authorized to change the running time from that fixed in the time-tables of the company, represents the company; and a locomotive engineer may recover from the company for injuries sustained in a collision between his train and another train also running under the direction of the train dispatcher, and resulting from the engineer's obedience of the train dispatcher's order to run his own train ahead of time. In this case it is said in the opinion: "We think the discretion was vested by the defendant's rules in the train master or train dispatcher, and was exercised in this instance, and that his act in that particular was the act of the defendant. Sutherland *v.* Railroad Co., 46 Hun 372; on subsequent appeal (Sup.), 8 N. Y. Supp. 83; affirmed by the court of appeals, 26 N. E. 609. This case seems to settle the rule, before that involved in some doubt, that the act of the train dispatcher, vested with a discretion, is the act of the company, and not that of a fellow servant, and that any negligence of his in the exercise

Notes

of that discretion must be treated as the negligence of the company. It is quite apparent that the train dispatcher exercised this discretion in ordering train No. 9, to which plaintiff's engine was attached, to 'leave Aspinwall and run to Boheo ahead of time.' It is also apparent that the train dispatcher exercised his discretion in ordering engine No. 30, with which plaintiff's engine collided, to 'run special, Panama to Aspinwall;' and while disobedience to these orders would be the negligence of the servant, for which the defendant would not be liable, any defect or imperfection in the orders, or in their manner of communication, would be the negligence of the defendant, and that question would be one of fact to be submitted to the jury."

2. Of Firemen.

In *Crew v. St. Louis, K. & N. W. R. Co.*, 20 Fed. 87, it was held that train dispatchers and train masters are not the fellow servants of locomotive firemen.

In *Maher v. Union Pac., D. & G. Ry. Co. (C. C. A.)*, 106 Fed. 310, it is said in the opinion: "The case turns upon a single question, namely, whether the collision in which the plaintiff (the fireman) received his injury resulted from the negligence of the conductor and engineer on train No. 12, or from some fault or error in the orders of the train dispatcher to the conductors and engineers of these two trains. If the collision resulted from the negligence or error of the train dispatcher, the defendants are liable (*Railway Co. v. Elliott*, 42 C. C. A. 188, 102 Fed. 96, and cases there cited); * * *."

In *Missouri, etc., Ry. Co. v. Elliott (Ind. Ter.)*, 14 Am. & Eng. R. Cas., N. S., 587, it was held that where a train dispatcher has authority to direct the movements of trains, his relation to firemen on such trains, is not that of a fellow servant, but of a vice principal.

A train dispatcher, who has control of a railroad or division thereof so far as the running and operating of trains thereon is concerned, and whose directions it is the duty of all employees on the train to obey, is not the fellow servant of a fireman upon a train which is being operated under his direction. So held in *Hunn v. Michigan Central R. Co.*, 78 Mich. 513, 44 N. W. 502, 41 Am. & Eng. R. Cas. 452.

In *Houston & T. C. R. Co. v. Stuart (Tex. Civ. App.)*, 48 S. W. 799, an action for injury to a fireman in a collision, it is said in the opinion: "As we have seen, the dispatchers stood, for the purpose of discharging such duties, in the place of the master. They possessed information which was necessary for the servants on this train to be put in possession of, unless they already had it, or the means of obtaining it, in order to enable them to avoid the collision. The jury could have legitimately found that the employees were ignorant of the danger, and that they were not required to look for it from any source other than the dispatchers. This part of the charge in question does not exclude any proper application of the rule of fellow servants. It supposes a state of facts in which defendant itself would be guilty of negligence and in which, of course, contributing negligence of the fellow servants would be no defense."

3. Of Other Employees.

In *Lasky v. Canadian Pac. Ry. Co.*, 83 Me. 461, 22 Atl. 367, it was held that where a train dispatcher habitually performs, in the name of the superintendent of a railroad, certain duties of such superintendent in his absence, with the assent of the corporation, any order to an employee from such train dispatcher, within the limit of his delegated authority, imposes upon both the corporation and employee the same duties and liabilities as if issued directly by the superintendent himself.

In *Smith v. Wabash, St. L. & P. Ry. Co.*, 92 Mo. 359, 4 S. W. 129, it was held that a train dispatcher, having control of the movements of trains upon a railroad, is, in the performance of his duties as such, a representative of the company, and for an accident occurring through his negligence to another employee subordinate to him, and subject to his orders, the company will be liable.

4. Of Track Repairers.

A train dispatcher and material agent having authority to employ

Notes

and discharge men, and direct movements of trains, is not a fellow employee with an ordinary track laborer. *McKinne v. California Southern R. Co.*, 17 Am. & Eng. R. Cas. 589, 66 Cal. 302, 5 Pac. 482.

5. Of Trainmen.

In *Felton v. Harbeson* (C. C. A.), 20 Am. & Eng. R. Cas., N. S., 131, it was held that a railroad train dispatcher is a vice principal, and not a fellow servant, in his relation to trainmen, and the master is liable for an injury to a trainman which is the proximate result of the negligence of the dispatcher in giving orders for the movement of trains.

In *Louisville, etc., Ry. Co. v. Heck*, 151 Ind. 314, 50 N. E. 995, 11 Am. & Eng. R. Cas., N. S., 382, it is held that a train dispatcher who controls, and directs the movements of trains is not a fellow servant of trainmen, but a vice principal.

In *Smith v. Wabash, St. L. & P. Ry. Co.*, 92 Mo. 359, 4 S. W. 129, it is said in the opinion: "The authorities bearing upon the question as to whether or not a train dispatcher, invested with such control, is a fellow servant with the conductor and engineer and others engaged in actually operating and moving trains, are conflicting and irreconcilable. The rule laid down in Massachusetts, and cases cited from other states, where it is held that all who are engaged in a common employment, working to accomplish a common result, without regard to rank, are to be regarded as fellow servants, supports defendant's contention. While this court has held that, where one servant is injured by the negligence of a fellow servant, no action therefor can be maintained against the master, only in exceptional cases (such as, when the servant employed was incompetent, which was either known or might with ordinary care have been known by the master), we have never gone so far as to adopt a rule, by which to determine who are fellow servants, so broad as that adopted in Massachusetts, nor are we disposed to do so now."

A train dispatcher wielding the power and authority of a railroad company in the moving of trains, in the changing of schedules, or the making of new ones, as exigencies require, is not a fellow servant with a train employee; and for his negligence, which is the proximate cause of an injury to such employee, the company is liable in damages. So held in *Lewis v. Seifert*, 116 Pa. St. 628, 9 Cent. Rep. 755, 11 Atl. 514, 20 W. N. C. 145; *McKinne v. California Southern R. Co.*, 17 Am. & Eng. R. Cas. 589, 66 Cal. 302, 5 Pac. 482; *Hunn v. Michigan C. R. Co.*, 41 Am. & Eng. R. Cas. 452, 78 Mich. 513, 7 L. R. A. 500, 44 N. W. 502; *McChesney v. Panama R. Co.*, 66 Hun 627, 49 N. Y. S. R. 148, 21 N. Y. Supp. 207.

In *Lewis v. Seifert*, supra, it is said in the opinion: "If it be the duty to provide schedules for the moving of its trains which shall be reasonably safe, it follows logically that, when the schedules are departed from, when trains are sent out without a schedule, such orders should be issued by the company as will afford reasonable protection to the employees engaged in the running of such trains. I am not speaking now of collisions caused by a disobedience of orders on the part of conductors and engineers, but of collisions or other accidents the result of obeying such orders. At the time of the collision referred to, Wellington Bertolotte was the general dispatcher of the defendant company, and from his office in Philadelphia had the general power and authority of moving the trains. In this he was not interfered with by the company, or any one else. For the purpose of sending out the trains, he wielded all the power of the company. He could send a train out on schedule time, or he could hold it back. He could change the schedule time, or make new schedules, as the exigency of the case required. He could send a train out without schedule, and direct its movements from his office in Philadelphia. When he issued an order, the train was bound to move as he directed. The engineer and conductor had but one duty, and that was obedience."

III. TRAIN DISPATCHERS AS FELLOW SERVANTS.

1. Of Brakemen.

A brakeman and a train dispatcher are servants in the accomplish-

Notes

ment of the same general object, and are therefore fellow servants, though situate many miles apart, and with distinct duties. *Robertson v. Terre Haute & I. R. Co.*, 8 Am. & Eng. R. Cas. 175, 78 Ind. 77, 41 Am. Rep. 552. In this case, it is said in the opinion: "Injury to a brakeman upon a train en route, by reason of a collision with another train moving in an opposite direction, and which was the result of the negligence of the train dispatcher, whose duty it is to control the movement of trains affords no right of action against the railroad company for the injury. The brakeman and train dispatcher, though many miles apart, and with distinct duties, are nevertheless co-servants in the accomplishment of the same general object."

In *Marion v. Chicago, R. I. & P. R. Co.*, 78 Ind. 77, 8 Am. & Eng. R. Cas. 177, it is said in the opinion: "The duties of the train dispatcher and the brakeman are quite distinct, but not more so than are the duties of the trackman or the switch tender and the brakeman. Safety in running trains requires the prompt and faithful discharge of the duties of all these employees. Their co-operation and combined labor relate to the same object, and are essential to the movement of trains upon the road. The mere fact that the duties of some of the employees are performed upon the train, and those of others at a particular place upon the road, does not, as claimed by the appellant, determine the question of their common employment. If the duties discharged by each relate to the same general object, they must be held to be fellow servants. It is enough if they are employed for the purpose of effecting the same general object. *Wharton, Neg.*, sec. 230; *Slattery v. The Toledo, etc., Ry. Co.*, 23 Ind. 81; *Wilson v. The Madison, etc., R. R. Co.*, 18 Ind. 226; *Gormley v. The Ohio, etc., Ry. Co.*, 72 Ind. 31."

2. Of Engineers.

In *Norfolk & W. R. Co. v. Hoover*, 79 Md. 253, 29 Atl. 994, it was held that a train dispatcher, employed by the division superintendent, though he has power to employ and discharge brakemen and flagmen, and has general charge of the movement of trains, is a fellow servant of an engineer who is also subject to the instructions of the division superintendent. In this case it is said in the opinion: "Shull was a mere dispatcher of trains, with power to employ and discharge flagmen and brakemen, and having general charge of the trainmen of the first division of the road, and the movement of trains thereon. He was employed by the division superintendent, who had the general management of the division. The enginemen and firemen are also under the instructions of the division superintendent. This is all the evidence (and it is entirely undisputed) to show that Shull was a vice principal, and not a fellow servant."

A., an engineer in the employ of a railroad company, was in charge of a train proceeding southward. Several trains being not on time the train dispatcher at a point to the north ordered train No. 6, southward bound, to "get orders at Grand Junction." On arriving at Grand Junction the engineer of No. 6 found no orders awaiting him and so proceeded to the south. While so doing he collided with the train upon which A. was engineer and A. was in consequence killed. Suit being brought by A.'s widow against the railroad company to recover damages for her husband's death, it was held that the same had been occasioned by the negligence of a fellow servant of deceased, and that therefore plaintiff was not entitled to recover. *Chicago, St. Louis & N. O. R. R. Co. v. Doyle*, 60 Miss. 977, 8 Am. & Eng. R. Cas. 171.

3. Of Firemen.

In *Hankins v. New York, L. E. & W. R. Co.*, 28 N. Y. S. R. 59, 8 N. Y. Supp. 272, 55 Hun 51 (reversed in 142 N. Y. 416), it was held that an ordinary train dispatcher is the fellow servant of a locomotive fireman, for whose injuries, caused by the negligence of the former, the railroad company is not liable where it appears that the company had exercised care in the selection of a train dispatcher, and had prescribed adequate rules for his instruction and government.

Notes

IV. TELEGRAPH OPERATORS HELD TO BE FELLOW SERVANTS.

1. Of Engineers.

In *Illinois Cent. R. Co. v. Bentz* (C. C. A.), 99 Fed. 657, 18 Am. & Eng. R. Cas., N. S., 540, it was held that if the death of a locomotive engineer resulted from the negligence of a telegraph operator in failing to keep the train dispatcher advised as to the whereabouts of the engineer's train, there could be no recovery for the death, as such negligence was at common law that of deceased's fellow servant. In this case it is said in the opinion: "We have already decided in this court, in the case of *Railroad Co. v. Camp*, 31 U. S. App. 213, 13 C. C. A. 233, 65 Fed. 952, that at the common law (and there is no statute in Tennessee) a telegraph operator is the fellow servant of an engineer. See also, *Railroad Co. v. Clark*, 16 U. S. App. 17, 6 C. C. A. 281, 57 Fed. 125; *Slater v. Jewett*, 84 N. Y. 61; *Sutherland v. Railroad Co.*, 125 N. Y. 737, 26 N. E. 609; *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38, 25 Atl. 175; *McKaig v. Railroad Co.* (C. C.), 42 Fed. 288. The fact that the supreme court of Tennessee, in the case of *Railroad Co. v. De Armond*, 86 Tenn. 73, 5 S. W. 600, had taken another view of this question, under the department theory of fellow servants, which prevails in the state courts of that state, was noted in the *Camp Case*, and the view of the Tennessee court was dissented from. If the *De Armond Case* is the authority which was followed by the learned judge at the circuit, the *Camp Case* could not have been called to his attention."

A telegraph operator who is charged with the duty of displaying signals to regulate the movement of trains is a fellow servant with a locomotive engineer, so as to prevent the latter from recovering for an injury received through the negligence of the other, when no charge of incompetency is made. So held in *Monagan v. New York, C. & H. R. R. Co.*, 45 Hun 113, 9 N. Y. S. R. 672.

2. Of Firemen.

In *McKaig v. Northern Pac. R. Co.*, 42 Fed. 288, it was held that a telegraph operator employed by a railroad company to give information in regard to the location of trains on the road, and to communicate to the operators on the trains instructions for running them, received by him from the train dispatcher, is a fellow servant of the fireman on such trains. Nelson, J., after observing that the case of *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 17 Am. & Eng. R. Cas. 501, had no application, said: "Is the telegraph operator a fellow employee with the fireman who was injured on the west bound train? It is well known, under the rules of the company, that the purpose of his employment was to give information with regard to the location of trains upon the road, and also to communicate any instructions to the operators of these trains how to run, and when and where to stop and start, so that, as far as the operators of these trains were concerned, he was connected with the operation of them. He was instructed by the train dispatcher to take steps to inform the persons operating the west-bound train to stop and meet the east-bound train at Tower City. The engineers and firemen of the east and west-bound trains were in the same common employment, having the same object in view, and so was the telegraph operator at Tower City, who, under his duty and the orders which were sent to him, was required to communicate information to the engineer of the east-bound train how to run and what to do. He was a co-employee with them in the same common employment—common service—of operating both trains at that time, and, within the definition of who are 'fellow servants' and who are 'co-employees,' I think he comes within that rule. So that, as the case now stands, even if the jury should find sufficient evidence tending to show that the telegraph operator failed in his duty, although he states that he had performed it, yet, under the rule of law as I have announced it, the plaintiff cannot recover. The negligence of the telegraph operator was not the negligence of the railroad company."

In *Cincinnati, etc., R. Co. v. Clark*, 57 Fed. 125, 59 Am. & Eng. R. Cas. 494, it was held that a telegraph operator whose duty it is to signal

Notes

passing trains is engaged in the same service as a fireman on an engine of one of such trains and the negligence of the telegraph operator in failing to give proper signals whereby the fireman is injured is the negligence of a fellow servant for which the company is not liable.

S., plaintiff's intestate, was a fireman upon a train running upon a railroad operated by defendant as receiver. He was killed by a collision between his train and another. It was the custom, and was prescribed by the general regulations for the running of trains on said road, that when trains were behind time they should be moved in accordance with special telegraphic orders from the train dispatcher, to be communicated by the telegraph operators receiving them to the conductor and engineer of the train, in the presence of each other. An order was so sent directing where the train which collided with the train upon which S. was should meet the latter. The operator communicated it to the conductor, but not to the engineer; the conductor, without the authority or assent of the engineer, signed the name of the latter in acknowledgment of receipt of the order, and the train dispatcher was advised that the order had been correctly delivered. The conductor forgot to deliver the order to the engineer, who, in ignorance of it, instead of waiting at the station designated until the other train came up, proceeded with his train and the collision occurred. In an action to recover damages there was no evidence but that the operator and conductor were competent and skilful when employed. It did appear that defendant's rules and regulations were well devised for safety, and had been in use for a number of years without occasioning any accident. It was held, that the negligence was that of fellow servants of the intestate in the same common employment, for which defendant was not liable. *Slater v. Jewett*, 84 N. Y. Rep. 61, 5 Am. & Eng. R. Cas. 516.

A telegraph operator, who is also the station agent, is a fellow servant of a fireman on a locomotive. *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38, 25 Atl. 175; *Dealey v. Philadelphia & R. R. Co. (Pa.)*, 3 Cent. Rep. 112.

8. Of Trainmen.

Where the function of the operator is to merely transmit the dispatcher's orders to the trainmen, he is their fellow servant. So held in *Baltimore, etc., R. Co. v. Camp*, 65 Fed. 952, 31 U. S. App. 213.

In *Oregon, etc., Ry. Co. v. Frost*, 74 Fed. 965, it was held that a local telegraph operator at a station, who receives and delivers the orders of the train dispatcher, is the fellow servant of the employees of the railroad company in charge of a train. In this case it is said in the opinion: that "He (the telegraph operator), and the engineer and the conductor work together, at the same time and place, for a common employer, with an immediate common object, namely, the proper running of trains. It is essential, in the operating department of a railroad company, that there should be provision for communicating to those in charge of different trains the whereabouts of other trains, to avoid collision. This information is given by means of the general time-table and general rules for the running of trains with reference to each other, which the employees in charge of each train are obliged implicitly to obey. But it often happens that the general time-table must be varied from, and these variations must be communicated to those in charge of trains. This is effected usually by telegraphic orders from the superintendent or the train dispatcher, who has supreme control of the running of trains. The information is also communicated by means of flagmen, by means of torpedoes, by red lights and green lights upon trains, by the block signal system, and in other ways. The subordinate employees, whose duty it is to transmit the orders of the officer in control, or to give information as to the presence of trains upon any part of the track, without special orders, are engaged at the same time and place with the persons operating the train, in a common employment, having an immediate, common object, namely, that of the running of trains, and therefore are fellow servants. The man who makes the signal at the station to the engineer on the approaching train to stop is as much engaged in the running

Notes

and operation of that train as the flagman sent out ahead to signal the condition of a switch. Neither exercises the discretion or the judgment or the control of the master, but each contributes his part to the safe running of the train. There can be no separation of the signal department and the operating department, for the employees engaged upon the train, in the actual, manual operation of the train, are expected to be part of the signal department of the company. The man who puts out the green light at the back of the train, to indicate that a train is following, communicates to every station agent, every conductor, and every engineer who sees it knowledge upon which they, each of them, must act; and yet it can hardly be said that the brakeman, in displaying this green light, is acting in a different department from the man who opens and closes the throttle valve of the engine."

V. TELEGRAPH OPERATORS HELD NOT TO BE FELLOW SERVANTS.

1. Of Brakemen.

It has been held that a telegraph operator is not a fellow servant with a brakeman. See *Hall v. Galveston, H. & S. A. Ry. Co.* (C. C.), 39 Fed. 18; *Phillips v. Chicago, M. & St. P. R. Co.*, 23 Am. & Eng. R. Cas. 453, 64 Wis. 475, 25 N. W. 544.

2. Of Conductors.

In an action brought by the conductor of a train against a railroad company for damages for injuries received in a collision resulting from the negligence of a telegraph operator in the employ of the company, the court in its instructions to the jury said: "If you find that D. was conductor, and had a full crew of hands for managing the train, that B. as telegraph operator had nothing to do with the actual management of the train, but was only connected with D. as the medium through which orders were transmitted from G., the superintendent of the railroad, to D., then D. and B. are not fellow servants, and the risk of injury from the negligence of B. is not such a risk as the law places on D., by reason of his employment as conductor." It was held that the instruction was correct. *East Tennessee, V. & G. R. Co. v. De Armond*, 2 Pick. 73, 86 Tenn. 73, 5 S. W. 600.

3. Of Engineers.

Where an engineer upon one train of a railroad company is injured by the negligence of the conductor of another train of the company running in an opposite direction, or by the fault of one of the company's telegraphic operators in transmitting a telegraphic order to such conductor, such engineer being wholly without fault or the means of preventing such negligence or of avoiding its consequences, such engineer is not the fellow servant of said conductor, nor is he the fellow servant of said operator, in regard to acts and telegraphic orders between the operator and said conductor within the rule, which exempts the company from liability for the negligent acts of fellow servants or persons engaged in the common service, and the company will be held responsible for an injury to such engineer, caused by the negligence of such conductor or operator in such manner. *Madden v. C. & O. Railway Co.*, 28 W. Va. 610, 57 Am. Rep. 695.

4. Of Firemen.

In *Shehan v. N. Y. Cent., etc., R. Co.*, 91 N. Y. 332, 12 Am. & Eng. R. Cas. 235, the facts were these: Train 337, an irregular or special train called "Wild Cat," was going west from Auburn. Train 50 was a regular train going east from Cayuga. The latter was due at Cayuga at 4.40 p. m., and would go east at 4.45 by schedule. At 4.46 the superintendent telegraphed to 337, "Wild Cat to Cayuga regardless of No. 50." No notice was given to No. 50, and no rule of the company required it, but the superintendent telegraphed to the telegraph operator at Cayuga to hold No. 50 for orders. The operator told the conductor to hold No. 50 for train No. 61. He neither exhibited nor delivered any message; no rule of the company required him to do either. No. 61 came in soon after No. 50 started toward Auburn. In a few moments it collided

Boyd v. Blue Ridge Ry. Co

with No. 337 and the plaintiff was injured. The court say: "It was not disputed at the trial, nor is it upon this appeal, that the dispatching of train 337 and the holding of train 50 were within the province of the superintendent, nor that in respect thereto he represented the defendant in its corporate capacity. Clearly he held that relation."

5. Of Section Hands.

In *Northern Pacific R. Co. v. Charless*, 2 C. C. A. 386, 51 Fed. 56, 51 Am. & Eng. R. Cas. 198, it was held that the duty of keeping the employees of a railroad company at work upon a section of track informed as to the movements of trains over that section is a positive duty, devolving upon the railroad company, and where injuries are sustained by a section hand owing to the negligence of a telegraph operator in the performance of his duty, the railroad company is liable. In this case it is said in the opinion: "It was the duty of the company, as admitted in its amended answer, to furnish its employees engaged in maintaining its track and roadbed with information concerning the movements of trains over the sections on which they were employed. In the present case it is alleged that this duty was required to be performed by the telegraph operator at Cheney, but the designation of the official is immaterial. It was a direct, positive duty which the company owed such employees as were exposed to danger by the movement of trains. In *Lewis v. Seifert*, 116 Pa. St. 628-647, it was determined that a train dispatcher, wielding the power and authority of a railroad company in the moving of trains, in the changing of schedules, or the making of new ones, as exigencies required, is not a fellow servant with a train employee. The court, in its opinion, said: 'It is very plain that it was the duty of the defendant company, as between said company and its employees, to provide a reasonably good and safe road, and reasonably safe and good cars, locomotives, and machinery for operating its road. It is equally clear that it was its duty to frame and promulgate such rules and schedules for the moving of its trains as would afford reasonable safety to the operators who were engaged in moving them. This is a direct, positive duty which the company owed its employees, and for the failure to perform which it would be responsible to any person injured as a consequence thereof, whether such person be a passenger or an employee. It would be a monstrous doctrine to hold that a railroad company could frame such schedules as would inevitably, or even probably, result in collisions and loss of life. This is a personal, positive duty; and while a corporation is compelled to act through agents, yet agents, in performing duties of this character, stand in the place of and represent the principal. In other words, they are vice principals.'"

6. Of Trainmen.

In *Illinois Cent. R. Co. v. Bentz* (Tenn.), 5 R. R. R. 191, 28 Am. & Eng. R. Cas., N. S., 191, it was held that trainmen and railroad telegraph operators are not fellow servants.

A. R. Y.

BOYD v. BLUE RIDGE RY. CO.

(Supreme Court of South Carolina, March 14, 1903.)

[43 S. E. Rep. 817.]

Actions against Railroads—Venue.

An action may be brought against a railroad company in the county in which the president and assistant auditor of the company have their offices, in absence of evidence that its principal place of business has been established elsewhere, though its charter provides that its principal place of business shall be in another city, and it has no track in the county in which such officers reside.

Punitive Damages—Gross Negligence.

Punitive damages may be recovered against a railroad company for

Boyd v. Blue Ridge Ry. Co

injuries caused by such gross negligence and recklessness as to imply willfulness.

Instructions.

An instruction by stating a hypothetical case furnishing to the jury a standard of gross and reckless negligence amounting to willfulness, as charged in the complaint, is not ground for reversal.

Appeal from Common Pleas Circuit Court of Greenville County; Gary, Judge.

Action by James L. Boyd against the Blue Ridge Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

T. P. Cothran, for appellant.

B. F. Martin and Carey & McCullough, for respondent.

WOODS, J. This action was brought in the county of Greenville against the Blue Ridge Railway Company for damages for personal injuries which the plaintiff, James L. Boyd, alleged he had suffered from the grossly negligent, reckless, and willful conduct of the defendant's employees while a passenger on one of its trains. The plaintiff recovered judgment, and defendant appeals.

In the first exception, appellant takes the position that the court of common pleas for Greenville county was without jurisdiction of the action, and that it could only be maintained in the court of common pleas for Anderson or Oconee county. We assume the correctness of the statement of appellant's counsel that the following facts bearing on this exception are admitted: "(1) The Blue Ridge Railroad runs from Anderson to Walhalla, and lies wholly within the counties of Anderson and Oconee. (2) In the counties of Anderson and Oconee the company maintains public offices for the transaction of its business, and has there agents upon whom process may be served. (3) The 'principal place of business of the corporation' is designated in the charter (23 St. at Large, p. 1297) as Anderson, S. C. (4) H. C. Beattie is president of the company, lives at Greenville, and has his office as president there. (5) A. H. Wells is assistant auditor of the company, lives at Greenville, and has his office as assistant auditor there. The auditor lives at Washington; the secretary, at Raleigh, N. C. (6) The accident occurred in Anderson county."

Appellant contends, first, on authority of *Tobin v. Railroad Co.*, 47 S. C. 390, 25 S. E. 283, 58 Am. St. Rep. 890, that a railroad company can be sued only in the county where its road is located, and where it maintains a public office for the transaction of its business, and an agent upon whom process may be served; and, second, that, even if it may be sued as a resident of a county where it has its principal place of business, such place of business in this instance is not in Greenville county, where the suit was brought.

On the first proposition, it is manifest from the language used by Associate Justice Jones in the case above cited that

Boyd v. Blue Ridge Ry. Co

the court did not entertain the opinion that a railroad corporation is not a resident of the county where it has its principal office, but, on the contrary, the view of the court was that it is not only a resident of that county, but also of any county where its line is located, and where it maintains a public office and an agent for the transaction of business. The case of *Galveston R. Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248, and other like cases referred to in the opinion, were not followed, because they hold that a railroad company is not a resident of a county through which it operates its line and maintains an office and an agent, but only of the county where it has its principal place of business. The court adopted the view taken in *Glaize v. R. Co.*, 1 Strob. 70, that the residence of a corporation is not confined to the locality of its principal place of business. So far as we can discover, the authorities all agree that a corporation is regarded a resident of the place where it has its principal place of business, and may be sued there.

In considering whether the defendant had its principal place of business in Greenville county, the court has before it only the above stated admissions. The charter of the corporation states, "The principal place of business of the corporation will be Anderson, in the state of South Carolina." There is no evidence whatever that its main office has been established at Anderson, and we have no right to assume this as a fact. The president and assistant auditor seem to be the only important officers of the company doing business for it in this state, and they both reside in Greenville, and have their offices there. In the absence of any proof as to any other locality being the principal place of business, we are obliged to regard it the place where these offices are. Certainly the court cannot, as a matter of law, assume the office of the president is not the principal office of the corporation. The presumption is that the president is the general agent of the company, having the principal direction of its affairs. *Thompson on Corporations*, § 4618. It is not necessary, therefore, to decide the question whether a railroad company may not be regarded a resident of any county where it maintains a permanent office for the transaction of the business of the corporation, even though it is not the principal place of business, and none of its line be operated in the county, for, with the facts before the court, we are obliged to consider the main office of Blue Ridge Railway Company at Greenville.

In the second and third exceptions the appellant takes the position that the circuit judge charged the jury they might give exemplary damages for gross negligence. If this is so, the instruction was erroneous. *Watts v. Railway Co.*, 60 S. C. 67, 38 S. E. 240. The important inquiry, therefore, is whether the charge, fairly construed, bears this construction. Upon coming to the subject of exemplary damages, the circuit judge said: "Under this complaint, if you find the negli-

Boyd v. Blue Ridge Ry. Co

gence was so gross, or that from a reckless disregard of the safety of the passengers, the injury resulted, you are allowed to give exemplary damages in the way of punishment." It is not clear whether the expression "so gross" was intended to be qualified by the word "reckless"; but, if the charge had ended here, fair construction would require us to say the jury would have received the impression that exemplary damages might be awarded for gross negligence as well as for recklessness. In the next sentence, however, it is said: "Negligence may be so gross and so reckless as to imply the act was done willfully or with premeditation." This qualified what had been said before, and, taken in connection with the illustration immediately following—of a street car driven with extra speed through a crowded street—made it clear that it was not simply gross negligence, but negligence gross and reckless of consequences to others to such degree as to assume the nature of willfulness, which the jury must have understood to be necessary to warrant a verdict for exemplary damages. If it is fair to conclude the jury received this impression, the charge in this regard is fully sustained by the view of this court as expressed by Chief Justice McIver in *Proctor v. Railway Co.*, 61 S. C. 189, 39 S. E. 358: "Now, it is quite true that negligence may be so gross as to amount to recklessness; but when it does it ceases to be mere negligence, and assumes very much the nature of willfulness—so much so that it has been more than once held in this state that a charge of reckless misconduct will justify the jury, if the same be proved, in awarding punitive, vindictive, or exemplary damages, while it never has been held, so far as we are informed, that the jury, under a charge of mere negligence, would be justified in awarding vindictive or exemplary damages. One in charge of so powerful and dangerous a piece of machinery as a locomotive is bound to use care in operating it, so as to avoid, as far as practicable, doing injuries to others; and, if he uses such machine recklessly and without regard to the rights of others, his conduct may as well be characterized by the term 'willful' as by the term 'reckless,' for the difference in this regard between recklessness and willfulness is scarcely appreciable." If any doubt could remain as to the meaning of the charge, it was set at rest by the conclusion, where it was said: "You can take in doctor's bill, paralysis, suffering, etc., and if the negligence was such as to warrant you to come to the conclusion that it was a willful and intentional disregard of the passengers of that train—if it was recklessness of that sort—you can add to the actual damages whatever you think proper as punishment or smart money for the punishment of the defendant." The charge given to the jury, fairly construed, was, without doubt, to the effect that exemplary damages could be awarded for gross negligence and recklessness so great as to imply willfulness, and in this there was no error.

The questions made in subdivisions "a" and "b" of the

Griffin v. Southern Ry

fourth exception have already been discussed. In subdivision "c" of this exception the appellant insists the circuit judge invaded the province of the jury in using the illustration of a motorman of a street car putting on an extra head of electricity and rushing his car through a crowded street in utter disregard of the safety of the people on the streets. To illustrate by stating a hypothetical case, as was done here, sometimes gives the jury a clearer apprehension of the legal terms the trial judge is obliged to use in his charge. While such illustrations should, no doubt, be used with great caution, they are admissible when they contain no statement of the facts of the case under consideration, and no intimation of the opinion of the judge on the facts. *Mew v. Ry. Co.*, 55 S. C. 100, 32 S. E. 328; *Welch v. Mfg. Co.*, 55 S. C. 583, 33 S. E. 739; *Mason v. Ry. Co.*, 58 S. C. 78, 36 S. E. 440, 53 L. R. A. 913, 79 Am. St. Rep. 826; *Sims v. Ry. Co.*, 59 S. C. 256, 37 S. E. 836. In this case the illustration was hypothetical, and contained no reference to the evidence offered, and no intimation as to the merits of the case before the court. Even if the illustration could be regarded as furnishing to the jury a standard of gross and reckless negligence amounting to willfulness, it was not so unfavorable to the defendant that the jury should be led to think the plaintiff must make out a case as strong as the example given by the court before he could recover exemplary damages.

The judgment of this court is that the judgment of the circuit court be affirmed.

GRIFFIN v. SOUTHERN RY.

(*Supreme Court of South Carolina, Jan. 10, 1903.*)

[43 S. E. Rep. 445.]

Negligence—Different Causes of Action—Pleading.

Under 22 St. at Large, p. 693, providing that, where two or more acts of negligence are set forth in the same complaint as causing the injury for which suit was brought, the plaintiff shall not be required to elect between them, a complaint in an action against a railroad company, alleging willful negligence in running a train, and also that the cars were in a dangerous condition, does not entitle defendant to a nonsuit on the ground that there was no evidence of willful negligence.

Exemplary Damages.

Where two or more persons are injured by the negligent act of a railroad company, that one of them sued and recovered exemplary damages for intentional wrong is no bar to the claim of the others to recover exemplary damages.

Same—Injury to Passengers—Reckless Speed.*

In an action against a railroad company, where the running of a train at a great rate of speed over a defective track was alleged, evidence that the train was running at the rate of a mile a minute justified a finding that there was a reckless disregard of the rights of the passengers authorizing exemplary damages.

*Speed of trains or cars as an element of negligence, see monograph appended to *Northern Pac. Ry. Co. v. Adams* (C. C. A.), 3 R. R. R. 734, 27 Am. & Eng. R. Cas., N. S., 734.

Griffin v. Southern Ry

Appeal from common pleas circuit court of Edgefield county; Buchanan, Judge.

Action by Marvin Griffin, by a guardian ad litem, against the Southern Railway. Judgment for plaintiff. Defendant appeals. Affirmed.

B. L. Abney and E. M. Thomson, for appellant.

J. Wm. Thurmond and S. McG. Simkins, for appellee.

GARY, A. J. This is an action for the punitive and compensatory damages, alleged to have been sustained by the plaintiff while a passenger on defendant's train. The answer of the defendant contained substantially a general denial of the allegations set forth in the complaint. So much of the complaint as is necessary to understand fully the questions presented by the exceptions is as follows: "(6) That the last-mentioned train of cars upon which the plaintiff and his said mother were received and were being transported as aforesaid (the same being behind time, as the plaintiff is informed and believes and alleges), soon after it had left the town or station of Trenton, at a point or place about three and one-half miles from the said town or station of Trenton, and at a point of or commencement of a curve in said line of railroad, was wrecked, and the car or coach in which the plaintiff with his said mother was traveling, together with other cars, boxes, or coaches, composing a part of said train, having been derailed, and suddenly, with great force and violence, thrown from the track, and the plaintiff, by reason of the great and sudden force and jar occasioned by said wreck, and the cars, boxes, and coaches being thrown from the track as aforesaid, was seriously shocked and was with great force and violence thrown from the lap of his said mother. * * * (7) That the approach on the roadbed of the defendant to and beyond the point where said wreck occurred and said car or coaches were derailed and thrown from the track as aforesaid, is, for a considerable distance, a heavy downgrade, and that the engineer and servant and agent of the defendant company who was running and driving said engine to which said car or coaches were attached, unmindful of his duty and of the safety of this plaintiff and others upon said train, negligently, carelessly, recklessly, wantonly, and willfully ran and was running said engine and train of cars or coaches down said grade, and up to the point and place where said wreck occurred and said cars and coaches were derailed and thrown from the track, at a high, dangerous, and unreasonable rate of speed. That upon information and belief the plaintiff alleges that the roadbed and fixtures composing the same of the defendant company at the point or place and time where and when said wreck occurred and said cars or coaches were derailed and thrown from the track, was defective, out of repair, and in an unsafe and dangerous condition, due to the negligence, carelessness, and wantonness and willfulness of the defendant, its

Griffin v. Southern Ry

officers, servants, and agents. And, further, upon information and belief, this plaintiff alleges that the rolling stock or trucks of one or some of the cars, coaches, or boxes forming a part of said train was defective, unsafe, and unsound, and in a dangerous condition, due to the negligence, carelessness, recklessness, wantonness, and willfulness of the defendant, its officers, servants, and agents." The jury rendered a verdict in favor of the plaintiff.

The appellant's first exception is as follows: "(1) Excepts because the presiding judge erred in overruling defendant's motion for a nonsuit as to so much of the complaint as charged wantonness, willfulness, recklessness, and malice, which motion was made upon the ground that there was no evidence in the case showing or tending to show the same." In 1898 (22 St. at Large, p. 693) an act was passed entitled "An act to regulate the practice in the courts of this state in actions ex delicto for damages," the first and second sections of which provide:

"Section 1. That in all actions ex delicto in which vindictive, punitive or exemplary damages are claimed in the complaint, it shall be proper for the party to recover also his actual damages sustained; and no party shall be required to make any separate statement in the complaint in such action, nor shall any party be required to elect whether he will go to trial for actual or other damages, but shall be entitled to submit his whole case to the jury under the instruction of the court.

"Sec. 2. That in all cases where two or more acts of negligence or other wrong are set forth in the complaint as causing or contributing to the injury for which such suit is brought, the party plaintiff in such suit shall not be required to state such several acts separately nor shall such party be required to elect upon which he will go to trial, but shall be entitled to submit his whole case to the jury under the instructions of the court, and to recover such damages as he has sustained, whether such damages arose from one or another or all of such acts or wrongs alleged in the complaint."

The complaint contains but a single cause of action. Before the passage of said act the plaintiff could not properly combine in the same cause of action acts of negligence (which entitled him to recover only compensatory damages) and other acts of wrong growing out of willfulness, wantonness, or recklessness (which entitled him to recover punitive, vindictive or exemplary damages). *Pickens v. R. R. Co.*, 54 S. C. 498, 32 S. E. 567. The plaintiff, however, is permitted by said act to allege in the same cause of action two or more acts on negligence or other wrong as causing or contributing to the injury or which the suit is brought; and is entitled to submit his whole case to the jury, and recover such damages as he has sustained, whether such damages arose from one or another or all of such acts or wrongs alleged in the complaint.

Griffin v. Southern Ry

A nonsuit, furthermore, is an entirety. It, therefore, cannot be granted unless there is a failure of testimony to sustain all the acts of wrong set out in the cause of action, as its effect would be to deprive the plaintiff of the right to recover damages for those acts of wrong which the testimony showed were the cause of the injury. This exception is overruled.

The second and third exceptions are as follows: "(2) Excepts because the presiding judge erred in refusing to allow the defendant to amend its answer by setting up the judgment in the case of Jose Griffin v. Southern Railway Company, in so far as it included punitive damages against the defendant, said case having been tried just before the present case, having arisen out of the same accident, being against the same defendant, in which suit punitive damages were demanded, and, as defendant contends, recovered; whereas, it is submitted that punitive damages cannot be recovered but once for a single willful transaction,—that is, punitive damages, being in the nature of a penalty, cannot be recovered but once for the same willful wrong or transaction. (3) Excepts because the presiding judge erred in holding that defendant could not introduce any evidence going to show that punitive damages had been once recovered against it by another party for the same accident or transaction referred to in the complaint herein, for the reason stated in exception 2, supra." This is the first time the question raised by these exceptions has been presented to this court for adjudication. The only authority cited by the appellant's attorneys is the case of Watts v. R. R. Co., 60 S. C. 73, 38 S. E. 240, in which the court says: "Exemplary or punitive damages go to the plaintiff not as a fine or penalty for a public wrong, but in vindication of a private right which had been willfully invaded; and, indeed, it may be said that such damages in a measure compensate or satisfy for the willfulness with which the private right was invaded, but, in addition thereto, operating as a deterring punishment to the wrongdoer and as a warning to others." The question under consideration was not before the court in that case, and, in our opinion, it does not sustain the appellant's contention. When several persons are injured by the same wrongful act, their causes of action are separate and distinct. Hellams v. Switzer, 24 S. C. 39. The plaintiff is as much entitled to the damages arising from an act of intentional wrong as to those growing out of negligence. The judgment in the action which should first be tried would bind the parties to the record and those in privity with them, but would not be binding upon parties to a separate and distinct action. The effect of sustaining the proposition for which the appellant contends would be to deprive all persons injured by the wrongful act of punitive damages, except the party who should first succeed in recovering a verdict. It cannot be successfully contended that the law contemplated that the rights of litigants should be dependent upon so

Griffin v. Southern Ry

precarious an event. These exceptions must also be overruled.

The fourth and fifth exceptions are as follows: “(4) Excepts because the presiding judge erred in refusing to charge the jury defendant’s request, to wit: ‘There having been no evidence offered showing or tending to show any wantonness or willfulness, recklessness, or malice on the part of the defendant, the jury cannot award any punitive damages in this case, but must confine their verdict to actual damages only.’ Said request, it is submitted, contained a correct proposition of law applicable to the case, and should have been charged, its refusal being to defendant’s prejudice. (5) Excepts because the presiding judge erred in charging the jury as follows: ‘If willfulness, recklessness, and wantonness appear, then you can give punitive or vindictive damages.’ The error consisted in authorizing the jury to award punitive damages when there is no evidence whatsoever to support the same, the entire evidence being capable of but one inference, to wit, that the defendant was guilty of no wantonness, willfulness, recklessness, or malice.” It is frequently difficult to tell whether an act of wrong is attributable to willfulness or mere inadvertence, which is the foundation of negligence; and, whenever the facts are susceptible of more than one inference, it is peculiarly the province of the jury to determine such question. *Pickens v. R. R. Co.*, 54 S. C. 498, 32 S. E. 567. The fact that it is often hard to determine whether an act of wrong was the result of recklessness or inadvertence, was no doubt one of the reasons inducing the legislature to pass the act of 1898, hereinbefore mentioned. By reference to the complaint it will be seen that the running of the train at the rate of speed and under the circumstances therein mentioned was alleged to have been both willful and negligent. In the testimony of Mrs. Jose Griffin we find the following: “Q. Before that wreck that morning, did you look out of the window? A. Yes, sir. Q. How was it running? A. It was running so fast that I could not hardly tell what the telegraph post was.” E. Harrison, another witness, testified as follows: “Q. Did you see the train that morning? A. Yes, sir. Q. Did you ever time the train? A. Yes, sir; M. Ryan and myself timed it, and it ran a mile in fifty-nine seconds. Q. This morning you saw it how was it running? A. Running pretty fast. Q. As fast as it did the time you timed it? A. Yes, sir; I think so.” This was, at least, some testimony from which the jury might have inferred that there was a reckless disregard of the rights of the passengers under the circumstances alleged in the complaint. These exceptions are likewise overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

ANDERSON *v.* CITY & SUBURBAN RY. CO.

(*Supreme Court of Oregon, March 9, 1903.*)

[71 Pac. Rep. 659.]

Contributory Negligence—Riding on Footboard of Street Car.*

One is not guilty of contributory negligence in riding on the footboard of an open car where all the seats are occupied.

Injury to Street Car Passengers—Proximity of Bridge.

A street railway company constructed its tracks so near the superstructure of a bridge as to leave only 18 inches between the framework thereof and the outer edge of the footboard of its open cars. A passenger riding on the footboard—the seats inside the car all being occupied—was injured by coming in contact with a strut of the bridge. There was evidence that the car was going at an unlawful rate, and that no warning was given: *held*, that the company's negligence was a question for the jury.

Same—Absence of Negligence—Evidence.

The fact that the street railway had been operated for over 10 years, and that no accident had occurred from a like cause, did not show an absence of negligence, as matter of law.

Same—Contributory Negligence—Riding on Footboard of Street Car.

One injured while riding on the footboard of an open car by coming in contact with the strut of a bridge over which the car was passing was not guilty of contributory negligence, though he leaned back in returning his money to his pocket, or in looking to see what a friend, also on the footboard, was doing.

Same—Negligence—Allowing Passengers to Ride on Footboard.†

It is not negligence per se for a street railway company to permit passengers to ride on the footboard of an open car where all the seats are occupied.

Same—Same—Same—Instructions.

Refusal to charge that it was not negligence for a street railway company to permit a passenger to ride on the footboard of a crowded car was error, though the court charged that if the passenger voluntarily took his place there, and, by reasonable care, could have ridden safely, but did not use such care, the company was not liable, especially where the court also charged that, if the accident to the passenger was the direct result of the overcrowded condition of the car, the company would be liable, provided the passenger was not guilty of contributory negligence.

Appeal from circuit court, Multnomah county; John B. Cleland, Judge.

Action by George W. Anderson, administrator of Chester Anderson, deceased, against the City & Suburban Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

The plaintiff's intestate, a boy about 16 years of age, was killed in October, 1901, by coming in contact with a strut of the Morrison Street Bridge while riding as a passenger upon one of defendant's open trolley cars. In company with his two sisters and a young gentleman named Robinson, he boarded the car on the East Side, near Grand avenue, about

*See foot-note appended to *Baltimore Consol. Ry. Co. v. Foreman* (Md.), 2 R. R. R. 182, 25 Am. & Eng. R. Cas., N. S., 182.

†See generally, monograph appended to *Chicago City Ry. Co. v. Morse* (Ill.), 4 R. R. R. 215, 27 Am. & Eng. R. Cas., N. S., 215.

Anderson v. City & Suburban Ry. Co

8 o'clock in the evening, for the purpose of crossing to the West Side, and there transferring to an Albina car. The seats in the car were all occupied, and one of the passengers gave up his seat to the ladies of the party; and the deceased, his companion, Robinson, and other passengers, stood on the footboard. In crossing the bridge the deceased was struck on the head by one of the timbers thereof, thrown under the car, and killed. The bridge is 20 feet and 10 inches wide in the clear. The defendant company has two car tracks thereon, 6 feet apart, leaving a space of 26 inches between the uprights supporting the roofs of the open or summer cars as they pass each other, and 24 inches between the uprights on the outer side and the strut of the bridge. The footboard of the car is 6 or 8 inches wide, thus leaving a space of about 18 inches from the outer edge of the board to the strut. There is no material conflict in the evidence as to the manner of the accident. The witnesses for the plaintiff testified that the deceased was holding the upright with his right hand, and returning his money to his pocket with the left, at the time he was struck. Dr. Josephi, who was standing on the footboard between Robinson and the deceased, and who testified for the defendant, said that the conductor had been around collecting fares, and just before reaching the bridge the deceased asked Robinson to get transfers for the party; that Robinson started to the end of the car for that purpose, when the deceased, who was riding with his back to the west, and therefore toward the bridge, leaned back so as to look behind the witness and see whether Robinson was getting the transfers, and while in this position his head came in contact with the strut of the bridge, throwing him from the car. The evidence as to the speed of the car is somewhat conflicting. Some of the witnesses for the plaintiff put it as high as 18 miles an hour, while those for the defendant estimated it at much less. It is admitted, as we understand the record, or at least there is evidence tending to show, that no warning was given of the approach of the car to the bridge, or of any danger therefrom. The complaint alleges that the defendant was negligent (1) in constructing its tracks in such close proximity to the strut or brace timbers of the bridge as to make it dangerous for passengers riding on the footboard of its cars; (2) in running the car upon which deceased was riding at a dangerous and unlawful rate of speed; (3) in failing to give warning of the approach to the bridge, or the danger on account thereof; and (4) in overloading and crowding the car upon which deceased was riding. These several charges of negligence are denied by the answer. At the close of the testimony, the defendant requested the court to charge the jury as follows: "There is not sufficient evidence in this case to sustain a judgment in favor of the plaintiff, and your verdict must be for the defendant. * * * It is not negligence on the part of the railway company to permit

Anderson v. City & Suburban Ry. Co

passengers to ride on the footboard of its cars, provided a passenger voluntarily chooses that place when the seats are full, rather than await the arrival of another car, and a passenger taking such position is bound to exercise reasonable care to avoid accident or injury to himself; but if he fails to exercise reasonable care, and by reason thereof is injured, the railway company is not liable for such injury." Both of these instructions were refused, and the following, among others, given: "If you find from the evidence that the defendant company undertook to carry a number of persons greatly in excess of the capacity of the car upon which the accident happened, so that passengers, including the deceased, were compelled to stand on the footboard, and the accident was the direct result of such overcrowded condition of said car, the defendant would be liable for the same, provided the deceased was not guilty of negligence contributing to the cause of his injury." "If you find from the evidence that the deceased, Chester Anderson, voluntarily took his place on the footboard of the car, and that by the exercise of reasonable care he could have ridden safely in that place to his destination, and if you further find that he did not use ordinary care, but unnecessarily and carelessly leaned out from the car, and, by reason of so leaning out, his head came into contact with the framing of the bridge, causing an injury of which he died, the defendant is not liable for any damages resulting therefrom, and your verdict must be for the defendant." The plaintiff had a verdict and judgment for \$3,000, and the defendant appeals.

John M. Gearin, for appellant.

V. K. Strode and Henry E. McGinn, for respondent.

BEAN, J. (after stating the facts). It is urged that the request for an instruction directing a verdict for defendant should have been given, because the evidence shows no breach of any duty that the defendant owed to plaintiff. Negligence is generally a question for the jury. The cases in which the courts will assume to decide it, and withdraw the case from the jury or direct a verdict, are generally those in which reasonable minds cannot differ as to the conclusions to be drawn from the facts. Where the facts are in conflict, or where they are undisputed, but honest minds might reasonably differ as to the conclusions to be deduced therefrom, the case must go to the jury. Now, it is admitted that the defendant constructed its tracks so near the superstructure of the bridge as to leave a space of only 18 inches between the framework thereof and the outer edge of the footboard of its open cars, upon which passengers were permitted to ride; and there is evidence tending to show that the car was moving at an unusual and unlawful rate of speed, and that no warning was given to the deceased of the approach to the bridge, or of any danger to be apprehended therefrom. The question, then, is whether, under such circumstances, the court can say,

Anderson v. City & Suburban Ry. Co

as a matter of law, that the defendant was not negligent. The authorities all agree that it is negligence for a street railway company to permit permanent obstructions to stand so near its tracks that passengers getting off or on its cars, or riding thereon, are in danger of coming in contact therewith, and it is generally considered a question for the jury as to whether a given obstruction is so situated. *Walsh v. Oregon Railway & Navigation Co.*, 10 Or. 250; *Johnston v. O. S. L. Ry. Co.*, 23 Or. 94, 31 Pac. 283; *Elliott v. Newport Street Railway Co.*, 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208; *Whalen v. Illinois R. & Coal Co.*, 16 Ill. App. 320; *Chicago & Iowa R. Co. v. Russell*, Adm'r, 91 Ill. 298, 33 Am. Rep. 54; *West Chicago Street Railroad Co. v. Marks*, 82 Ill. App. 185, affirmed in 182 Ill. 15, 55 N. E. 67; *Geitz v. Milwaukee City R. Co.*, 72 Wis. 307, 39 N. W. 866; *City Railway Co. v. Lee*, 50 N. J. Law, 435, 14 Atl. 883, 7 Am. St. Rep. 798; *Topeka City Ry. Co. v. Higgs*, 38 Kan. 375, 16 Pac. 667, 5 Am. St. Rep. 754; *Dahlberg v. Minneapolis Street Ry. Co.*, 32 Minn. 404, 21 N. W. 545, 50 Am. Rep. 585.

It cannot be said that the deceased was guilty of contributory negligence in riding on the footboard of the car. *Lapointe v. Middlesex Railroad*, 144 Mass. 18, 10 N. E. 497; *Graham v. Manhattan R. Co.*, 149 N. Y. 336, 43 N. E. 917; *Seymour v. The Citizens' Ry. Co.*, 114 Mo. 266, 21 S. W. 739. He was there by the invitation and consent of the company, and, while he was, perhaps, required to exercise extra care and caution, on account of the increased danger attending his position, it was nevertheless the duty of the company to furnish him a reasonably safe place in which to ride, and not expose him to injury from permanent obstructions unreasonably near its tracks. "Where a railroad company," says the Supreme Court of Illinois, "places its tracks so near an obstruction, which it is necessary for its cars to pass, that its passengers, in getting on and off the cars, and while upon them, are in danger of being injured by contact with such obstruction, it is a fair question for the jury whether the company is or is not guilty of negligence." *North Chicago Street R. Co. v. Williams*, 140 Ill. 275, 29 N. E. 672. This doctrine is obviously sound, and the question of negligence for the jury, where a street railway company invites or expects passengers to ride on the footboard of its cars, and carries them, at a rapid rate of speed, in close proximity to dangerous obstructions, of which they have no knowledge, without warning them of the risk. A common carrier of passengers by street cars is required "to exercise the highest degree of skill and care which may reasonably be expected of intelligent and prudent persons engaged in that business, in view of the instrumentalities employed and the dangers naturally to be apprehended." *Booth, St. Ry. Law*, § 328. And it is the duty of such a carrier to foresee the possible danger to which passengers riding on the footboards of its cars might be ex-

Anderson v. City & Suburban Ry. Co

posed by a slight movement of the body in consequence of the proximity of its tracks to permanent structures, and it is not negligence on the part of a passenger to omit to look out for such structures unless he has reason to anticipate some such danger. He has a right to assume that the company has performed its duty to carry him safely, and that it will not expose him to unnecessary hazard, and to act accordingly. *Dickinson v. Port Huron Ry. Co.*, 53 Mich. 43, 18 N. W. 553. So that, upon the whole, we are of the opinion that the question of negligence was for the jury, and not the court. The fact that the defendant's road had been operated since 1890, and no accident had occurred from a like cause, is not conclusive evidence of the absence of negligence on its part, either in the construction of the road or the operation of the cars. Nor was the deceased necessarily guilty of contributory negligence because he leaned back while in the act of returning his money to his pocket, or in looking after his friend. Conduct of that kind on the part of passengers was such as might reasonably be anticipated by the railway company. The cases of *Craighead v. B. C. R. Co.*, 123 N. Y. 391, 25 N. E. 387, and *Gilly v. New Orleans City R. Co.*, 21 South. 850, 49 La. Ann. 588, principally relied upon by the defendant, are in many ways to be distinguished from the case in hand. In the former, the plaintiff was injured in the daytime by a passing car, while going along the footboard of the car upon which he was riding, at a place where cars were passing as often as once every half minute. In the latter, the plaintiff was familiar with the obstruction by which he was injured, had ridden on the cars for six or seven years, and was fully aware of the danger.

That the instruction requested and refused, to the effect that it was not negligence on the part of the defendant to permit passengers to ride on the footboard of its cars, contains a correct statement of the law, is unquestioned. It is not negligence per se, either on the part of a passenger or a street railway company, that a passenger, reasonably competent to take care of himself, should ride on the platform or footboard of a crowded car. It is, however, obviously more dangerous to occupy such a position than a seat in the car, and therefore the law imposes upon both the passenger and the railway company the duty of extra caution to prevent injury; and a railway company which accepts a person as a passenger, and permits him so to ride, is bound to carry him with a degree of skill, prudence, and care proportionate to the danger to be apprehended, but it is not negligent in permitting him to do so. *Booth, St. Ry. Law*, § 341; *Sandford v. Hestonville R. Co.*, 136 Pa. 84, 20 Atl. 799; *Craighead v. B. C. R. Co.*, *supra*; *Gilly v. New Orleans City R. Co.*, *supra*.

It is insisted, however, that the instruction as requested was, in substance, given by the court, in the charge that if the

Kansas City, etc., R. Co. v. McShan

deceased voluntarily took his place on the footboard, and by the exercise of reasonable care could have ridden safely, but did not use such care, and on account thereof was injured, the defendant is not liable. A comparison of the instruction refused and the one given will show that they are not the same. They are practically so as to the negligence of the defendant, and the result thereof; but the important part of the requested instruction—that it was not negligence on the part of the company to permit passengers to ride on the footboard of its cars—was refused. The instruction as given was declaratory of the obligation resting on the deceased to look out for himself, and was correct, whether the act of defendant in permitting him to ride on the footboard constituted negligence or not. If it was negligence, but the deceased was also guilty of negligence in projecting himself against the bridge, it would not be liable. If, on the other hand, it was not guilty of negligence in allowing him to ride upon the footboard, and the accident was the result of the negligence of the deceased, the plaintiff could not recover. But if the jury should find that the deceased was not guilty of negligence in leaning back from the car, then the vital question would be, was it negligence in the company to allow him to ride on the footboard? and upon this question the defendant was entitled to have the jury properly instructed as to the law. The error in failing to give the instruction requested was emphasized by the one given, to the effect that, if the accident was the direct result of the overcrowded condition of the car, defendant would be liable, if deceased was not guilty of contributory negligence. The natural inference from the instructions given would be that the defendant was in some way guilty of negligence in permitting its cars to be so overloaded that passengers were required to stand on the footboard, while, under the law, such an act on the part of the street railway company is not negligence per se as to a passenger who voluntarily boards a crowded car, and assumes to ride on its footboard. *Oliver v. Railroad Co.*, 43 La. Ann. 804, 9 South. 431.

It follows that the judgment of the court below must be reversed, and a new trial ordered.

KANSAS CITY, M. & B. R. CO. v. MCSHAN.

(*Supreme Court of Mississippi*, Jan. 12, 1903.)

[33 So. Rep. 223.]

Railroads—Injuries to Passengers—Evidence—Sufficiency.*

In an action for injuries received by a passenger in alighting from a train on an unlighted platform, evidence *held* to support a verdict for plaintiff.

*See monograph appended to *Muhlhouse v. Monongahela St. Ry. Co.* (Pa.), 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131.

Illinois Cent. R. Co. v. Matthews

Appeal from circuit court, Lee county; E. O. Sykes, Judge.

Action by Sarah D. McShan against the Kansas City, Memphis & Birmingham Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. W. Buchannan and Allen & Robins, for appellant.

Adersen & Long and Clayton & Clayton, for appellee.

TERRAL, J. In May, 1901, Mrs. McShan was seriously injured in debarking late at night from appellant's train at Tupelo. Upon her cross-examination as a witness, appellant's counsel asked her whether, if her husband had been with her, she could have gotten off safely. She replied, if anybody had been there to help her, she could have done so. Upon this statement appellant insists that she was so feeble that she should have had a special attendant upon the train with her. She was, however, according to the evidence, a woman who attended to all her household duties, not robust, yet not so feeble that she should have had a special attendant for her assistance in getting on and off trains. Upon the night of her injury the moon was in the upper sky, but its light was obscured by clouds to such an extent, according to the testimony, that it was a question before the jury whether her injury was not caused by the want of proper lights on the part of the railroad company, or whether it was an accidental misfortune to plaintiff, without the fault of the company. And whether her injury was caused by the culpable negligence of the company in not having proper lights for her debarkment, or was an unavoidable accident, happening without the fault of the company, was fairly submitted to the jury, and we find no ground in the record for disturbing their verdict. The grievous and insufferable hurt to appellee was so great that appellant makes no complaint of the verdict as to the measure of damages fixed by it, and the rule of law that requires railroad companies to provide lights for the safe debarkation of passengers from its cars supports the finding for the appellee, and we think the verdict should be approved.

Affirmed.

ILLINOIS CENT. R. CO. v. MATTHEWS.

(*Court of Appeals of Kentucky, Feb. 25, 1903.*)

[72 S. W. Rep. 302.]

Passenger's Baggage—What Constitutes.*

Under Ky. St. § 783, providing that every company shall check every parcel of "baggage" taken for transportation, a company is only liable as a carrier for what the passenger takes with him for his own personal use and convenience, unless the company by contract, express or implied, has accepted other articles as baggage.

Same—Merchandise—Notice to Company.*

The paying of overweight charges on baggage is not of itself such

*See foot-note appended to *Amory v. Wabash R. Co.* (Mich.), 4 R. R. R. 408, 27 Am. & Eng. R. Cas., N. S., 408.

Illinois Cent. R. Co. v. Matthews

notice to the company that the trunk contains merchandise, or other articles than the passenger's ordinary baggage, as will render the company liable as a carrier for such articles.

Same—Damages—Parties.

Where a traveler is not the owner of goods which he checks as baggage, but is liable to such owner for any loss or damage to them, he may be treated as their owner for the purposes of an action against the carrier for damage to such goods in its hands.

Appeal from circuit court, Hickman county.

"To be officially reported."

Action by W. E. Matthews against the Illinois Central Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

N. P. Moss, Pirtle & Trabue, and J. M. Dickinson, for appellant.

J. W. Bennett, for appellee.

O'REAR, J. Appellee was a traveling salesman or drummer for certain wholesale dealers in dental instruments. He bought a ticket and took passage on one of appellant's trains, and had his trunk checked for transmission by that train to his point of destination. The trunk was heavier than was allowed as free baggage to one passenger, and appellee was required and did pay 60 cents extra as overweight charges. The trunk contained about \$1,700 worth of dental goods—steel instruments, presumably. These goods were used not only as samples by which other goods of a like quality were sold for future shipment, but they were sold from the stock in custody of appellee, and then delivered by him to the customers, if they so desired. The goods belonged to appellee's employers, the wholesalers. While the trunk was in appellant's possession it got wet, and the instruments were damaged by rust, it is claimed, to the extent of about \$500. There was evidence for appellee that when the trunk was being loaded on the train the person handling it (whether a porter, roustabout, or baggage master, or whether connected with the railroad he did not know) remarked as to its extraordinary weight, and that appellee replied that it contained dental instruments. For appellant, its baggage master at the station at which the trunk was checked and shipped testified that he was in sole charge of the checking of baggage at that station, and that he was not apprised of the nature of the contents of the trunk; but that it was customary with that road to ship drummers' sample trunks as baggage. The cause of the damage, and the extent of it, do not seem to be controverted by the proof. On this state of case the court gave the jury the following instructions: "No. 1. The court instructs the jury that if they believe from the evidence the defendant, while the plaintiffs' trunks were in its custody, left them exposed to rain, and that said trunks or contents became wet, and thereby damaged, they should find for the plaintiffs the actual damages which said trunks or merchandise therein

Illinois Cent. R. Co. v. Matthews

sustained by reason of such injury, not exceeding the sum set out therefor in the petition. No. 2. If the jury believe from the evidence the plaintiffs' trunk, while in the custody and care of the defendant, was bursted or torn in handling, through the negligence or carelessness of the defendant's agents or servants, and that it was thereby damaged, they will find for the plaintiffs such damages as they sustained for this injury to their trunks, not exceeding the sum claimed therefor in the petition." Appellant asked for this instruction, which was refused: "The court instructs the jury that if they believe from the evidence that the trunks shipped by plaintiff contained merchandise which he was carrying for sale, and said merchandise was checked as baggage on the passenger cars by defendant, and at the time of said shipment plaintiff failed to make known to the agent of defendant who checked said baggage, or other agent authorized to ship and have said baggage checked and shipped on its passenger trains, the law is for the defendant, and the jury should so find." From a verdict and judgment in favor of appellee for \$531.50 damages, this appeal is prosecuted.

The first instruction given to the jury assumes as a matter of law that the common carrier is accountable, under its liability as carrier, for all damage to the contents of trunks shipped as baggage, without reference to the nature or ownership of such contents, and regardless of the carrier's knowledge or notice or agreement as to such contents. The second instruction is not questioned on this appeal. The only legislation in this state on the subject of baggage is that found in section 783, Ky. St., as follows: "Every company shall furnish sufficient accommodation for the transportation of all such passengers and properly as shall, within a reasonable time previous thereto, offer, or be offered, for transportation, at places established by the corporation for receiving and discharging passengers and freight, and shall, when requested, check every parcel of baggage taken for transportation, if there is a handle, loop, or fixture, so that the same can be attached, and shall give to the person delivering such baggage a check for the same." We are thus left to determine what is meant by the term "baggage" by reference to the common law. A very considerable number of adjudications have been rendered on this subject, as might naturally be expected. From them it may be stated that the word "baggage," as used in the connection under discussion, refers only to what the passenger takes with him for his own personal use and convenience, and which he has committed to the care of the carrier. Generally, the articles allowed as baggage to accompany the passenger, and which the carrier is bound to transmit as an insurer, are the personal apparel of the passenger, but may include a number of other articles, which may not unreasonably be designed for his pleasure, business, or convenience upon the journey which he is prosecuting. "In

Illinois Cent. R. Co. v. Matthews

a general sense, it may be said to include such articles as it is usual for persons traveling to take with them for their pleasure, convenience, and comfort, according to the habits and wants of the class to which they belong." *Oakes v. N. P. R. Co.*, 20 Or. 392, 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. Rep. 126. Story on Bailments, sec. 499, thus states it: "By 'baggage' we are to understand such articles of necessity or personal convenience as are usually carried by passengers for their personal use; and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes, such as sale or the like." *Bomar v. Maxwell*, 9 Humph. 624, 51 Am. Dec. 682; *Macrow v. Great Western Ry. Co.* L. R. 6 Q. B. 612. Rorer on Railroads, 988, states it this way: "It is difficult to enumerate the articles that may be included, in each particular case, in the term 'baggage.' This depends much on the condition, habits, and circumstances of life of the passenger. Ordinarily, it includes a trunk or trunks, with the necessary wearing apparel for both comfort and dress suitable to the condition in life of the person; * * * but not money in larger amount than for necessary expenses, nor articles of merchandise or of virtu. * * * "As, ordinarily, only the wearing apparel and similar kindred articles are included in the personal baggage of the traveler, the carrier knows the probable extent of his liability in the event of the loss or damage of the baggage, and may reasonably be presumed to have regulated his charges and provided means for its safe-keeping proportioned to that liability. If, on the other hand, the passenger might include in his parcel valuable jewels, not properly classed as baggage, or plate, or merchandise, bonds, or money, of many thousands of dollars in value, and the carrier made liable for its loss without knowledge or notice of its extraordinary value, he is compelled to assume a responsibility for which he has not been paid in fact, and without an opportunity to provide that extraordinary care and attention which, by common prudence, would be due to such a valuable charge. Baggage, to a certain reasonable limit, and belonging to a passenger, is carried free, as an incident on the passenger's contract for passage. The common-law definition of baggage forms a part of the carrier's undertaking as though expressly stated and assented to at the time of the passage. The parties may, of course, vary this contract by agreement. If the carrier elects to receive and transport that as baggage which in fact is freight, and which it would have the right to refuse to take as baggage on its passenger trains, it ought to be liable therefor upon the same terms as if it were baggage. But this is not because of its common-law liability therefor, but because it has agreed by special contract for a consideration to be so bound. The elements of such a contract are sufficiently satisfied by an acceptance of the package or trunk by the carrier for trans-

Illinois Cent. R. Co. v. Matthews

portation as baggage, with knowledge of its contents. Hutchinson on Carriers, sec. 685 (1st Ed.); Texas, etc., R. R. Co. v. Capps, 2 Wilson, Civ. Cas. Ct. App. § 33; Jacobs v. Tutt (C. C.) 33 Fed. 412; Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co. (C. C.) 39 Fed. 417; Humphreys v. Perry, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. Ed. 587. The fact that the passenger paid for the extra weight of the trunk does not vary the rule; for, if the trunk or trunks contained enough of those articles clearly entitled to be classed as personal baggage of the passenger as to be over the weight allowed, and reasonably allowable, to each passenger for free carriage, he would have to pay a just compensation for its being carried. This fact alone is not notice that the package contains anything besides the usual articles entitled to be taken as personal baggage, the nature and probable value of which are generally well known. The carrier might refuse to carry on its passenger train articles not properly baggage. It could not be required to carry freight on passenger trains. Delivering to the carrier a trunk or closed package, ostensibly ordinary baggage, without a statement as to its contents, is equivalent to a representation by the passenger that it belongs to him, and contains only such articles as are properly classed as personal baggage. Haines v. Chicago, etc., Ry., 29 Minn. 160, 12 N. W. 447, 43 Am. Rep. 199; Michigan Central R. R. Co. v. Carrow, 73 Ill. 348, 24 Am. Rep. 248. If it contains other articles, and the carrier is not informed of the fact, it is a deception upon the carrier as to such articles, and as to such they are not covered by the carrier's contract. Story on Bailments (9th Ed.) sec. 565. In the event of loss of or damage to such articles while in the carrier's possession, without notice of their character when received and checked as baggage, or without a special agreement with reference thereto, it is not liable, except as in case of a bailee without hire. But notice in terms of the contents of the trunks is not required. It is sufficient if, from all the circumstances of the case, the jury may reasonably infer that the carrier's agent charged with the duty of receiving and checking baggage over its line knew of the extraordinary contents of the package when he received it and checked it as baggage for the passenger; that is, knew that they contained merchandise or other articles than the traveler's wearing apparel. Sloman v. Great Western Ry. Co., 67 N. Y. 208; Brown v. Camden, etc., Ry. Co., 83 Pa. 316.

While it is true that a carrier cannot be made liable for the goods of another than the passenger or a member of his family traveling with him, which may be included in the passenger's baggage, yet the facts in this case tend to show that, although the goods belonged to the wholesale merchants, by an agreement between them and appellee he had such an interest in them, by reason of his being responsible to them for their loss or damage, and required to replace them in such event, that

Hesse v. Meriden, S. & C. Tramway Co

they may fairly be treated as his for the purposes of this action. The damage fell upon him. They were being carried for him. He was the passenger. We therefore conclude that the court erred in assuming appellant's liability for the damage to the dental instruments shipped as baggage.

The judgment is reversed, and cause remanded for a new trial under proceedings consistent herewith.

HESSE v. MERIDEN, S. & C. TRAMWAY CO.

(*Supreme Court of Errors of Connecticut, March 4, 1903.*)

[54 Atl. Rep. 299.]

Injury to Passengers Riding on Running Board—Contributory Negligence—Evidence.

In an action for wrongful death of one killed by being struck by a trolley pole while riding on the running board of an open car, defendant claiming that before deceased was struck he had ridden for some distance, and was chargeable with knowledge of the proximity of the pole that struck him, it was proper to show that the poles passed prior to the accident were placed at a safe distance.

Same—Negligence.*

A street car being crowded so that there were no seats, a passenger rode on the running board; and as the car, running at a speed of 15 miles an hour, went upon a curve, he was jolted so that his head was thrown outward, and was struck by a trolley pole, inflicting injuries from which he died. The pole leaned towards the outside of the curve. Its distance from the body of the car, at the level of the floor thereof, was 25 inches, and at the height of the head of the deceased, as he stood on the running board, 21 inches; and the running board was 8½ inches wide, and the distance between its outside edge and the pole was 14½ inches: *held*, that the facts justified a conclusion that defendant was negligent in permitting a passenger to ride on the board while running at such speed past the point in question, with the pole so situated.

Same—Contributory Negligence.†

A street car being so crowded that there were no vacant seats, a passenger rode on the outside running board, and as the car went upon a curve his head was thrown back so that it struck a trolley pole dangerously near the track: *held*, that no contributory negligence was shown.

Death by Wrongful Act—Damages.

In an action for wrongful death, defendant made a claim of law "that, on the facts proven, no judgment could be rendered against defendant for greater than nominal damages": *held*, that the claim meant that there was not sufficient evidence bearing on the quantum of damages to warrant an award of the full statutory amount.

Same—Same—Sufficiency of Evidence.

As a general rule, in an action for death there should be more evidence as to the quantum of damages than the mere fact that the injured party died at a certain age, to warrant an award of full statutory damages.

Same—Same—Evidence.

In an action for wrongful death, the evidence tended to show that deceased was a man of average size, and in good condition mentally

*See monograph appended to *Chicago City Ry. Co. v. Morse* (Ill.), 4 R. R. R. 215, 27 Am. & Eng. R. Cas., N. S., 215.

†See foot-note appended to *St. Louis S. W. Ry. Co. of Texas v. Ball* (Pa.), 2 R. R. R. 187, 25 Am. & Eng. R. Cas., N. S., 187.

Hesse v. Meriden, S. & C. Tramway Co

and physically, and that he lived for some minutes after the accident, and suffered some pain; and a claim of law was that, on the facts, no judgment could be rendered for greater than nominal damages: *held*, that it was not error to award the full statutory damages; it appearing that there was little or no contest as to the quantum of damages, and the attention of the court not having been called to the matter, save by a somewhat ambiguous claim of law.

Appeal from Superior Court, New Haven County; John M. Thayer, Judge.

Action by John Hesse, as administrator of the estate of Joseph J. Meyer, deceased, against the Meriden, Southington & Compounce Tramway Company. Judgment for plaintiff for substantial damages, and defendant appeals. Affirmed.

Marcus H. Holcomb, for appellant.

Jacob P. Goodhart and Robert C. Stoddard, for appellee.

TORRANCE, C. J. Joseph J. Meyer, the plaintiff's intestate, while riding upon the footboard of one of the trolley cars of the defendant, came in contact with a trolley pole, and was so injured thereby that he died within a short time thereafter. In the suit brought to recover damages for said injury, the defendant suffered a default, and the case was heard in damages. The trial court rendered judgment in favor of the plaintiff for \$5,000, and the defendant appealed.

The errors assigned relate to the action of the trial court (1) in refusing to amend the finding as requested; (2) in admitting certain evidence; (3) in holding that the defendant was guilty of negligence, and that the deceased was not guilty of contributory negligence; (4) in overruling certain claims of law; (5) in rendering judgment, upon the evidence in the case, for full damages. These claimed errors will be considered substantially in the order stated.

Upon a careful review of the evidence certified up, in connection with the defendant's claims to have the finding corrected, we are of opinion that the court did not err in refusing to do so. Most of the matters which the court below has refused to expunge from or add to the finding are matters about which there was some conflicting evidence, or are dependent upon the credit which the court might give to a witness; and the few, if any, not of this nature, are immaterial, and would not affect the finding if added to or expunged therefrom. Consequently the finding as made must stand.

The only ruling upon evidence, of which the defendant complains, was correct. The defendant claimed that as Meyer, before he was struck, had ridden for some distance on the footboard next to the poles, he was chargeable with knowledge of the nearness to the track of the pole that struck him. To meet this claim, it was proper to show that the poles passed prior to the accident were placed at a safe distance from the track, and so would have led Meyer to believe, if he observed them at all, that all were so placed.

The court has found, in substance, the following facts:

Hesse v. Meriden, S. & C. Tramway Co

Meyer became a passenger on a trolley car of the defendant going from Stillman's Corners towards Meriden. From the time he boarded the car until he was thrown off, he rode upon the right-hand, or south, running board of the car, near the rear platform. The car, when he got on, was full; every seat and the rear platform being occupied. Passengers were riding on both running boards, and three or four others besides Meyer were riding on the south running board. The car was a double-truck open car, for summer traffic, new and in good condition. There was room for persons to stand between the seats, and for a few to sit on the car floor between the seats, with feet on the running board, but it did not appear that it was practicable to do so while Meyer was on the car. Meyer voluntarily took his position upon the running board, and made no request for a seat; nor did he make any attempt to find a seat inside the car, or between the seats, or upon the platforms. The conductor saw Meyer get on, but did not know that he was riding on the running board until he collected his fare. After doing so, the conductor passed around Meyer, and stood on the footboard, collecting fares from passengers on the rear platform. While so doing "he felt some portion of Meyer's arm or hand strike him, and Meyer was hurled from the car." The car was then going down grade, with power off, under control of the brake, at the rate of 15 miles an hour. It was stopped as soon as possible—within about 300 feet from the point where Meyer left the car. The conductor and others went back, and found Meyer lying on the ground, about 35 feet from the pole that struck him. He was alive, but unconscious, and died within a few minutes after he was found. The trolley pole that caused the accident is situated on the south side of the track, at the outside of a curve, and leans towards the track. Its distance from the track, and from a car standing on the track near it, leaving out small fractions of an inch, is as follows: From the inside gauge line of the south rail to the pole the distance is 3 feet 6 inches; from the body of the car, at the level of the floor, to the pole, the distance is 25 inches, at the level of the seats it is 22 inches, while at the height of Meyer's head above the running board it is $21\frac{1}{2}$ inches. The running board is $8\frac{1}{2}$ inches wide, and, from the manner in which it is hung, the distance between its outside edge and the pole is $14\frac{1}{2}$ inches. Nothing prevented the defendant from placing this pole at a greater distance from the track. A car traveling rapidly to the east, as was the one in question, when it strikes the curve aforesaid, "gives a jolt or lurch, and has a tendency to throw people upon the car outward." Just as the rear of the car, at the time in question, was passing this pole, the forward wheels struck the curve, "there was a jolt, and Meyer's head was thrown back and struck said pole, and he was hurled from the car in consequence." It did not appear that Meyer had any knowledge of the nearness of the pole to the track.

Hesse v. Meriden, S. & C. Tramway Co

These are the controlling facts in the case, and from them the court drew the conclusion that "the defendant was negligent in permitting its passengers to ride upon said running board while running its car at such rate of speed along the track at the point in question, with the pole situated as aforesaid." The facts found amply justified this conclusion, whether it be regarded as one of fact or of law. Upon the facts found, the court ruled that the defendant "had failed to disprove that the intestate's injuries and death were caused by the negligence alleged in the complaint, or to prove that the plaintiff's intestate was guilty of contributory negligence, as alleged in the notice" filed before the hearing in damages. There is nothing in the record that shows or tends to show that the court erred in these rulings.

The defendant made some 10 claims of law in the court below, relating to the question of negligence on the part of the defendant, and contributory negligence on the part of Meyer. Most of these claims were based upon states of fact negatived by the finding, and were properly overruled; and, so far as any of said claims were not so based, there is nothing in the record to show that the court overruled them.

The defendant also made the following claim below: "That, upon the facts proven at said trial, no judgment can be rendered against the defendant for greater than nominal damages." This, standing alone, is perhaps somewhat ambiguous. It may mean that, upon the facts proven, the defendant was not guilty of negligence, or that Meyer was guilty of contributory negligence, and so the plaintiff was entitled to no more than nominal damages; or it may mean, as the defendant claims, that there was not sufficient evidence bearing upon the quantum of damages to warrant the court in awarding the full statutory amount. We are of opinion that this last is the meaning that should be given to this claim. The finding upon this point is as follows: "Upon the trial the plaintiff, in opening his case, offered no evidence of damages, further than the fact, formerly and expressly admitted by the defendant, that he (Meyer) was dead, and that his age was thirty-seven years; and there was no evidence as to damages, except such admission and the facts hereinbefore set forth." This part of the finding occurs near the end, so that "the facts hereinbefore set forth" include all the facts in relation to Meyer stated theretofore in the finding. We agree with the defendant that in cases of this kind there should be more evidence as to the quantum of damage than the mere fact that the injured party died, and at such an age. Such evidence, standing alone, would rarely, perhaps, warrant a court in awarding the full statutory amount of damages. But the court below had before it, bearing upon the quantum of damage, something more than the mere facts of the age and death of Meyer. There was evidence tending to show that Meyer was a man of average size, and in good

Wadsworth v. Boston El. Ry. Co

condition physically and mentally; and there was evidence tending to show that he lived for some minutes after the accident, and that he suffered some pain. This being so, we cannot say that the court erred in awarding the full statutory amount of damages, especially in a case like the present, where, from the record, it appears that there was little or no contest upon this point as to the quantum of damages, and that the attention of the trial court was not called to this matter, save by the somewhat ambiguous claim of law hereinbefore stated.

There is no error. The other Judges concurred.

WADSWORTH v. BOSTON EL. RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, Feb. 25, 1903.)

[66 N. E. Rep. 421.]

Elevated Railroad—Injury to Passenger—Falling Sawdust.

Where a passenger was injured by sawdust blowing in her eye from an elevated railroad structure adjoining defendant's depot, and plaintiff testified that she did not know whether the sawdust was thrown or blew down, it being proved that there was a wind blowing at the time from 14 to 22 miles per hour, plaintiff was not entitled to recover under the doctrine of *res ipsa loquitur*.

Same—Same—Same—Negligence.*

The mere presence of sawdust and shavings and a piece of wood on an elevated railroad structure, by the falling of which a person is injured, is not of itself evidence of negligence.

Exceptions from superior court, Suffolk county; Elisha B. Maynard, Judge.

Action by one Wadsworth against the Boston Elevated Railway Company. From a judgment in favor of plaintiff, defendant brings exceptions. Exceptions sustained.

N. L. Sheldon and Harold Hastings, for plaintiff.

Endicott P. Satonstall, for defendant.

MORTON, J. This is an action of tort for personal injuries received on May 17, 1901, by the plaintiff, while riding in one of defendant's open cars in Boston. The plaintiff's testimony tended to show that she boarded the car in Dewey Square, and, as it reached the side door of the South Station, some shavings, sawdust, and a piece of wood fell from overhead, and the sawdust blew into the car, and got into her eye, causing the injuries complained of. On cross-examination the plaintiff testified that it seemed as though it had been thrown after the man got through his work, and that the wind carried it into the car; but she did not know whether it was thrown down or blew down, and that the same effect would have been produced if the wind had carried it down. There was a verdict for the plaintiff, and the case is here on excep-

*As to carrier's duties with respect to stations and stopping places, see monograph attached to *Muhlause v. Monongahela St. Ry. Co.* (Pa.), 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131.

Wadsworth v. Boston El. Ry. Co

tions by the defendant to the refusal of the court to rule that on all of the evidence the plaintiff was not entitled to recover.

The exceptions assume that there was an elevated structure belonging to the defendant, which ran overhead at the place where the accident occurred, and the plaintiff's contention is that the shavings, sawdust, and piece of wood fell in consequence of negligence on the part of the defendant or its servants or agents while at work or engaged upon the elevated structure. There is nothing to show what caused them to fall. For aught that appears, the winds may have blown them down. There was testimony tending to show that at the time the wind was blowing from 14 to 19 miles an hour, with a maximum velocity of 22 miles an hour. The statement of the plaintiff that it seemed as though they had been thrown down was immediately followed by the statement that she did not know whether they were thrown down or blown down, and the effect of her testimony was to leave the cause of the fall entirely uncertain. Aside from the fall of the sawdust, there was not even testimony tending to show that any one was at work on the elevated structure at the place where the accident occurred. The cause of the fall is entirely a matter of conjecture. The plaintiff invokes the doctrine of *res ipsa loquitur*. But that applies only when the circumstances are such as to afford just ground for a reasonable inference that, according to ordinary experience, the accident would not have occurred except for the want of due care. It was held in the cases relied on by the plaintiff, and in others referred to by the defendant, that there was ground for such an inference. See *Lowner v. N. Y., N. H. & H. R. R.*, 175 Mass. 166, 55 N. E. 805; *Manning v. West End St. Ry. Co.*, 166 Mass. 230, 44 N. E. 135; *Graham v. Badger*, 164 Mass. 42, 41 N. E. 61; *Jager v. Adams*, 123 Mass. 26, 25 Am. Rep. 7; *Kearney v. London, etc., Ry. Co.* (1871) L. R. 6 Q. B. 759; *Hogan v. Manhattan Ry. Co.*, 149 N. Y. 23, 43 N. E. 403. But where, as in the present case, it is as inferable that the accident occurred without negligence on the part of the defendant or its servants or agents as that it did, the ground for such an inference is wanting. If causes other than the negligence of the defendant or its servants or agents might have produced the accident, the plaintiff was bound to exclude the operation of such causes by fair preponderance of the evidence. • *Kendall v. Boston*, 118 Mass. 234; *Searles v. Manhattan Ry. Co.*, 101 N. Y. 661, 5 N. E. 66; *Wiedmer v. N. Y. Elev. Ry. Co.*, 114 N. Y. 462, 21 N. E. 1041. It cannot be held that the mere presence of sawdust and shavings and a piece of wood on the elevated structure was of itself evidence of negligence, and there is nothing to show that, if the iron flooring under the tracks had been extended beyond the sides of the tracks, the falling of the sawdust would or might have been prevented.

Exceptions sustained.

NASH v. SOUTHERN RY. CO.

(Supreme Court of Alabama, Feb. 28, 1903.)

[33 So. Rep. 932.]

Ejection of Intoxicated Passengers—Injury from Another Train—Liability.*

Where an intoxicated passenger so demeans himself as to justify his ejection, and on reaching his destination in the nighttime leaves the train, and his body is found on the track under such circumstances as to show injury by another train which passed during the night, the railroad company is not liable, it being under no obligation to guard the passenger through the night.

Pleading.

It is not error to refuse permission to amend a complaint by adding another count, after plaintiff's evidence has shown that he has no right to recover.

Appeal from City Court of Bessemer; B. C. Jones, Judge.

Action for wrongful death by M. J. Nash, administratrix of James Nash, deceased, against the Southern Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Pinkney Scott, for appellant.

James Weatherby, for appellee.

HARALSON, J. The assignments of error as to counts of the complaint are to the overruling separately and severally of defendant's demurrers to the first, second, third, fifth, seventh and ninth counts, but it appears there was no judgment of the court on these demurrers. The other assignments of error relate to the action of the court in refusing to allow the plaintiff to amend the complaint by adding an additional count numbered 10, and in giving the general affirmative charge for defendant.

There were three pleas, first, not guilty, second, plea of contributory negligence to each count, to which pleas a demurrer was sustained, and the third, that the plaintiff's intestate was a trespasser or quasi trespasser on the track of defendant at the time of his injury and death, and that the injuries which caused his death were not inflicted wantonly or willfully or intentionally by the defendant or any of its employees. On motion of the plaintiff, as the judgment entry recites, that part of the plea, averring that intestate was a trespasser on the track was quashed, leaving the plea averring a want of willfulness or wantonness in defendant, and issue was joined thereon. The course of the trial shows, that the case was tried on the defenses that defendant was guilty of no negligence; on the plea of contributory negligence of the plaintiff's intestate, and that he was a trespasser

*As to the duties of carriers to intoxicated persons, see foot-note to *Haug v. Great Northern Ry. Co.* (N. Dak.), 12 Am. & Eng. R. Cas., N. S., 25.

Nash v. Southern Ry. Co

on defendant's track, and will be reviewed on the evidence as applicable to these defenses.

In *C. & W. R. Co. v. Wood*, 86 Ala. 166, 5 South. 464, this court through Stone, C. J., approved the doctrine thus stated by Mr. Beach: "Drunkenness is a wholly self-imposed disability, and in consequence is not to be regarded with that kindness and indulgence which we instinctively concede to blindness, or deafness, or any other physical infirmity. Trespassers go at their peril. This is settled law. Much more is it just to hold that they make themselves drunk at their peril. Disabilities, moreover, of any kind, are a shield, and never a sword. It would be a strange rule of law that regarded a certain course of conduct negligent and blame-worthy upon the part of a sober man, but that held the same conduct, on the part of the same man when intoxicated, venial and excusable. Drunkenness will never excuse one for a failure to exercise the measure of care and prudence which is due from a sober man under the same circumstances." Beach on Cont. Negligence, § 492.

Again, approving this rule, the court said: "Drunkenness does not exempt a person from the responsibility of contributory negligence. If intoxication renders a person reckless or indifferent to consequences, or inadvertent, or thoughtless, and he fails to exercise due care, his failure or omission will not be excused because superinduced by his intoxication. The law exacts from one intoxicated, the same care and precaution to avoid injury as it would from a sober person of ordinary prudence under like circumstances." *Johnson v. L. & N. R. Co.*, 104 Ala. 246, 16 South. 76, 53 Am. St. Rep. 39.

The evidence for the plaintiff shows without conflict, that plaintiff's intestate, Nash, entered a passenger coach of the defendant at Bessemer without a ticket, and paid to the conductor his fare to Maylene; that when he got on the train he had a bundle with him, and it contained two bottles of whisky which were unopened, and he was very much intoxicated; that he was staggering around and boisterous, using very bad language and was hardly able to stand on his feet; that Nash told the conductor he desired to go to Maylene; that the conductor at first refused, stating that the train did not stop at that point, at which Nash became so noisy and boisterous, the conductor told him, if he would behave himself and be quiet, he would take him to Maylene; that intestate was not quiet, and when the train stopped at Mobile Junction, he wanted to get off there, but did not, and that some of the employees of the company stayed with him until he arrived at Gurney, seven miles this side or short of Maylene, where the witness deposing to the above facts left the train and saw no more of what occurred. This witness also stated, that when he got off, Nash was still walking around over the coach talking, and staggering about; that he did not seem to talk like he had sense, could stand up without assistance, but

Nash v. Southern R. Co

could not walk very well without it, and while on the train, he did not drink anything that he saw. There is no evidence tending to show how he got off the train, whether by himself or with the assistance of another. The evidence tended to show, that the train arrived at Maylene about 1 o'clock a. m.; that the weather was cold and the night drizzly and dark, and that another train from the south going north came along, during the night, and afterwards the body of Nash was found cut in two, with the head lying between the rails opposite the depot, and other parts of the body some 40 feet to the north on the side of the track. The bundle containing the whisky was also there found. It was shown that deceased lived at Maylene, which was a regular station but not a regular stopping place; that there was a store there, about 25 or 30 yards from the depot; that a box car with a platform in front, constituted the depot, and that no night office was at the place, and no one was kept on duty at night.

Contributory negligence is matter of defense, the onus of proving which is on the defendant, except when the plaintiff's evidence relieves defendant from discharging it. *K. C., M. & B. R. Co. v. Crocker*, 95 Ala. 412, 428, 11 South. 262.

From the evidence in this record, the conduct of deceased was such, as for which the conductor would have been justified in ejecting him from the train at a proper place and under suitable conditions, having reasonable regard to the safety of his life and limb. *Johnson v. Railroad Co.*, 104 Ala. 241, 16 South. 75, 53 Am. St. Rep. 39; *Railroad Co. v. Johnson*, 108 Ala. 62, 19 South. 51, 31 L. R. A. 372. If the conductor had this right, there certainly was no negligence or breach of duty in allowing deceased to get off the train at the point of his destination, or to assist him in departing. The one or the other was done, but which, does not appear. The injury did not happen on the train, but after he got off. His departure from the train, under the evidence cannot be regarded as the natural and proximate cause of his death, or as connected with it, except as he himself connected it by his voluntary intoxication, and the suit is not brought for the killing of intestate, disconnected with his condition and what occurred on the train. It also appears that when killed, intestate was on the track of the company, and was a trespasser thereon. The company was under no duty, so far as the evidence discloses, to look after and guard him through the night, and to keep him from off the track. *McClelland v. Railroad Co.*, 94 Ind. 276.

The cases cited by plaintiff's counsel and to which we have referred, were cases where the deceased was expelled from the train for drunkenness or improper conduct, at a place and under conditions which were dangerous, rendering such ejection at the time and place unlawful.

The only evidence offered was by the plaintiff, and after it was all in, she proposed to add another count to the com-

Timms v. Old Colony St. Ry

plaint, numbered 10, to which defendant objected, "because said count is subject to demurrer, to the effect that it shows that plaintiff's intestate was a trespasser on the track of the defendant, but fails to allege or show that the injuries of which he died were wantonly or willfully inflicted, and the same is indefinite and uncertain; and because the count proposed as an amendment has no evidence to support it."

The proposed amendment, after the evidence closed, by the addition of count 10 was subject to demurrer, and was not sustained by evidence. There was, therefore, no error in disallowing it. *Beavers v. Hardie*, 59 Ala. 570.

The affirmative charge was properly given for defendant. Affirmed.

TIMMS v. OLD COLONY ST. RY.

(*Supreme Judicial Court of Massachusetts, Plymouth, April 1, 1903.*)

[66 N. E. Rep. 797.]

Carriers—Injuries to Passengers—Negligence—Sufficiency of Evidence.*

In an action against a street railway company for injuries to a passenger, evidence showing that plaintiff, who was standing near the edge of the rear platform without holding onto anything, was pitched off by a sudden jerk in the car, caused by a sudden stop, without showing that there was any defect in the car or rails, or that the apparently sudden stop was not justifiable, fails to show any negligence on the part of defendant.

Exceptions from Superior Court, Plymouth County; John H. Hardy, Judge.

Action by one Timms against the Old Colony Street Railway. A verdict was directed for defendant, and plaintiff excepts. Exceptions overruled.

A. F. Barker, for plaintiff.

Henry F. Hurlburt and Damon E. Hall, for defendant.

LATHROP, J. We need not consider in this case whether there was any evidence for the jury that the plaintiff was in the exercise of due care, for we are of opinion that there was no evidence of negligence on the part of the defendant, and that the plaintiff was not entitled to recover on either count of the declaration. The evidence is that the car was not going at an excessive speed, but was running along in the ordinary way, when the speed slackened, and seemed to slacken very suddenly, and there was a little jerk, and the plaintiff, who was standing near the edge of the rear platform, with his body half inside and half outside the line of the car, not holding onto anything, and with one hand in his pocket,

*As to liability of carriers for injuries to passengers by jerks and jolts of trains or cars, see monograph appended to *Freeman v. Metropolitan St. Ry. Co. (Mo.)*, 3 R. R. R. 584, 26 Am. & Eng. R. Cas., N. S., 584.

Sweet v. Birmingham Ry. & Electric Co

pitched off, and sustained the injuries complained of. There is nothing in the evidence to show that there was any defect in the car or in the condition of the rails and jerks in the motion of street cars are not unusual. As to the apparent sudden stopping, there is nothing to show that it was not caused by some obstacle appearing suddenly in front, such as a horse and wagon, or a person on foot, attempting to cross the track a short distance ahead. See *Byron v. Lynn & Boston Railroad*, 177 Mass. 303, 58 N. E. 1015, and cases cited.

As to the second count, the allegation is that the defendant, "by its servants and agents, so negligently and carelessly managed and operated said car, by the sudden, careless, and negligent stopping of the same, as to cause some object on the rear platform of said car to be thrown violently against the plaintiff with such force as to throw him from the car." We have already disposed of the gist of the allegation, namely, the negligent stopping of the car, and we fail to find any evidence that whatever struck him threw him from the car.

Exceptions overruled.

SWEET v. BIRMINGHAM RY. & ELECTRIC CO.

(Supreme Court of Alabama, Feb. 28, 1903.)

[33 So. Rep. 886.]

Carriers—Injury to Passengers Alighting from Train—Question for Jury.*

Plaintiff was injured while alighting from a train, drawn by a dummy which ran along certain streets, stopping at crossings for passengers. There was evidence that, as it approached a certain street, a signal from a person taking passage having been given, the train was brought nearly to a stop, and that thereupon plaintiff, with her left hand holding a bundle, and her right the hand railing, descended to the steps of the car platform about the time the other passenger got aboard, and as she reached the bottom step, and was about to step from the train, its speed was quickened with a jerk, whereby she was thrown to the ground. Plaintiff testified that the dummy stopped regularly at the crossing: *held*, that the questions of negligence and contributory negligence were for the jury.

Appeal from Circuit Court, Bessemer County; A. A. Coleman, Judge.

Action by Mrs. M. M. Sweet against the Birmingham Railway & Electric Company. Judgment for defendant, and plaintiff appeals. Reversed.

James Trotter and J. A. Estes, for appellant.

Walker, Tillman, Campbell & Porter, for appellee.

SHARPE, J. This action is to recover for injuries alleged to have been inflicted on the plaintiff by negligent conduct of

*See preceding case and foot-note.

Sweet v. Birmingham Ry. & Electric Co

the defendant while acting in the capacity of a common carrier. Defendant pleaded the general issue and contributory negligence. At defendant's request the court charged, in writing, "If the jury believe the evidence in this case, they will find a verdict for the defendant;" and the propriety of that charge is the only matter here in question.

The train by which the injury occurred was used by defendant for carrying passengers between Bessemer and Birmingham, and along certain streets and avenues of those cities. It consisted of cars drawn by what is known as a "dummy engine," propelled by steam. Customarily it stopped at street crossings to receive passengers when signaled, and to discharge passengers when the conductor was notified to stop. Plaintiff about nightfall boarded the train at Third avenue, in Bessemer, and rode to Eighth avenue crossing, where a passenger for whom a signal had been given from the outside got on, and the plaintiff attempted to get off, the train. At that time the train had not stopped entirely, and was moving by that station. The conductor had not collected plaintiff's fare, and was not notified of her destination. There is evidence which, though in conflict with other evidence, tends to show that as it approached Eighth avenue, and when the signal by the person taking passage was given, the train was brought nearly to a stop, and that thereupon the plaintiff, with her left hand holding a bundle, and her right the hand railing, descended to the steps of the car platform, about the time the other passenger got aboard, and that when she reached the bottom step, and was about to step from the train, its speed was quickened with a jerk, whereby she was thrown to the ground. In her fall, plaintiff received the injuries on account of which she sues. She testified, among other things, that "the dummy stopped regularly at that crossing; in getting on and off there, they stopped there all the time."

In view of the whole evidence, we are of the opinion the charge referred to should not have been given. The degree of diligence which the law imposes on operatives of such trains is no less strict than that applying where the train is of the ordinary, larger kind. In respect of starting after stopping for the reception and discharge of passengers, this court has held they are bound to be even more watchful than those operating larger and more cumbersome trains, in that they must not only stop long enough to allow passengers to get on and off, but, as in the case of ordinary street cars, they must "see and know that no passenger is in the act of alighting, or in a position which would be rendered perilous by putting the car in motion." *Highland Ave., etc., R. Co. v. Burt*, 92 Ala. 291, 9 South. 410, 13 L. R. A. 95. Though this train did not stop at the crossing, the jury might have found it was so operated as to imply an invitation to passengers to alight, by reason of indications given that it was being slowed for that

Corkhill *et ux.* v. Camden & S. Ry. Co

purpose. In such a situation, the duty of trainmen towards passengers departing is the same as those taking passage, respecting which this court has said: "An invitation thus conveyed implies at least an assurance that the momentum will not be increased until all persons desiring to come aboard have done so, and imposes a correlative duty on those in charge of the train not to increase the speed without knowing that no person intending to act on the invitation is so situated as to be imperiled thereby. They cannot, in other words, acquit themselves by merely maintaining the slow movement sufficiently long for persons with diligence to get on, for this itself is a wrong; and as there is no obligation on the would-be passenger to avail himself of such an invitation, though he may do so without negligence, they have no right to assume that he will avail himself of it immediately, or at all, in fact, but they must know that it has been acted on, and that there is no one in an exposed condition when the increased motion is imparted to the train." *Montgomery, etc., R. Co. v. Stewart*, 91 Ala. 421, 8 South. 708. If defendant's train was so managed as to apparently invite passengers to alight at Eighth avenue, those so operating the train were bound to act with reference to the probable acceptance of such invitation, and to use care for the avoidance of jerks and other movements calculated to make the act of alighting dangerous. *McDonald v. Long Island R. Co.*, 116 N. Y. 546, 22 N. E. 1068, 15 Am. St. Rep. 439.

The mere act of stepping from a slowly moving train does not, of itself, and under all circumstances, constitute negligence. *Watkins v. Birmingham Ry. & Elec. Co.*, 120 Ala. 147, 24 South. 392, 43 L. R. A. 297; *Birmingham Ry. & Elec. Co. v. James, Adm'x*, 121 Ala. 120, 25 South. 847. Whether plaintiff's conduct was negligent or otherwise is to be tested by what would have been the action of a reasonably prudent person under like circumstances, and the evidence in this record is such as to require a jury for the application of that test, as well as for the determination of the question of whether defendant was negligent, as alleged in the complaint.

Reversed and remanded.

CORKHILL *et ux.* v. CAMDEN & S. RY. CO.

(*Supreme Court of New Jersey, Feb. 24, 1903.*)

[54 Atl. Rep. 522.]

Street Railroads—Injury to Passenger—Negligence of Motorman.*

The motorman of an electric street railway car started his car at moderate speed to cross an intersecting steam railroad consisting of three tracks, after his conductor had gone forward upon the crossing and had used proper care to ascertain that no railroad train was to be expected. While thus proceeding over the crossing at moderate speed, the motor-

*See generally, preceding case and foot-note.

Corkhill et ux. v. Camden & S. Ry. Co

man became suddenly aware of a railroad train rounding a curve near by, and coming towards his car at a high rate of speed, without timely warning by bell or whistle. A collision seemed imminent, and was in fact narrowly averted. The motorman, on seeing the danger, instantly applied all power, and increased the speed of his car to the utmost, in order to escape the collision. It was claimed that in the lurch of the street car thereby occasioned a passenger was thrown to the floor of the car and injured: *held*, that a verdict attributing negligence to the motorman on these facts cannot be supported.

(Syllabus by the Court.)

Action by Adam Corkhill and wife against the Camden & Suburban Railway Company and the Pennsylvania Railroad Company. Verdict against defendant Camden & Suburban Railway Company. Rule to show cause made absolute.

Argued November term, 1902, before GUMMERE, C. J., and VAN SYCKEL, FORT, and PITNEY, JJ.

Howard Carrow, for plaintiffs.

Joseph H. Gaskill, for defendant.

PITNEY, J. This action was brought against the present defendant and the Pennsylvania Railroad Company to recover damages for personal injuries alleged to have been sustained by Mrs. Corkhill while a passenger upon a street car of the Camden & Suburban Railway Company at the crossing of that railway over the tracks of the Pennsylvania Railroad Company. Upon the trial a nonsuit was ordered with respect to the latter company. This ruling is not complained of. The plaintiffs recovered verdicts as against the present defendant, and a new trial is asked because those verdicts are against the weight of the evidence.

With respect to the liability of the Camden & Suburban Railway Company, the questions raised are, first, was there negligence on the part of the motorman or conductor in attempting to cross the tracks of the steam railway; secondly, was there negligence on the part of the motorman in suddenly increasing the speed of the car while upon the crossing; and, thirdly, did such negligence, if any, result in a physical injury to Mrs. Corkhill.

Taking the evidence most strongly in favor of the plaintiffs, it shows: That while Mrs. Corkhill was seated in an electric street railway car operated by the employees of the present defendant the car came to the crossing of the steam railroad (which consisted of three tracks) at Twelfth and Federal streets, in the city of Camden. That it stopped before entering upon the crossing. That the gates were at this time down. The conductor of the electric car went forward to the center of the crossing, and looked for trains upon the steam railway. He saw no train save a freight train, which was standing on one of the tracks near by. The railroad flagman told the conductor to cross, as the train was going to stand there. Then the gates were raised. The conductor beckoned to the motorman to come ahead, and he did so. Thereupon

Corkhill et ux. v. Camden & S. Ry. Co

the electric car started over the crossing at a moderate speed. While it was passing over, a train unexpectedly approached on the railroad, rounding a curve, and, so far as the evidence shows, it gave no signal by bell or whistle. The evidence shows that a collision appeared imminent. The flagman upon the railroad waved a red flag in front of the locomotive in order to avert a collision, and the train was finally stopped within 50 feet of the electric car. The situation was so critical that every passenger in the car was alarmed, and stood up, and looked out of the windows; and the motorman, seeing the danger, instantly applied all power, in order to carry his car across as quickly as possible. Mrs. Corkhill's story is that by the sudden lurch caused by the increased speed of the electric car she was thrown to the floor, and the inference sought to be drawn from this is that the fall caused the paralysis from which she has since suffered.

The case is devoid of evidence to show any want of care in either conductor or motorman in attempting the crossing; on the contrary, there is affirmative evidence to show that the conductor took every reasonable precaution, and that neither he nor the motorman had any warning that a train was coming. As to the conduct of the motorman in turning on full power when confronted with the imminent danger of a collision, his act evidenced complete presence of mind and the exercise of the highest degree of care. If, on being confronted with such a danger, he had failed to make extraordinary efforts to increase his speed, there would, perhaps, have been ground to charge him with negligence, and the only excuse would have been that in the sudden peril he lost his presence of mind. If he had presence of mind (as he manifestly had) it was his plain duty to instantly apply the utmost power possible, in order to carry his passengers across without loss of life. Even though that might necessarily result in some danger of bruising, or even of more serious personal injury to the passengers, such injury was far preferable to the loss of life of one or more of the passengers, which would undoubtedly have resulted from a collision with the locomotive.

The cases that have held street railway companies liable for injuries to passengers caused by the lurch of a car have gone upon the ground that there was a sudden increase of speed under circumstances that evinced a disregard of the safety of the passengers. *Consolidated Traction Co. v. Thalheimer*, 59 N. J. Law, 474, 37 Atl. 132; *Scott v. Bergen Co. Traction Co.*, 63 N. J. Law, 407, 43 Atl. 1060. See, also, *May v. North Hudson Co. Railway Co.*, 49 N. J. Law, 445, 9 Atl. 688; *Haile v. Clayton & Hoff Co.*, 61 N. J. Law, 197, 38 Atl. 805; *Burr v. Pennsylvania R. R. Co.*, 64 N. J. Law, 30, 44 Atl. 845; *Paynter v. Bridgeton Traction Co.*, 67 N. J. Law, 619, 52 Atl. 367.

In the present case the trial judge properly charged the jury, in effect, that, unless there was negligence on the part

Louisville Ry. Co. v. Casey

of the conductor in allowing the car to cross without exercising proper vigilance, or negligence on the part of the motor-man in managing the car as it crossed the railroad, the plaintiff could not recover. The finding of the jury that there was such negligence was contrary to the great weight of the evidence. It is therefore unnecessary to deal with the question whether Mrs. Corkhill's paralysis did not result, according to the great weight of the evidence, from mere fright, as insisted by the defendant, rather than from her being thrown to the floor of the car, as claimed by the plaintiffs.

The rule to show cause will be made absolute.

LOUISVILLE RY. CO. v. CASEY.

(*Court of Appeals of Kentucky, Feb. 4, 1903.*)

[71 S. W. Rep. 876]

Permanent Injuries to Passenger—Question for Jury.

Where a passenger on a street car, who was injured by the premature starting of the car while she was attempting to alight, testified that her ankle had never recovered its strength, and that she walked with difficulty, was unable to go up and down the steps as she had done before, and still suffered pain from the injury, the court was justified in submitting the question of permanent injury to the jury.

Excessive Verdict.

Where a passenger on a street car was injured by the premature starting of the car while she was attempting to alight, wrenching and spraining her ankle, which had not recovered at the time of the trial, a verdict of \$1,000 in her favor was not excessive.

Appeal from circuit court, Jefferson county, common pleas division.

"Not to be officially reported."

Action by Catherine Casey against the Louisville Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Fairleigh, Straus & Eagles and Hazelrigg & Chenault, for appellant.

Forcht & Field, for appellee.

BARKER, J. Appellee, Catherine Casey, in her petition, states that she was a passenger upon one of the appellant's street cars running over its line on Preston street, in Louisville, Ky. Just before the car in question reached Roselane street, appellee, desiring to leave the car, rang the bell, and when the car stopped at Preston and Roselane streets she attempted to alight from the rear platform. As she was about to step from the lower step of the platform to the ground, the car was negligently and carelessly started by appellant's employees in charge thereof, and she was violently thrown to the ground, wrenching and spraining her ankle, from which she suffered great pain, and which has never become entirely well,—it remaining so weak that she has not been

Davis v. Seaboard Air Line Ry

able to walk upon it since with ease or comfort to herself,—and that by reason of said injury her power to earn money has been substantially diminished. Appellant's answer put in issue the material allegations of the petition, and also pleaded contributory negligence. The evidence in this case, as is usual in cases of this kind, is conflicting and contradictory. That for the appellee shows a case of gross neglect on the part of appellant's servants and employees in charge of the car in question, whereas the evidence for appellant shows no neglect whatever upon the part of its agents or employees, but, on the contrary, the kindest and most considerate treatment of appellee; that she was helped down from the car by the conductor, and stumbled and fell in the street after the street car had passed 25 or 30 yards beyond the point where she had alighted. The jury which tried the case evidently believed the witnesses for appellee, as upon trial of the case they returned a verdict of \$1,000 in her favor.

Upon this appeal, appellant rests its right of reversal upon two grounds: First, that the court erred in submitting the question of permanent injury to the jury; and, second, that the verdict is excessive.

We think there was sufficient evidence of permanent injury to authorize a submission of the question to the jury. Appellee testified that her ankle has never recovered its strength, and that she walks with difficulty, is unable to go up and down the steps as she had done before, and that she still suffers pain from the injury in question; and we therefore believe that the court did not err in submitting the question as to whether or not, under all of the circumstances, appellee was permanently injured, to the jury.

The amount of the verdict we believe to be full large; but we cannot say that, under all the circumstances of this case, it was excessive,—certainly not so much so as to warrant us in invading the province of the jury in estimating it. If the witnesses for the appellee are to be believed, the negligence of appellant's employees was great and reprehensible; and it was peculiarly within the province of the jury, who had all the parties before them, who heard the testimony, and saw the demeanor of the witnesses, to judge of their credibility, and to estimate and fix the damage sustained by appellee.

Perceiving no error in the record, the case is affirmed.

DAVIS v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina, April 7, 1923.)

[43 S. E. Rep. 840.]

Person Assisting Passenger Injured by Sudden Jerk of Car—Evidence.*

Plaintiff testified that, being about to seat his wife and children on

*As to the duty of a carrier to persons assisting passengers, see note

Davis v. Seaboard Air Line Ry

defendant's train, he asked the conductor to hold the train until he got them on. Plaintiff seated them as quickly as possible, and went out as quickly as he could, when, before he could get off, the train started with a quick jerk, throwing him to the ground to his injury. Defendant offered no evidence: *held*, that defendant's motion for nonsuit was properly denied.

Appeal—Review.

Where the record contains no prayers for instructions, assignments of error in refusing to give defendant's prayers furnish nothing for consideration.

Appeal from Superior Court, Union County; Robinson, Judge.

Action by L. A. Davis against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. Affirmed.

Adams & Jerome and J. D. Shaw, for appellant.

Redwine & Stack, for appellee.

MONTGOMERY, J. This action was brought to recover damages against the defendant for personal injuries alleged to have been received by the plaintiff through the negligence of the defendant.

According to the plaintiff's evidence, he had seated his wife and children on the defendant's train, bound for Charlotte, at Marshville, having purchased a ticket for them, and on reaching the bottom step of the coach, with the intention to alight, he was suddenly jerked by a motion of the train from his footing, and thrown violently to the ground, whereby he was hurt on the leg. His evidence is that he was jerked from the step, and not that he had actually moved from the step. He further said the conductor knew he was going to put his wife and children on the cars, and that he asked him to hold the train until he got them on, and that he got on as quickly as he could, and turned to go out of the coach as quickly as he could.

The defendant offered no evidence, and moved to nonsuit or to dismiss the plaintiff's action under the statute. We think there was no error in the refusal of his honor to grant the motion. The case of *Whitley v. Railway*, 122 N. C. 987, 29 S. E. 783, seems to be substantially like this one, and is decisive of this case.

We notice in the assignments of error three to the refusal to give the defendant's first, second, and third prayers for instructions, but the record does not contain any such prayers, nor, indeed, any prayers for instructions of any kind.

Affirmed.

appended to *Whitley v. Southern Ry. Co.* (N. Car.), 12 Am. & Eng. R. Cas., N. S., 210.

As to the liability of carriers for injuries to passengers by jerks and jolts of trains or cars, see monograph appended to *Freeman v. Metropolitan St. Ry. Co.* (Mo. App.), 3 R. R. R. 584, 26 Am. & Eng. R. Cas., N. S., 584.

FRANCIS WINSLOW *et al.*, Appts., *v.* BALTIMORE & OHIO
RAILROAD COMPANY.

(*Argued December 17, 18, 1902. Decided February 23, 1903.*)

[23 Sup. Ct. Rep. 443.]

Leases—Covenant to Renew.

A covenant in a lease to renew at its expiration with the same covenants and privileges as contained in the original lease is satisfied by one renewal without the insertion of another covenant to renew.

Same—Same—Power of One Trustee to Execute Lease.

A valid lease of real property containing a covenant to renew cannot be made by one of the trustees in whom the title to the property is vested, as such an act is of a nature to require the deliberate discretion and judgment of all the trustees.

Same—Same—Same.

Recognition by all the trustees of a lease for five years of a portion of the realty included in the trust estate, executed by one of their number, even assuming that it could cure the invalidity of such lease under the statute of frauds, must have been founded upon full knowledge of all the facts, in order to have that effect.

Same—Same—Part Performance—Specific Performance.

The continued possession of land by a lessee after the expiration of a five years' lease which contained a covenant to renew for a like period, and the payment and acceptance of rent therefor during the period covered by the renewal clause, are not such part performance as called for the specific performance of a covenant to renew contained in a lease which purports to have been executed in compliance with the renewal covenant in the prior lease, but which is invalid under the statute of frauds because signed by only one of the trustees in whom the title to the property was vested.

Same—Same—Same—Same.

The receipt of rent by the beneficiary in a trust, after the expiration of a lease containing a covenant to renew, in ignorance of the invalidity of such lease under the statute of frauds, is not such part performance as calls for the specific performance of such covenant,—especially where her action was unknown to the trustees, who had substantially refused to renew on the old basis, and took place while negotiations were pending between them and the lessee relative to the terms of a continued occupation of the land.

Same—Railroad's Right to Injunction against Dispossession Prior to Its Exercise of Right to Condemn.

A railroad company which enters upon the use and occupation of real property under a lease, with a view to its purchase when that can properly be effected, and constructs a portion of its line thereon, is entitled to an injunction restraining its lessors for a reasonable time from proceeding to dispossess the company from the land, in order to enable it to condemn such land in proper proceedings for that purpose.

Appeal from the Court of Appeals of the District of Columbia to review a decree which reversed the judgment of the Supreme Court of the District dismissing a bill in a suit to establish the validity of a lease and compel the specific performance of a contract to sell, and to enjoin further proceedings at law to obtain possession of the premises, and the further prosecution of an action to recover damages for its use and occupation, and directed that court to give judgment for complainant. Reversed and remanded for further proceedings.

Winalow v. Baltimore & Ohio R. Co

See same case below, 18 App. D. C. 438.

Statement by MR. JUSTICE PECKHAM:

The court of appeals of the District of Columbia, reversing the judgment of the supreme court of the District (which dismissed the bill of the railroad company), directed that court to give judgment in favor of the company, and from the judgment of the court of appeals an appeal to this court has been taken by the defendants below.

The company brought this suit to obtain a judgment declaring the validity of an alleged lease to it for five years from the 1st day of August, 1897, and to compel the specific performance of an alleged contract to sell to it the same land mentioned in the lease and lying in the city of Washington, owned by the defendants as substituted trustees under the will of the late Catherine Pearson, deceased, and to enjoin the defendants from continuing proceedings at law which they had commenced to obtain possession of the premises, and also to enjoin them from the prosecution of an action to recover damages for the use and occupation of the land by the railroad company. The facts are as follows:

Catherine Pearson in her lifetime owned certain land, consisting of unimproved lots in the city of Washington, near the Baltimore & Ohio Railroad Company's depot, and lying on the line of its Metropolitan branch as subsequently constructed in that city. After the decease of Mrs. Pearson, and on June 30, 1868, her will was duly proved before the proper probate court in the District. In it she devised the premises to trustees for the sole and separate use of her daughter, Eliza W. Patterson—

“During the term of her natural life, and so that the same shall not be liable for the debts or subject to the control, contracts, or engagements of her present or any after taken husband; to permit her by herself, or her special attorney appointed in writing, to be signed by her, to receive the annual income and profits of the same for her own sole and separate use, her receipt or that of her attorney so appointed as aforesaid alone to be an acquittance to the person or persons charged with the payment of such income or any part of the same, and to the extent only therein expressed to have been paid; and if she pleases to occupy, possess, and use for her own account, accommodation, and convenience and that of her family any part of the property, real and personal, so held for her separate use and benefit, she shall be allowed to do so; and if at any time the said Eliza Patterson shall in writing, to be signed by her in the presence of and to be attested by a subscribing witness, desire the said Carlisle P. Patterson, William H. Philip, and Walter S. Cox, or the survivors and survivor of them, to sell any part of the estate, real and personal, held by them for her separate use, for the purpose of changing the investment thereof, it shall be lawful for the said named trustees or the survivors or survivor of them to

Winslow v. Baltimore & Ohio R. Co

sell the same for such purpose only, and to transfer and convey the absolute estate in fee therein, to the purchaser thereof; to receive the proceeds of any and every such sale of the purchaser, who shall not be required to see to the application thereof; and to invest the same in such manner as the said Eliza W. Patterson may require; and such new investment shall be held by the said trustees for the same use, trusts, and purposes, and with the same powers and authority of sale and reinvestment, as is herein declared of and concerning the original trust, subject, and separate estate.

“And after the death of the said Eliza W. Patterson the said named trustees and their successors shall hold the said trust, subject, and separate estate—original and subsequently acquired by sale and reinvestment—for the use and benefit of any child, or children, of the said Eliza W. Patterson, and the issue of any child or children of the said Eliza who may die leaving issue in the lifetime of the said Eliza, and such issue shall take the share or portion of the said estate which their parent or parents would have taken had they survived the said Eliza. And if the said Eliza W. Patterson shall die without leaving a child or children, or issue of any child or children, living at the time of her death, the said trustees and their successors shall hold the said trust, subject, and separate estate for my right heirs. And if it shall happen that either of the said trustees shall die, or become incapable of acting, or shall refuse to act in the execution of said trust, then and in every such case the continuing trustees or trustee shall from time to time nominate some other person or persons to be approved by the said Eliza W. Patterson to be trustee or trustees in the place and stead of the person or persons so dying, or becoming incapable or refusing to act, and shall convey and settle the said trust, subject and separate estate in such manner that the same shall be legally vested in such continuing trustees or trustee, and such person or persons so named and appointed to that office for the same uses, trusts, and purposes, and with the same power and authority of administration, sale, and reinvestment as is hereinbefore declared of and concerning the said trusts, subject, and estate, and the said new trustee or trustees shall have the same power to act in the premises in conjunction with the continuing trustees or trustee, and survivors of them, as if they had been originally named trustee or trustees in the premises in this my last will and testament.

“I do hereby nominate and appoint Carlisle P. Patterson, William H. Philip, and W. S. Cox to be the executors of this my last will and testament.”

In 1872 the trustees under Mrs. Pearson's will leased to the railroad company the land for five years, the lease containing a privilege to the railroad company to purchase such land during those five years on payment of \$12,592. It also contained an agreement to renew the lease with the same cove-

nants and privileges for another term of five years, or until the lessors were prepared to convey the premises as agreed in the lease with a perfect title in fee simple.

From the time of the first lease in 1872, and under various leases thereafter, the company occupied the land, constructed part of its branch line thereon, and paid rent therefor up to 1888. On January 30 of that year a lease was made, which was signed by the trustees and by the president of the railroad company, though not by Mrs. Patterson. By the terms of that lease the premises were rented for five years from August 1, 1887, at the same rent and with the same covenants as to renewal and for the sale of the lands as contained in the first lease of 1872. The company continued in the occupation of the premises under this lease for the five years mentioned therein. Upon October 17, 1892, the company still being in occupation of the land, another instrument was executed in the form of a lease, signed by but one of the trustees, and purporting to lease the land for five years from August 1, 1892, at the same rental as the lease of 1888, and with the same covenants to sell at the same price (\$12,592), and to renew the lease for five years, as contained in the lease of 1888. This lease was signed by Winslow, alone, he then being one of the substituted trustees, but Jay, another of the substituted trustees, did not sign it, and, so far as appears, never saw it. These two substituted trustees had been duly appointed prior to or in the year 1883. The former trustee, Judge Cox, had resigned in June, 1892, and it does not appear that his successor had then been appointed.

The company retained possession of the property from August 1, 1892, up to August 1, 1897, and paid the amount of money mentioned in the paper of 1892, being at the same rate that had been paid since 1872, and as was provided in the lease of 1888. About the 1st of August, 1897, questions arose as to the terms of future occupation of the land. The trustees refused to execute any further lease, denied any obligation to renew it for any term, and said they preferred to sell, but refused to do so on the old terms, the land having in the meantime largely appreciated in value. In September, 1897, Mr. Winslow, in a letter to the company, said they were prepared to convey the property with a perfect title, and that they also preferred to execute such conveyance to any renewal of the lease. The company, however, prepared a lease, which provided for again leasing the land to it on the same terms for a period of five years, commencing on August 1, 1897, and this lease also contained a provision for a renewal for another five years, or until the lessors could convey the premises in fee simple to the company. This lease was never signed. Negotiations continued in regard to the matter, the company insisting it had the right to a renewal of the lease by virtue of the instrument dated August 1, 1892, while the trustees denied that contention, and, though willing

Winslow v. Baltimore & Ohio R. Co

to sell, were not willing to do so at the price named in the former lease, as they said that the value of the land had increased from \$12,592 to over \$30,000. During these negotiations and disputes the company retained possession of the land, and on or about February 1, 1898 (the disputes and the negotiations between the trustees and the company being still unsettled), in accordance with the custom which it had followed during the running of the various instruments since 1872, of paying the rent semi-annually on the 1st days of February and August as it accrued, it sent the money that would have been due for rent (if a lease were then in existence), in the form of a money order payable to the order of Mr. Winslow, trustee of Eliza W. Patterson, and inclosed it in a letter addressed to Mr. Winslow, in care of Fisher & Co., agents, who sent it to Mrs. Patterson, as Mr. Winslow was then absent in Nicaragua as secretary of the Canal Commission. This money order was received by Mrs. Patterson, who thereupon wrote the following letter, under date of February 5, 1898, to one of the officers of the company:

Dear Sir:—

I returned to you a few days ago the draft which you sent me for the rent of my property on First street, Washington, by the railroad company of Balto. & Ohio of \$377.77. The draft was made out to Mr. Francis Winslow, trustee, and I could not draw it as Mr. Winslow is in Nicaragua, and I could not send it so far away to him, fearing it might be lost. I therefore return it to you, with the request that you would sign it, as you always have done heretofore, Cox, Jay, & Winslow, trustees. Judge Cox & Mr. Jay are both here, so that they can sign it at once and I can have the money. By giving prompt attention to this small matter of business you will greatly oblige,
Eliza W. Patterson.

The statement in this letter, that Judge Cox could sign the draft or order, was evidently a mistake, as his resignation had been accepted by the court years prior to the date of the letter.

The company afterwards sent back the draft, and, under some arrangement between Mrs. Patterson and Fisher & Co., which it does not appear was known by the trustees, but which was consented to by the company, the same was indorsed "Francis Winslow, trustee, by Thomas J. Fisher & Co., attorneys," and on such indorsement the money on the voucher was obtained from the company and received by Mrs. Patterson.

On August 1, 1898, the company sent a draft or money order for \$377.77, the amount of rent which would have been due if there had been a valid lease in existence, the draft being sent to Mr. Winslow, trustee, which he declined to negotiate, and insisted that the rights of the company had been terminated by his notice prior to and in September, 1897, and that since that time the company had been occupying the property as tenants by sufferance.

Winslow v. Baltimore & Ohio R. Co

This voucher, and those which succeeded it, and which were forwarded to Mr. Winslow, as trustee, and made payable to his order, were retained by him until January, 1900, when they were returned to the company and a check given for the aggregate amount under an agreement that its acceptance should be without prejudice to the rights of the respective parties and their claims relating to the leasing of the land or the renewal of the lease, or to any question or matter connected therewith.

The dispute between the parties continued, as also did the negotiations in regard to a settlement thereof, until some time in March, 1900, when Mr. Winslow, Mr. Jay, and the American Security & Trust Company, the substituted trustees, took proceedings against the company before a justice of the peace to obtain possession of the premises, based upon a notice to quit, given under the statute. Judgment in favor of the trustees was rendered in that case by default, and an appeal by the company, as provided for by law, was prosecuted, and was undetermined at the time of the commencement of this suit. On August 15, 1900, the substituted trustees also commenced an action against the company for the use and occupation of the premises from August 1, 1897, to April 16, 1900, claiming \$6,500, with interest from the last-named date. Soon thereafter the company commenced this suit asking for a judgment that the company was entitled to a lease from August 1, 1897, for five years, and also for a judgment for specific performance of the contract to sell, and obtained an injunction restraining the prosecution of both of the proceedings above mentioned.

The trial court held that there had been no valid contract for a sale, and that there was then no valid lease in existence such as was required to be proved before a court of equity would decree specific performance. The court expressed no opinion as to the effect of continued occupation after the expiration of any lease under the facts in the case with reference to the amount of the rental to be paid. That was a matter which it was held could be determined on the law side of the court. A decree was therefore entered dismissing the bill and dissolving the injunction which had been granted.

The court of appeals reversed the judgment of the trial court and remanded the case, and in its opinion it was stated as follows:

“In view of what has been said, we are of opinion that, under the provisions of the lease of 1892, executed by Francis Winslow, trustee, for and on behalf of the life tenant, Mrs. Eliza W. Patterson, the appellant was and is entitled to one renewal of such lease for the term of five years from and after the 1st day of August, 1897, upon the terms and conditions of said lease as to the rents to be paid therefor, and that during the continuance of such term no suit for the dispossession of the appellant can be maintained. We are also of opinion

Winslow v. Baltimore & Ohio R. Co

that, for the time subsequent to the determination of said renewal lease for which the appellant shall require the use and occupation of said land, the appellant is entitled, and it is its duty, to acquire the right to such use and occupation, under the exercise of the right of eminent domain conferred upon it by the act of Congress, by the ascertainment of the value of such use and occupation, and payment to the owners of the land of the just compensation so to be ascertained. And the bill of complaint in this cause may be retained for the purpose of such ascertainment of value and just compensation. It follows that the decree of the supreme court of the District of Columbia, dissolving the injunction granted in this cause and dismissing the bill of complaint, must be reversed, with costs, and that the cause will be remanded to that court, with directions to vacate said decree, to restore the injunction and make the same perpetual, and for such further and other proceedings as may be just and proper, according to law and in conformity with this opinion; and it is so ordered." [18 App. D. C. 438.]

Mr. William G. Johnson for appellants.

Messrs. George E. Hamilton and M. J. Colbert for appellee.

MR. JUSTICE PECKHAM, after making the foregoing statement of facts, delivered the opinion of the court:

It is quite plain that a lease containing a covenant to renew at its expiration with similar covenants, terms, and conditions contained in the original lease is fully carried out by one renewal without the insertion of another covenant to renew. Otherwise a perpetuity is provided for. *Piggot v. Mason* (1829) 1 Page, 412; *Carr v. Ellison* (1838) 20 Wend. 178; *Syms v. New York* (1887) 105 N. Y. 153, 11 N. E. 369; *Cunningham v. Pattee* (1868) 99 Mass. 248; *Taylor, Landl. & T.* 8th Ed. §§ 333, 334.

From the ordinary covenant to renew, a perpetuity will not be regarded as created. There must be some peculiar and plain language before it will be assumed that the parties intended to create it.

There is no question of the validity of the lease of 1888. It was for five years from the 1st of August of the year 1887, with a covenant of renewal, and that covenant would have been satisfied by giving a lease in 1892 for five years, up to August, 1897, without any covenant therein for a further renewal. In fact, however, the lease was not legally renewed in 1892, because the paper of that year was signed by one trustee only. In our opinion his signature did not make a valid lease. It required the signatures of all the trustees. A deed of land executed by one trustee does not convey his share as in the case of ordinary joint tenants. So, where a deed of land was executed by two out of three trustees, the burden is upon the purchaser to prove the third trustee was

Winslow v. Baltimore & Ohio R. Co

dead. 1 Perry, Tr. 2d Ed. § 411; 2 Perry, Tr. §§ 499, 502; 2 Story, Eq. Jur. 12th Ed. § 1280; *Brennan v. Willson*, 71 N. Y. 502-507.

The authorities cited by the counsel for the company, to the effect that one of several trustees may, when so authorized by his associates, act with regard to the execution of some portions of the trust, as their agent, and that when not previously so authorized a subsequent ratification of his act by his associates may bind them all, do not embrace the facts in this case. There is no evidence of any authority to one trustee to sign a lease. The granting of a lease was an important and material act in the way of carrying out the trust under the will, requiring an exercise of the judgment and discretion of all the trustees. It was therefore necessary for them all to act in order to make a valid instrument.

That one of several trustees can be intrusted by his associates with the transaction of the business of the trust may be, under certain circumstances, conceded, but those circumstances will not justify the doing of an act by one trustee on his own responsibility which is of a nature to require the deliberate discretion and judgment of all the trustees. In the case of a lease of property, such as is presented herein, the signatures of all are necessary to the validity of the paper.

The case cited of *Howard F. Ins. Co. v. Chase*, 5 Wall. 509, 18 L. Ed. 524, relates to an insurance effected by one of several trustees, and the question was whether the policy covered the individual interest of the person taking out the insurance or his interest as a trustee; if the former it was void because he had no interest as an individual, and the policy was therefore one in the nature of a wager. The court in the course of the opinion remarked:

"It is true that in the administration of the trust, where there is more than one trustee, all must concur, but the entire body can direct one of their number to transact business, which it may be inconvenient for the others to perform, and the acts of the one thus authorized are the acts of all, and binding on all. The trustee thus acting is to be considered the agent of all the trustees, and not as an individual trustee. If, within the scope of his agency, he procures an insurance, it is for the other trustees, as well as himself. If he does it without authority, still it is a valid contract, which the underwriter cannot dispute, if his co-trustees subsequently ratify it. In fact, so liberal is the rule on this subject, that where a part owner of property effects an insurance for himself and others, without previous authority, the act is sufficiently ratified, where suit is brought on the policy in their names."

The facts in this case do not bring it within the principle mentioned, and it is clear that to render the lease originally valid it must have been signed by all the trustees. Without it the instrument as a lease for five years was void under the statute of frauds. D. C. Comp. Stat. 231, § 4.

It is contended that the act of one of the trustees in sign-

Winslow v. Baltimore & Ohio R. Co

ing the lease was subsequently ratified by the other by a recognition of its existence by long continued silence, if not by an express ratification. But an express ratification would consist of the signature of the other trustee to the paper, and of that there is no pretense. A ratification of an invalid instrument of this nature by recognition, we do not understand. The instrument was void under the statute of frauds, because of the lack of those signatures which could alone render it valid as a lease for five years. Recognition could not take the place of the absent signature. Whether the conduct of the trustees, or of Mrs. Patterson, amounted to such a part performance of an invalid contract as would take the place of the otherwise necessary signatures is another question. It is difficult to see how there could be any technical ratification of this instrument without a signing thereof by the other trustee.

But, assuming that something in the nature of a ratification might be based upon subsequent recognition, yet such recognition or ratification must be shown to have been founded upon a full knowledge of all the facts. There is no evidence of that kind in the case; none that the other trustee even knew of the existence either of the written paper of 1892 or that it contained a covenant to renew at all for any time. The possession by the company and the payment of rent were provided for by the covenant to renew contained in the lease of 1888, and hence there was a justification for that possession and for the payment of the money, which was entirely compatible with the nonexistence of any written lease from 1892, or of any covenant to again renew for five years from August 1, 1897. This possession and payment cannot, therefore, be used as a basis for the presumption of knowledge on the part of the trustee of the existence of the so-called lease of 1892 or of the covenant contained therein.

Regarding the asserted part performance of the alleged contract of lease in 1892, or of the covenant contained in that lease, we think there was none such as to justify the contention that the covenant to renew in 1897 for five years was thereby so far rendered valid as to call for its recognition and enforcement. In this case there was reason, as we have said, without reference to any assumed part performance of, and aside from the alleged covenants in the paper of 1892, for the possession by the company and for the taking of the rent of the land by the trustees up to 1897. This reason was based upon the obligation which existed under the valid lease of 1888. The remaining in possession from 1892 to 1897 and the payment of the money need not, therefore, be referred to as a part performance of the invalid contract of lease and renewal contained in the paper of 1892. Without any reference to any paper of that character, possession and payment of rent were proper, and amounted to nothing more than an acknowledgment of the obligations provided for in the before-mentioned lease of 1888.

Winslow v. Baltimore & Ohio R. Co

Acts of part performance which will take a case out of the statute must be referable solely to the contract. *Williams v. Morris*, 95 U. S. 444, 457, 24 L. Ed. 360, 362; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Byrne v. Romaine*, 2 Edw. Ch. 445; *Jervis v. Smith*, Hoffm. Ch. 470; *Lord v. Underdunck*, 1 Sandf. Ch. 46; *Wolfe v. Frost*, 4 Sandf. Ch. 72.

And again, specific performance of a void contract will not be decreed because of part performance, unless fraud and injustice would be done if the contract were held inoperative. *Purcell v. Miner*, 4 Wall. 513, sub nom. *Purcell v. Coleman*, 18 L. Ed. 435; *Williams v. Morris*, 95 U. S. 444, 24 L. Ed. 360. Such would not be the result here.

Nor can the receipt of rent in February, 1898, by Mrs. Patterson, under the circumstances detailed in the foregoing statement of facts, amount to such part performance of the invalid covenant to renew as to authorize its enforcement. Neither trustee received the rent. The signing of the name of Mr. Winslow, one of the trustees, on the back of the draft from the company in February, 1898, was without the knowledge of or authority from such trustee, although the indorsement was made in perfect good faith by Fisher & Co., and the money was paid to and received by Mrs. Patterson. That signing was not a part performance of the contract of lease on the part of the trustees or either of them.

Mr. Winslow was at this time absent in Nicaragua. There is no proof in the case that Mrs. Patterson knew there was no valid covenant in existence for the granting of a further five-year lease from August 1, 1897. Her receipt of the money as beneficiary under the will of her mother would not bind the trustees to renew a lease under an invalid covenant to do so, or operate as a part performance of that invalid covenant. Especially would this be so where, as in this case, there had for months, or ever since August 1, 1897, been a substantial refusal by the trustees to renew on the old basis or to sell at the old price, and negotiations were still in progress between the trustees and the company relative to the terms of a continued occupation of the lands. The trustees and the company were alone the parties who could agree upon a lease, and while negotiations were pending on the subject, the receipt, unknown at the time to the trustees, of the money by Mrs. Patterson, as stated, could not be equivalent to a part performance by the trustees, or either of them, of an alleged covenant to renew contained in the paper of 1892, the validity of which was at the same time denied.

Subsequently when drafts were received by the trustees they were not cashed, and when they were finally paid it was under a specific agreement that the payment should not in any way affect the situation between the parties. Hence the receipt of these drafts constituted no part performance upon which to base the recognition of the covenant to renew from August 1,

Winslow v. Baltimore & Ohio R. Co

1897, which was repudiated as invalid by the trustees and which was in fact invalid.

Upon the question of the alleged contract to sell, after carefully examining all the facts, we agree with the court of appeals in holding that the company was not entitled to a decree for the specific performance of that alleged contract, and, therefore, specific relief of that nature should be denied. Under the terms of the will it is plain the trustees had no general and absolute power of sale, and the conditions upon which it could be exercised did not exist.

Regarding the other relief, we are of opinion that the portion of the injunction prohibiting the further prosecution of the trustees' action to recover the rental value of the land occupied by the company from August 1, 1897, up to the time mentioned in the complaint in that action, should be dissolved.

As to that part of the injunction which prohibits the further prosecution of the proceedings to recover the possession of the land there is more to be said. We agree with the court of appeals upon the subject of ousting the company from such possession. That court held that the evidence showed the company entered upon the use and occupation of the property in controversy with a view to its purchase when it could properly be effected. It was understood by all the parties what the character of the use and occupation of the land by the company was intended to be. Subsequently to its obtaining possession of the land in 1872 the railroad company constructed what is known as its Metropolitan branch, part of a highway between Washington city, the adjoining states and the west. This highway is not a merely private enterprise, nor a matter of purely private concern. It is a public road, constructed for public purposes, under the sanction of the public authority, and over which the public have rights which cannot be permitted to be obstructed, much less destroyed, either by the company itself, to which the franchise has been granted as a public trust to construct and operate this road, or by antagonistic parties claiming the ownership of the land upon which it has been permitted to enter without previous payment therefor, or as the result of any private controversy between the railroad company and such parties. The company having entered by the license of the lessors, an action at law for the dispossession of the railroad company cannot be maintained if the company is willing to make compensation for its use and occupation of the land.

These views of the court of appeals we concur in, but we do not say that the company can take proceedings in this suit to condemn the land. The proceeding to condemn is otherwise provided for by law, and, although the appellants contend that the company has no power under the law to do so, we are of opinion that by virtue of the various acts passed relative to the company, it has such power in this city with reference to this land. The court ought to keep in force for a

Gorman's Adm'r v. Louisville Ry. Co

reasonable time, say six months, that portion of the injunction prohibiting the trustees from continuing their proceeding to dispossess the company from the land, in order to enable it to condemn such land in proper proceedings for that purpose, which cannot be taken in the present suit. If more time is needed, the trial court may, upon application, after notice, extend the time as to it may seem reasonably necessary. If no proceedings to condemn are taken within six months from the issuing of the mandate from this court to the court below, then the injunction should be wholly dissolved.

Our judgment, therefore, will be to reverse the judgment of the court of appeals of the District of Columbia, with directions to remand the case to the supreme court of the District, with directions to that court to refuse specific performance of the alleged contract to sell the land, and to deny enforcement of any alleged covenant to lease the same from August 1, 1897, and also to dissolve that portion of the injunction enjoining the trustees from prosecuting their suit to recover the rental value of the land from August 1, 1897, and to retain that portion which enjoins further action on the part of the trustees to oust the company from the land, for six months from the date of the mandate of this court, and for further time, if the supreme court of the District shall be of opinion that it is proper. If no proceedings are taken to condemn the land within six months, then the injunction shall be dissolved. When the condemnation proceedings are concluded, or if not taken within the time stated, then, at the end of that time, application may be made to the trial court, and such judgment then entered as shall be consistent with this opinion, and with such provision in regard to costs incurred, subsequent to the mandate from this court, as shall to that court seem proper.

Reversed and remanded, with directions to reverse the decree below and remand the case for further proceedings in conformity to this opinion.

GORMAN'S ADM'R v. LOUISVILLE RY. CO.

(*Court of Appeals of Kentucky, March 11, 1903.*)

[72 S. W. Rep. 760.]

Street Railways—Care Due Persons Using Streets—Children*—Instructions.

An instruction that it is the duty of a motorman to use ordinary care to discover and prevent injury to persons using the street, and defining ordinary care as that degree of care usually exercised by ordinary careful persons "under the same or similar circumstances," sufficiently states the degree of care required towards a young child.

Same—Same.†

A street railway company, while required to use the highest degree of

*As to the care required of those in charge of street cars to prevent injuries to children, see note appended to *Sample v. Consolidated Light & Ry. Co. (W. Va.)*, 1 R. R. R. 380, 24 Am. & Eng. R. Cas., N. S., 380.

†See note appended to *Robinson v. Louisville Ry. Co. (C. C. A.)*, 1 R. R. R. 838, 24 Am. & Eng. R. Cas., N. S., 838.

Gorman's Adm'r v. Louisville Ry. Co

care towards passengers, need only use ordinary care towards persons using the streets.

Instructions.

Where the instruction given by the court holds defendant to the same degree of care required in an instruction requested by plaintiff, plaintiff cannot complain.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"Not to be officially reported."

Action by K. A. Gorman, as administrator of Catherine Gorman, deceased, against the Louisville Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. O. Harris, B. K. Marshall, and O'Neal & O'Neal, for appellant.

Fairleigh, Straus & Eagles and Kohn, Baird & Spindle, for appellee.

O'REAR, J. Appellant's intestate, a child about six years old, was killed by being run over by one of appellee's cars. The neighborhood where the accident occurred was sparsely settled. There was not a crossing at the point where the child attempted to cross appellee's tracks when it was injured. Appellee's motorman testified that he did not see the child till it darted in front of his car; that a large four-horse brick wagon was just ahead and to the side of the car track, and as it passed the child she attempted to cross the track. The evidence was conflicting touching the motorman's negligence, but the jury returned a verdict for appellee.

The only question presented is the correctness of the instructions. The court told the jury that it was the duty of the motorman in charge of the cars to watch the street in front of his car, so that he might avoid injury to persons upon the street, if he could do so by the exercise of ordinary care; and that if they believed from the evidence that the death of Catherine Gorman (appellant's intestate) was caused by the failure of the motorman to exercise ordinary care to discover her peril or danger from his car, and to prevent injuring her, the law was for the plaintiff. The gravamen of the negligence charged in the pleadings and pointed out in the proof was that the motorman had negligently failed to keep a lookout, and because of that fact the injury occurred. The duty of the motorman is stated in the instruction to be (1) to keep such a lookout on the street in front of his car, so that by the exercise of ordinary care in operating his car he might avoid injury to others using the street at the same time; (2) to use ordinary care to discover the peril or danger of such others as might be attempting to use the street at that point when the car was passing; and (3) to use ordinary care to prevent injuring such one. Appellant complains because a higher degree of care was not required of the motorman. He argues that, as to young children, a different and higher degree of

Gorman's Adm'r v. Louisville Ry. Co

care is owing than is to adults under similar circumstances. We believe that is true. We are also of opinion that the instruction given by the court defining "ordinary care" fairly submitted that idea to the jury, viz.: "Ordinary care means the degree of care usually exercised by ordinarily careful and prudent persons under the same or similar circumstances. Negligence is the failure to exercise ordinary care." It might be impossible to lay down a general rule that would aptly and minutely define the care to be exercised under every conceivable state of case. Nor would it be wise to attempt it. What would amount to ordinary care in operating an electric car in a sparsely settled, unfrequented part of a city might be gross negligence in a much used downtown thoroughfare. And what would be ordinary care toward an adult, under similar circumstances, might be criminal negligence toward an infant of very tender years. Ordinarily careful and prudent persons regulate their conduct by the difference in circumstances surrounding the act. This is generally known and recognized of all people. That is what makes it ordinary care. So, when the jury were instructed that the motorman must regulate his conduct in operating the car by the standard of conduct and caution usually exercised by ordinarily careful and prudent persons in operating electric cars in such neighborhoods where small children were likely to be upon the streets, his full legal duty was stated.

It has been held in this state, and we believe is generally held, that operators of street cars, while held to the highest degree of care toward their passengers, are required to use but ordinary care towards others using the streets. *Passamanek's Adm'r v. Louisville Ry. Co.*, 98 Ky. 195, 32 S. W. 620; *L. & N. R. R. Co. v. Cummins' Adm'r* (Ky.) 63 S. W. 594; *Louisville, C. & L. R. R. Co. v. Goetz's Adm'r*, 79 Ky. 449, 42 Am. Rep. 227; *Shearman & Redfield on Negligence*, sec. 485a; *Wood on Railroads*, sec. 323. If they discover the peril of the pedestrian, it is then their duty to exercise the highest degree of care to prevent his injury. *Passamanek's Adm'r v. Louisville Ry. Co.*, 98 Ky. 195, 32 S. W. 620; *Ry. Co. v. Blaydes* (Ky.) 51 S. W. 820. But whether the law defining the degree of care in this case was fully and accurately given or not, we are of the opinion that the error, if any, would not be available to appellant, because the only instruction he asked for (and which was embraced, substantially, by those given by the court of its own motion) embodied this same standard. That instruction was: "Although the jury may believe from the evidence that plaintiff's intestate, Catherine A. Gorman, was guilty of negligence which contributed to cause the injury complained of in this suit, yet if they further believe that the motorman in charge of the car did see her in time to have prevented the accident by ordinary care on his part, or if they believe from the evidence that he could, by the exercise of ordinary care, have seen her

Missouri, etc., Ry. Co. v. Cambern

in time to so prevent said accident, then in either such a case the law is for the plaintiff, and the jury should so find." This court has frequently held that when the trial court is induced to give an erroneous instruction, the error cannot avail the party in fault on appeal. *Union, etc., Co. v. Hughes' Adm'r* (Ky.) 60 S. W. 850; *First National Bank v. Germania Safety Vault & Trust Co.* (Ky.) 66 S. W. 716; *L. & N. R. R. Co. v. Penrod's Adm'r* (Ky.) 66 S. W. 1013, 1042.

The judgment is affirmed.

MISSOURI, K. & T. RY. CO. v. CAMBERN, County Treasurer, et al.

(*Supreme Court of Kansas, March 7, 1903.*)

[71 Pac. Rep. 809.]

Eminent Domain—Construction of Levee.

The construction of a levee along the bank of a river is a public use in aid of which the power of eminent domain may be invoked and local assessments may be levied.

Constitutional Law.

Chapter 104, p. 180, of the Laws of 1893, relating to the construction of levees, is not unconstitutional, either upon the ground that it delegates legislative power to the petitioners, or upon the ground that there is a discrimination against railroad companies in its method of providing for the cost of the improvements.

(Syllabus by the Court.)

In Banc. Error from District Court, Neosho County; L. Stillwell, Judge.

Action by the Missouri, Kansas & Texas Railway Company against L. S. Cambern, as county treasurer of Neosho county, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

For opinion below, see 63 Pac. 605.

T. N. Sedgwick, for plaintiff in error.

Jno. J. Jones and W. R. Cline, for defendants in error.

MASON, J. The Missouri, Kansas & Texas Railway Company began an action in the district court to enjoin the collection of a special assessment against it, imposed under the provisions of chapter 104, p. 180, Laws 1893 (chapter 57, Gen. St. 1901), as a part of the cost of building a levee along the Neosho river. The district court refused the injunction. Plaintiff prosecuted proceedings in error to the Court of Appeals, where the decision of the trial court was affirmed. 63 Pac. 605. The case is now brought here for review.

The validity of the assessment is attacked upon various grounds, some of them relating to the proceedings taken under the statute, and others based upon the contention that the statute itself is void. So far as concerns objections other than those made to the constitutionality of the statute, we

approve the decision of the Court of Appeals and the reasoning adopted in its opinion, upon the authority of the cases there cited.

It is claimed that the act in question is void because the construction of a levee is not a public use. We think the analogy between the building of a levee to prevent the overflow of water and the construction of irrigating canals to distribute water for agricultural purposes is sufficiently close so that any argument that one is not a public use could be urged with equal force as to the other. It is held that irrigation is a public use. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; *Irrigation Co. v. Klein*, 63 Kan. 484, 65 Pac. 684. By parity of reasoning, we hold that the construction of a levee is a public use. In *Cooley on Torts* (page 620, 2d Ed.) a number of cases are cited in support of the following statement by the author: "The construction of embankments to protect low lands bordering upon rivers from overflow is a public object of the highest importance to the communities immediately concerned. No doubt, general taxation is admissible for this purpose, but the legislation which authorizes special assessments for the construction of embankments, and imposes the cost upon those who, without them, would be the principal sufferers, is probably in most cases wiser and better than would be any provision for general levies. The practice of making local assessments for this purpose has prevailed for many years in the states bordering on the Lower Mississippi, and has been sustained against all the objections which have been made to such assessments for other purposes."

It is further urged that this statute is unconstitutional within the rule announced in *Commissioners of Wyandotte Co. v. Abbott*, 52 Kan. 148, 34 Pac. 416, because, under its provisions, if a petition for a levee signed by one or more owners of any land affected is presented to the county commissioners, they must act as viewers themselves, or appoint three viewers; and, if the viewers report in favor of construction the levee, the commissioners have no discretion, but must establish it and cause its construction. We do not think the statute fairly open to this objection. Its exact language in this regard (section 6) is that the board of county commissioners shall cause the construction of the levee "if it finds that the cost thereof will not be too burdensome upon the persons to be directly benefited." This we think sufficiently implies that the commissioners are to weigh the public benefits of the improvement in comparison with its cost, and that the final determination as to the necessity of the work is made by the commissioners.

The plaintiff in error also complains of a discrimination against it in the manner of providing for the cost of the improvement, in that, as to lands in general, the proportion of cost is charged against the real estate only, while in the case

Southern Ry. Co. v. Gregg

of railroads the charge runs against the owner. This difference results from the necessities of the case, as, of course, land used by a railroad company for the operation of its road could not be sold to pay the assessment made against it. See, in this connection, *Lake Erie & W. Ry. Co. v. Bowker* (Ind. App.) 36 N. E. 864, and *Pittsburg, Co., C. & St. L. Ry. Co. v. Hays* (Ind. App.) 44 N. E. 375. The special method of enforcing the payment of the assessment of railroad land is the same as that employed in collecting the ordinary taxes on real estate used in the operation of a railroad.

The judgment of the Court of Appeals, with that of the district court, is affirmed. All the Justices concurring.

SOUTHERN RY. CO. v. GREGG.

(Supreme Court of Appeals of Virginia, March 12, 1903.)

[43 S. E. Rep. 570.]

Eminent Domain—Right of Way—Payment of Award.

Under Code, § 1079, providing that in condemnation proceedings the sum due for land taken may be paid to the person entitled thereto or into court, and that on such payment the title to the land taken shall be absolutely vested in the petitioner in fee, the payment of the award is a condition precedent to the divesting of the owner's title.

Same—Same—Owner's Lien.

Where the award for land taken in condemnation proceedings was not paid by the petitioner, who entered and subjected the land to the use intended, the owner had a lien on the property condemned for the amount of the award, enforceable in equity.

Same—Same—Same—Presumption.

In a suit to enforce a landowner's equitable lien for the award for land taken for a railroad right of way, evidence *held* to repel a presumption of payment from lapse of time.

Same—Same—Same—Waiver.

Where it was alleged that a landowner had waived his equitable lien on land taken for a railroad right of way by permitting the company to construct its line on the land before payment of the award, such waiver was complete when the line was constructed, and was not affected by mere lapse of time.

Same—Same—Same—Same.

Where an owner of land was awarded judgment in condemnation proceedings for a railroad right of way, at a time when he was in the employ of the railroad and in easy circumstances, but when the railroad company was under financial embarrassment, and several times thereafter the owner requested payment of the award from the railroad company and its successor, the fact that he permitted the initial company to construct its line on the land without payment of the award did not constitute a waiver of his equitable lien on the land for the payment of the award.

Laches.

Where, in a suit to enforce an award for land taken for a railroad right of way, the question of payment was not put in issue, and plaintiff's evidence that the claim had never been paid was not denied, and plaintiff's demand had been continuously asserted and acknowledged both by defendant and its predecessor, the defense of laches was not applicable thereto.

Southern Ry. Co. *v.* Gregg**Sale of Railroad Property—Owner's Lien upon Right of Way—Liability of Purchaser.**

Where a landowner whose land had been taken for a railroad right of way in condemnation proceedings was not a party to a lien creditors' suit against a railroad company in which the company's assets were sold, and such owner had no notice as to where the suit was pending or of the taking of the account, and only casually heard or read that the company's property was to be sold, he was not bound thereby, and evidence of the record in such suit was inadmissible in an action against the purchaser to enforce the award for the land taken.

Appeal from circuit court, Loudoun county.

Suit by one Gregg against the Southern Railway Company to declare and enforce a lien for the value of land condemned for a railroad right of way. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Wm. H. Payne, C. F. Janney, and John Janney, for appellant.

Edward Nicols and E. E. Garrett, for appellee.

WHITTLE, J. There is practically no controversy in respect to the facts involved in this appeal. It appears that in the year 1869 the Alexandria, Loudoun & Hampshire Railroad Company instituted proceedings in the county court of Loudoun county to condemn certain lands situated therein upon which its proposed road was to be located. In September, 1870, the commissioners appointed for that purpose reported that the lands of appellee, Gregg, proposed to be taken by the company for its purposes contained 3 acres, 3 roods, and 7 poles, and ascertained that \$296.09 would be a just compensation therefor. The report was confirmed February 14, 1871, on motion of the Washington & Ohio Railroad Company, the successor of the Alexandria, Loudoun & Hampshire Railroad Company, but was not recorded in the clerk's office until February 11, 1895. The new company succeeded to all the rights of the original company, and in the year 1874, without having paid the compensation allowed by the commissioners either to appellee or into courts, entered upon the land in controversy and proceeded to construct its road thereon. The company took possession of the land without asking or obtaining the permission of appellee, but he interposed no objection to the entry.

It further appears that appellee has never received any compensation for the property taken by the company, and did not intend to waive his rights by tacitly permitting it to take possession of his land. On the contrary, he from time to time made demand upon the superintendents of the various companies for payment of the amount which had been allowed him. These officials admitted that the claim was justly due, and promised to settle it, but never did so. The last demand was made on the superintendent of the Southern Railway Company only a year or two before the commencement of this suit, but it does not appear that he acknowledged liability on the part of that company.

Southern Ry. Co. v. Gregg

While the authority of these officers to bind their respective companies was not proved, they nevertheless promised to pay the damages, and that circumstance at least shows that appellee did not intend to waive his rights.

Appellee was in the employment of the Washington & Ohio Railroad Company and its successors, as depot agent, from the time the company first commenced to do business until November, 1899. He had a small family dependent on him for support, and was in easy circumstances, while the company, on the contrary, was in great financial stress. About the year 1877 a lien creditors' suit was instituted against it, and the road was subsequently sold, and reorganized under the name of the "Washington & Western Railroad." The last-named company having made default in the payment of the purchase money, the property was again sold, and the company reorganized as the "Washington, Ohio & Western Railroad." That company mortgaged the road, and operated it until the year 1894, when the property was conveyed to appellant, the Southern Railway Company.

Appellee was not made a party to the lien creditors' suit, and was not called on to report his claim therein. He did not even know in what court the suit was pending, but heard or read in a newspaper that the road had been decreed to be sold.

In the year 1900 appellee filed a bill in equity in the circuit court of Loudoun county against appellant and others, to subject the land in controversy to sale for the satisfaction of the compensation allowed him by the commissioners in the condemnation proceedings, to wit, the sum of \$296.09, with interest thereon from July 1, 1874.

There was a demurrer to the bill, and also two pleas of the statute of limitations, the one setting up a limitation of three years, and the other a limitation of five years, in bar of a recovery.

In its answer the Southern Railway Company avers that it is not advised whether the amount claimed by appellee was ever paid; but insists that at the date of its purchase it found those under whom it claims in possession of the land, and presumed, and had a right to presume, that the law had been complied with, and that possession had been transferred from appellee to them by virtue of payment of the compensation allowed; but that, if said damages have not been paid, appellee has waived his right to the same against appellant, a purchaser for value and without notice.

It further denies that appellee has a vendor's lien, or a lien in the nature of a vendor's lien, on the land for the amount of his demand. And it insists that, if all the allegations of the bill are true, appellee's claim amounts to a mere personal right of action against the Washington & Ohio Railroad Company.

The answer also relies on the presumption of payment from

Southern Ry. Co. v. Gregg

lapse of time, and laches. The deposition of appellee was taken, and at the hearing the circuit court overruled the demurrer and the two pleas of the statute of limitations, and established the demand of appellee as a lien on the land in controversy. The last decree in the case provides for a sale of the land, unless the lien, with interest and costs, is paid within 60 days. To these decrees an appeal was allowed by one of the judges of this court.

It is conceded that the statute of limitations has no application to appellee's demand, and that there was no error in the action of the court in overruling the pleas which interposed that defense.

On the demurrer the contention is that appellee has no lien on the land in controversy, and for that reason a court of equity is without jurisdiction in the premises, and the demurrer ought to have been sustained. The soundness of that contention will be considered in connection with the merits of the case.

In the condemnation proceedings the appellee bore the relation of an enforced vendor to appellant's predecessor in title, the Washington & Ohio Railroad Company, and their respective rights in regard to the property must be determined in the light of the acknowledged principle of universal law that private property cannot be taken for public use without just compensation (2 Kent's Com. 339), and of the statutory enactment regulating such proceedings, found in section 1079 of the present Code, that "the sum so ascertained to be a just compensation may be paid to the person entitled thereto or in court.

"Upon such payment the title to the part of the land for which such compensation is allowed shall be absolutely vested in the company * * * in fee simple."

The essential element of this extraordinary mode of acquiring title to real estate is the payment of the sum ascertained to be a just compensation. That requirement is a condition precedent, and as indispensable to divest the title of the owner as is a conveyance between an ordinary vendor and vendee.

Until that condition is complied with he remains as completely invested with title, and occupies as high a plane in respect to the property, as does an ordinary vendor who has retained title as security for the purchase money. That being the inevitable result of the principle adverted to and the statutory provision, the rules applicable to this case and to the case of an ordinary vendor and vendee are analogous, if not identical.

These principles are well settled and familiar to the profession.

Mr. Barton, in discussing the subject, says: "But neither before or under the statute (meaning the statute abolishing the vendor's equitable lien) must the care of a vendor's lien

Southern Ry. Co. v. Gregg

be confounded with the right of a vendor who has retained title to enforce specific execution by compelling the payment of the purchase money, and to subject the land sold therefor, for the vendee and persons claiming under him can never compel a relinquishment of the legal title except upon the terms of a full payment of the purchase money." 2 Bar. Chy. Pr. (2d Ed.) p. 985. This statement of the law is sustained by numerous decisions of this court to which he refers.

"That a vendor retaining the legal title occupies a position different from and higher than one who has parted with the legal title, and relies on the mere implied equitable lien, is not only clear from the considerations aforesaid, but is shown by the authorities. Notwithstanding the doubts of Lord Eldon, it may now be considered as well established that, where the vendor who has conveyed takes a personal collateral security, binding others as well as the vendee, as a bond or note with security, the lien on the land does not exist. But in the case of *Hatcher's Adm'x v. Hatcher' Ex'ors*, 1 Rand. 53, the purchaser gave bond with security for the purchase money, but received no conveyance; and it was decided that the right of the vendor to resort to the land was not lost by taking personal security. In that case, a suit at the instance of the security to subject the land for his indemnity was sustained, before he had been compelled to pay himself. And upon the same principle it was held, in *Lewis v. Caperton's Ex'or*, 8 Grat. 148, that the vendor retaining the legal title may resort to the land as against creditors and incumbrances of the vendee, although the vendee had subsequently executed a deed by which he conveyed other property to secure the purchase money." Opinion of Allen, Judge, in *Yancey v. Mauck*, 15 Grat. 307.

At page 306, Judge Allen observes: "Among the circumstances to repel the presumption of an intention to resort to the estate is the making of a conveyance of the legal title—a circumstance always sufficient to repel the presumption as against a bona fide purchaser from the vendee having the legal title. But a purchaser or an incumbrancer of a mere equitable title must take the place of the person from whom he purchases."

And, again, at page 308: "The vendee cannot compel a relinquishment of the legal title until he clothes himself with equity by the payment of the purchase money." See, also, *Coles v. Withers*, 33 Grat. 193, where Judge Staples remarks: "Upon this subject I refer to the able and exhaustive opinion of Judge Allen in *Yancey v. Mauck*."

Mr. Barton comments on that case as follows: "The learned judge there calls attention to the fact that, where no deed has been executed by the vendor, very different considerations govern; that, in such cases, the question of implied waiver does not arise, and that no distinct personal or collateral security will operate as a waiver; for, by retaining

Southern Ry. Co. v. Gregg

the title, the vendor has manifested, in the most unmistakable manner, his purpose of looking to the land as security for his debt, and no court of equity will compel him to part with the title until he has actually received the consideration." 2 Bar, Chy. Pr. (2d Ed.) p. 987.

Thus it appears that the contention of appellee, that his demand in this case constitutes an equitable lien on the property condemned which a court of equity will enforce, is fully sustained by the principles applicable to the analogous case of an ordinary vendor and vendee.

But the contention is also directly sustained by the decisions of other states in condemnation proceedings. See *Fries v. Railroad Co.* (Ohio) 46 N. E. 516; *Kendall v. Railroad Co.*, 55 Vt. 438; *Kittell v. Railroad Co.*, 56 Vt. 96; *Adams v. Railroad Co.*, 57 Vt. 240; *Bridgman v. Railroad Co.*, 58 Vt. 198, 2 Atl. 467; *Railroad Co. v. Harvey*, 107 Pa. 319; *Epling v. Dickson, Recv'r*, 170 Ill. 329, 48 N. E. 1001.

In *Railroad Company v. Hall*, 135 Ind. 91, 34 N. E. 704, 23 L. R. A. 231, it was said: "The new company is enjoying the easement under the conditions of the old company, and the benefits and burdens incident to its use are inseparable."

And in *Railroad Company v. Galey*, 141 Ind. 483, 39 N. E. 940, 40 N. E. 801, "A new railroad company which succeeds to the rights of the old company cannot divest itself of the burdens of the old company, among which are damages for the appropriation of land for right of way. The contrary to this has been expressly decided. A man's land cannot be taken from him without compensation. The new railroad company which succeeds to the rights and privileges of the old company cannot divest itself of the burdens."

It follows, therefore, from these authorities that the demurrer to the bill was properly overruled.

The sole ground relied on by appellant to establish a waiver on the part of appellee of his equitable lien in this case is the circumstance that its predecessor in title, the Washington & Ohio Railroad Company, was allowed to enter upon the possession of the land and construct its road thereon without having first paid the damages assessed against it as required by law.

It will be recalled that this action of the company was taken without either asking or obtaining the permission of appellee, but that he interposed no objection.

It must be observed also that the alleged ground of waiver is unaffected by lapse of time. The waiver, if there was a waiver, was as complete the day after the company took possession of the property as it was at the time of the institution of this suit, and, if the contention of appellant is sound, would have as effectually defeated an assertion of the lien at the former as at the latter date.

"A complete title to lands embraces three several stages or

Southern Ry. Co. v. Gregg

degrees, namely, (1) the mere possession, (2) the right of possession (which may be either apparent or real), and (3) the mere right of property." 2 Min. Inst. 447.

Now, the contention of appellant leads to the conclusion that a surrender of one of these subordinate elements of a complete title constitutes an abandonment of them all. If that view prevails, it would carry the doctrine of waiver far beyond its reasonable and legitimate scope, and, if applied to transactions between ordinary vendor and vendee, would ingraft a dangerous innovation on the well-established principles regulating the devolution of title to real estate in this commonwealth.

As title to private property by mere operation of law can be only acquired by payment of the ascertained value, it is essential for appellant, in order to rely on the extraordinary method of acquisition, to prove performance of the condition by which alone the owner can be divested of his title.

Where, however, it relies on the acquisition of title in the ordinary way, by act of the parties, such act must conform to the requirements of law applicable to that mode of divestiture of freehold title to land.

The subject of parol disclaimer of title has quite recently received the consideration of this court. The rule is stated thus: "Where legal title is vested in one, no mere parol disclaimer can divest title. It has been long settled here that disclaimer of a freehold can only be by deed, or in a court of record." *Suttle v. R. F. & P. R. Co.*, 76 Va. 284; *Jennings v. Gravely*, 92 Va. 377, 23 S. E. 763; *Haney v. Breeden*, 100 Va. —, 42 S. E. 916.

Waiver is the intentional relinquishment of a known right, with both knowledge of its existence and an intention to relinquish it.

"Waiver of Lien. Such consent to enter upon the land, to construct the road, the arrangement as to damages, their appraisal by commissioners, do not constitute a waiver—a clear and express contract is necessary." *Kittell v. Railroad Co.*, *supra*.

It affirmatively appears from this record that appellee did not intend to relinquish any of his rights by tacitly permitting the company to take possession of his land. On the contrary, he was insistent in demanding payment of the superintendents of the various companies, and their repeated promises to settle makes it manifest that neither party understood that there had been an abandonment or waiver of any right. This positive evidence of a continual claim by appellee and promise to settle by the superintendents, strengthened by the circumstances that appellee was in the employment of the company and was in easy circumstances, while the company was laboring under financial embarrassment, repels any presumption of payment from lapse of time.

And the same evidence and circumstances fully answer the

Louisville & N. R. Co. v. Lee

suggestion that the claim is barred by laches. There is no pretense that the justness of the demand is obscured by lapse of time, death of parties, or loss of evidence. Indeed, the pleadings do not even put in issue the question of payment, and appellee's testimony that the claim has never been paid is not denied. Laches is only permitted to defeat an acknowledged right on the ground of its affording evidence that the right has been abandoned. The doctrine can have no application, therefore, to a case where the demand is continuously asserted and as continuously acknowledged.

The last assignment of error is to the ruling of the court in suppressing and refusing to admit as evidence excerpts from the record in the lien creditors' suit against the Washington & Ohio Railroad Company, heretofore referred to. The facts in relation to that suit have been stated. Appellee was not a party, he did not know in what court the suit was pending, he had no notice of the taking of the account, and casually heard or read in a newspaper that the property of the company had been decreed to be sold. He was not bound or affected by any of the proceedings in that cause, and the court properly excluded the parts of the record offered in evidence.

Mr. Barton, in discussing the effect of decrees in creditors' suits, says: "The rule has not been carried to the extent of holding that the lien creditors of a living man who has not been made a party, or proved his claim before the commissioner, will be bound by the proceedings in the suit." 1 Bar. Chy. Pr. (1st Ed.) p. 177, note. See also, 1 Bar. Chy. Pr. (2d Ed.) p. 364.

There is no error in the decrees complained of, and they are affirmed.

LOUISVILLE & N. R. CO. v. LEE.

(*Supreme Court of Alabama, Feb. 28, 1903.*)

[33 So. Rep. 897.]

Railroads—Accident at Crossing—Negligence—Burden of Proof.*

In an action for the negligent killing of a horse, due to fright caused by the blowing off of steam by defendant's engine as it started to back up while plaintiff was waiting for a train to pass, the burden was on plaintiff to show that the emission of such steam was unnecessary, and, failing to do so, he could not recover.

Appeal from City Court of Birmingham; W. W. Wilkerson, Judge.

Action by Claiberne Lee against the Louisville & Nashville Railroad Company for the negligent killing of a horse. From a judgment for plaintiff, defendant appeals. Reversed.

The plaintiff introduced evidence tending to show that the

*As to whether railroad companies can be held responsible where teams are frightened by noises usual and necessary in the operation of trains, see foot-note appended to *Lake Shore & M. S. Ry. Co. v. Butts* (Ind. App.), 1 R. R. R. 898, 24 Am. & Eng. R. Cas., N. S., 898.

Louisville & N. R. Co. v. Lee

defendant's railroad tracks crossed Eighteenth street, and that this crossing was a public crossing within the corporate limits of the city of Birmingham; that he was driving his horse in a carriage going from north to south, and as he approached Eighteenth street crossing a flagman in the employ of the defendant, who was on the south side of the crossing, stopped him on the north side, in order to let a freight train pass; that as he waited for the freight train another train came down on one of the side tracks; that this last train was within 7 or 10 feet of where his horse had stopped, and was being pushed down the track by the engine; that, after the coaches were cut loose, and the engine started in the opposite direction from which it was bringing the coaches, a volume of hot steam escaped from it, which entirely enveloped the plaintiff's horse, that was standing within a few feet of the engine, and the plaintiff's horse then became very much frightened, reared back, and fell, and sustained injuries from which it died; that the steam escaped from the engine just as it was in the act of changing its direction. The defendant introduced no evidence.

J. M. Falkner and W. I. Grubb, for appellant.

J. W. Bush, for appellee.

TYSON, J. Unless we indulge in this case the presumption of wrongdoing on the part of those in charge of the locomotive, and imposed the burden upon the defendant of acquitting itself of the act complained of, the plaintiff should not have been allowed to recover. That no such presumption can be indulged, and that the burden of proof was upon the plaintiff to show that the emission of the steam was unnecessary to a skillful operation of the engine, is distinctly held in *Stanton v. L. & N. R. R. Co.*, 91 Ala. 382, 8 South. 798. It is there said: "As the railroad corporation has the right to use its track, and make the required signals at a public crossing, and all the usual noises incident to the running and moving of its trains, it was incumbent on the plaintiff to show the 'blowing off steam' and the making of the noise complained of was unnecessary." Applying this principle to the facts of this case, there being no evidence tending in the remotest degree to show that the letting off the steam that frightened plaintiff's horse was unnecessary, the plaintiff has not discharged the burden of proof that was upon him. We cannot judicially know that the volume of steam emitted was unnecessary, or that it was unnecessary to emit steam at all. For aught we may know, its emission was entirely and absolutely necessary to successfully give to the wheels of the engine a rotary motion backwards, such being the operation of the engine at the moment the steam complained of was emitted.

The judgment must be reversed and one will be here rendered for the defendant. Reversed and rendered.

GILA VALLEY, G. & N. R. CO. *v.* LYON.
(*Supreme Court of Arizona, March 20, 1903.*)

[71 Pac. Rep. 957.]

Killing of Brakeman—Setting Out Detached Cars on Dangerous Siding—Negligence—Question for Jury.

A freight conductor, in setting out cars on a siding on a trestle, instead of employing the proper method, which consisted in keeping the locomotive attached until they were stopped, allowed them to run on the trestle by their momentum, and, it being impossible to stop them by the handbrakes, one of the cars went over the end of the trestle, killing a brakeman who was riding thereon: *held*, that the question whether the premises were reasonably safe, and, if not, whether the negligence of the railroad contributed to the injury, was one for the jury.

Same—Same—Knowledge of Custom—Instruction.

It appearing that the uniform custom of setting out the cars was to do so with the engine attached, and that the conductor had knowledge thereof, it was error to instruct that it was for the jury to decide whether the railroad was negligent in failing to notify its employees to set out the cars with the engine attached, and whether it was negligence not to have warned them not to set them out in the manner employed.

Same—Negligence—Instructions.

In an action against a railroad company for wrongful death of a brakeman, the court charged that, if the death was caused by the negligence of the conductor, and the negligence of the defendant did not contribute to it, the jury should find for defendant, but that if the conductor was negligent, and defendant also, and defendant's negligence contributed to the injuries, plaintiff could recover. In the main charge the court did not discuss the question of proximate cause, nor present the question whether, if the negligence of the conductor was the proximate cause, defendant could be held liable. A subsequent instruction stated that, if the negligence of the conductor was the proximate cause of the accident, and was not coupled with any negligence on defendant's part, plaintiff could not recover: *held*, that there was error, since the jury were justified in believing that, though the negligence of the fellow servant was the proximate cause, they might find for plaintiff if defendant was negligent in some respect, whether the negligence contributed to the injury or not.

Same—Same—Fellow Servant—Proximate Cause.

The question whether the negligence of a fellow servant is the proximate cause or whether defendant's negligence was a contributing cause is ordinarily for the jury.

Pleading and Proof.

In an action for wrongful death of a railroad brakeman the court instructed that, if the injury was proximately caused by the conductor of the train without previous notice to the defendant of his incompetency for carelessness, plaintiff could not recover: *held* that, in the absence of any allegation of incompetency, or evidence thereof, or that the company had notice of any incompetency, or could have had by reasonable diligence, the instruction was erroneous.

Appeal from District Court, Gila County; before Justice Davis.

Action by A. J. Lyon against the Gila Valley, Globe & Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Frank W. Burnett, for appellant.
Falvey & Davis, for appellee.

Gila Valley, etc., R. Co. v. Lyon

KENT, C. J. This was an action brought by the appellee for damages for injuries resulting in the death of her son, alleged to have been brought about by the negligence of the defendant railroad company, the appellant in this court. The case was tried before the court and a jury.

The facts adduced upon the trial showed that the defendant, a railroad company, to accommodate the business of a certain mine near Globe, in this territory, built a side-track several hundred yards long, running from the main track for some distance up a steep grade, and near the top of the grade branching into two spurs. At the top of the grade, and where the ground began to be level, these tracks passed under a shed, a structural part of the mine company's plant, for about 30 feet. On ordinary freight box cars passing under the shed brakemen were compelled to stoop or sit down because of the nearness of the top of the car to the roof of the shed. Beyond the shed the tracks were extended upon a trestle about 110 feet long, and designed for the placing of cars for convenience of loading and unloading at the mine. At the end of this trestle the tracks stopped on the edge of a steep ravine or canyon. In order to place and leave cars on this spur or side track, there being but one connection with the main track, the engine could not go in in advance, but the cars had to be pushed up this spur, and, as the incline was steep leading from the main track, with a small engine some speed was at first required in order to reach the top of the incline. At the place where the steep grade ceased, the shed referred to spanned the track in such a way as to cut off the view between those on the engine and the far end of a train pushed up the incline on the side track. The roof of the shed was so low as to make it difficult to use hand brakes on the cars while passing through the shed. There was no obstruction placed at the end of the track and trestle which would prevent the cars from going beyond the track and falling into the ravine, except a piece of pine timber of a size 12x12 inches, bolted at each end, and screwed to the ties, rising to a height above the rails of 10 or 12 inches. The object of this timber was, not to serve the purpose of what is known as a "bumping post," and the timber was not sufficient to arrest the motion of cars propelled at even a comparatively low rate of speed, but was placed there primarily to prevent cars that were stationary on the track, and that might become loosened by accident or otherwise, from running off the track at the end, and was sufficient for that purpose.

The decedent was employed by the defendant company as a brakeman, and had been in its service for about 12 days when he met his death, and during that time he had been frequently on the premises in question, engaged in his duties as a brakeman, but it was not shown that prior thereto he had had experience in the duties required of him. Under ordinary circumstances, in switching cars onto this side track, it

was proper and usual to keep the engine attached to the cars until they were stopped at the desired position. At the time of the accident in question, instead of adopting the usual method, the conductor of the freight train upon which the decedent was employed adopted the unusual method, while the train was in full motion, of cutting off two cars from the rest of the train which was being pushed by the locomotive intending to let them go in on the side track by their own momentum, and, with the aid of the deceased, who was on the front car, stop them by means of the hand brakes when they had attained the desired position. When the cars were cut off the train, they were going at a rate of speed estimated by some witnesses as great as six miles an hour. After they had passed through the shed they were still going at such a rate of speed that the deceased and the conductor, who was on the last car, were unable to control them, and the forward car, upon which the deceased was riding, knocked the pine-barrier from its position, and was precipitated with the deceased into the ravine, and the deceased was immediately killed.

There was nothing to show that the deceased was aware of the purpose of the conductor to cut the cars loose from the train, or that, although the deceased knew the premises, he had had sufficient experience either to be aware of the danger of the premises, or to be chargeable with the knowledge of the dangers as a matter of law. Testimony was offered by the defendant to show that the premises were reasonably safe when used in a proper manner, and by the plaintiff to show that they were dangerous, not only when used in a reckless manner, but dangerous even when the work was performed with due care. The evidence, however, tended to show that, if the cars had been put in on the side track in the usual manner—that is, by being attached to the engine with the use of air brakes until the cars had attained the position desired—the accident and injury would not have occurred; and that the accident was brought about by the method adopted by the conductor of the train in cutting off the end cars and sending them upon the side track without the control of the engine. It appeared, also, that this unusual method had been resorted to once or twice before by the conductor, but that the ordinary custom, known to the conductor, who was an experienced man, was to “spot” the cars by means of the engine.

The court denied the motion of the defendant to instruct the jury to return a verdict for the defendant, and the jury returned a verdict for the plaintiff in the sum of \$5,000.

The first error assigned is that the court, at the close of the evidence, should have directed a verdict for the defendant; and it is urged that the case comes within the rule that if the evidence, with all the inferences that the jury can justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict if returned must be set aside, then it

Gila Valley, etc., R. Co. v. Lyon

is the duty of the court to direct a verdict for the defendant. *Randall v. Balt. & Ohio R. R.*, 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003. Upon the evidence in this case, however, we cannot say that the jury would not have been justified in returning a verdict for the plaintiff on the ground that the premises provided by the master for the work to be done were not reasonably safe, if the master's negligence in this respect contributed to the accident. The testimony as to the character of the premises is not so conclusive or undisputed as to make it a question of law for the court, rather than a question of fact for the jury, to decide whether the premises were reasonably safe, and, if unsafe, whether the negligence of the master in that respect contributed to the injury. We think it was not error, therefore, for the court to refuse the direction requested.

We have next to consider the errors assigned in the instructions to the jury given by the court, and in the modification by the court of the instructions requested by the defendant and as so modified given to the jury. At the request of the plaintiff, the court instructed the jury, in effect, that if they believed that the track was not constructed for the purpose of switching cars in the manner in which it was done on the occasion of the injury, but that the track was intended to be used for switching such cars by means of a locomotive engine connected with the cars by air brakes, or, as it was termed, by "spotting" the cars, then they should decide whether the defendant was negligent in failing to notify its employees that the track was constructed for the use in such latter manner, and in failing to require them to use it in such manner, or was negligent in not warning them from using the track in the manner adopted at the time of the accident, and, if the injuries resulted from a failure of the defendant to so warn its employees, or resulted from the negligence of the conductor combined with such failure to warn its employees, the plaintiff was entitled to recover, unless the jury should find against the plaintiff under the subsequent provisions of the charge. We think in this case the question whether the defendant was negligent in failing to make such rules or give such warning as specified should not have been submitted to the jury. The complaint contained no charge of negligence in this respect, and that issue was not properly raised. The evidence showed that the employees worked under standard rules familiar to all railroad men of experience, with which the conductor was familiar, and that to have made such a rule as suggested would have been extraordinary, or, as expressed by one witness, "would have been called a ridiculous order." The evidence further showed that the conductor had a knowledge of the uniform custom in respect to the method of performing the work which was being done at the time of the accident, and that such custom was not the method employed by him.

Gila Valley, etc., R. Co. v. Lyon

at the time of the accident, but was the method of spotting the cars above referred to. Where such a uniform custom exists, sanctioned by the master, and the employee has knowledge of such custom, the necessity of the adoption of formal rules in respect thereto is dispensed with. *Rutledge v. Mo. Pac. Ry. Co.*, 123 Mo. 121, 27 S. W. 528; *Luebke v. Ry. Co.*, 63 Wis. 91, 23 N. W. 136, 53 Am. Rep. 266; *Texas & P. R. Co. v. Campbell* (Tex. Civ. App.) 39 S. W. 1104. And the failure to adopt a rule as to precautions to be observed by his employees is not proof of negligence rendering a master liable to a servant, unless it appears from the nature of the business in which the servant is engaged that the master, in the exercise of reasonable care, should have foreseen the necessity of such precautions. *Morgan v. Hudson River Co.*, 133 N. Y. 666, 31 N. E. 234.

In the instructions given by the court at the request of the plaintiff the court said, in substance, that, if the injuries were caused by the negligence of the conductor, and the negligence of the defendant did not contribute thereto, the jury should find for the defendant; but that, if the conductor was negligent, and the defendant was also negligent, in reference to the character of the premises or in the failure to notify its employees with reference to spotting the cars on the track, and such negligence of the defendant contributed to the injuries, then the plaintiff should recover. Except so far as in this case the question of rules or notice is concerned, this instruction correctly stated the law as to the liability of the master for a concurring cause. In the main charge given, the court does not discuss the question of proximate cause, nor, except as above stated, was the question presented to the jury whether, if such negligence of the conductor, who it is admitted was the fellow servant of the deceased, was the direct or proximate cause, the defendant could still be held liable if in any way at fault.

From the evidence in this case we think the fundamental questions to be determined by the jury in arriving at their verdict, apart from the question of assumed risks, were with respect to the character of the premises as providing a reasonably safe place for the work, and, if unsafe, whether the negligence of the master in that respect or any other contributed to the injury, or whether the injury was proximately caused by the negligence of the fellow servant. We think, therefore, that the jury would have had the matters to be determined more clearly in mind if the court, in its main charge, had instructed them specifically as to the freedom from liability of the defendant if the proximate cause of the injury was the negligence of the fellow servant. The absence of such instruction would not alone be ground for reversal where a charge, as given, correctly interpreted the law in other respects. The defendant, however, requested the court to give to the jury the following instruction: "The court

Gila Valley, etc., R. Co. v. Lyon

further instructs the jury that if they believe from the evidence that for a year or more prior to the death of Lyon it had been the uniform custom of the employees of the defendant to put its cars on the spur in question by pushing them in with the engine, and under control of the engine, and that said method was reasonably safe in view of the situation of the premises; and that the conductor of said train, H. L. Rigg, was aware of said custom, and knew that said method was reasonably safe, and also knew that to throw said cars in detached from the engine, as was done at the time of the accident, was not a safe method, and that on the occasion of the accident said conductor caused said cars to be thrown in by said unsafe method, and that such act was the proximate cause of said accident, and that said unsafe method was adopted without direction or authority from the defendant, and had not been used more than two or three times before then, the plaintiff cannot recover, although defendant had furnished no written or printed rules governing the operation of trains at that point." The court refused the instruction as requested, but modified it by striking out the words "had not been used more than two or three times before," and inserting in the place thereof "was not coupled with any negligence on the part of defendant company," and gave the instruction so modified. The latter part of the instruction then read: "And that on the occasion of the accident said conductor caused said cars to be thrown in by said unsafe method, and that such act was the proximate cause of said accident, and that said unsafe method was adopted without direction or authority from the defendant, and was not coupled with any negligence on the part of defendant company, then the plaintiff cannot recover, although defendant had furnished no written or printed rules governing the operation of trains at that point." We think the court overlooked the effect of this instruction, as so modified, in its relation to the freedom from liability of the defendant if the negligence of the fellow servant was the proximate cause. If the act of the conductor was the proximate cause of the injury, then it made no difference with respect to the freedom from liability of the defendant, as a matter of law, whether the negligence of the conductor was or was not coupled with the defendant's negligence. It is, of course, well settled that, if the injury was caused both by the negligence of the fellow servant and the negligence of the master, then the master is liable. His negligence is then a contributory or co-operative cause, for which he is liable. *R. R. Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; *Elmer v. Locke*, 135 Mass. 573; *A. T. & S. F. Ry. v. Lannigan* (Kan.) 42 Pac. 343; *Morrissey v. Hughes* (Vt.) 27 Atl. 205. But when the proximate cause of the injury is the negligence of a competent fellow servant, no recovery can be had, even though the place or appliances are defective, and the master is negligent in that respect; and

Gila Valley, etc., R. Co. v. Lyon

whether such negligence of the fellow servant was the proximate cause, or whether the defendant's negligence was a contributory cause, is ordinarily a question for the jury. Wood on Master & Servant, 812; *Vizelich v. So. Pac. Co.*, 126 Cal. 587, 59 Pac. 129; *Trewatha v. Buchanan, G. M. & M. Co.* (Cal.) 28 Pac. 571, 31 Pac. 561; *So. Pac. Co. v. Yeargin*, 48 C. C. A. 497, 109 Fed. 436; *Whitman v. Ry. Co.* (Wis.) 17 N. W. 124; *C., N. O. & T. P. Ry. Co. v. Mealer*, 1 C. C. A. 633, 50 Fed. 725; *M. & S. P. Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Norfolk & W. Ry. Co. v. Brown* (Va.) 22 S. E. 496; *Edmonson v. Kent. Central Ry. Co.* (Ky.) 49 S. W. 200, 448; *Ariz. Lumber & Timber Co. v. Mooney* (Ariz.) 42 Pac. 952; *Little Rock & M. R. Co. v. Barry*, 28 C. C. A. 644, 84 Fed. 944, 43 L. R. A. 349. It is the master's duty to provide a safe place to work, but that principle is not applicable where the place becomes dangerous in the progress of the work from the manner in which the work is done, or is made dangerous only by the carelessness and neglect of fellow servants. *Cleveland, C., C. & St. L. R. R. v. Brown*, 20 C. C. A. 147, 73 Fed. 970; *Callaway v. Allen*, 12 C. C. A. 114, 64 Fed. 297; *Hussey v. Cogger*, 112 N. Y. 614, 20 N. E. 556, 3 L. R. A. 559, 8 Am. St. Rep. 787; *Hogan v. Smith*, 125 N. Y. 774, 26 N. E. 742. In the instruction as modified and given the jury were justified in believing that, although they should determine that the negligence of the fellow servant was the proximate cause of the injury, or the place was made unsafe solely by reason of the unsafe method adopted, they might yet find a verdict for the plaintiff, provided only they should find that the defendant was negligent in some respect, whether such negligence contributed to the injury or not. The error in this instruction as given was not so cured by the main charge on the question of concurrent liability that we can say the jury was not misled by it.

The defendant also requested an instruction to the effect that at the time of the injury all the trainmen were fellow servants with the deceased, "and the law is that, if said injury was proximately caused by the conductor of said train, then the plaintiff cannot recover." The court modified the instruction by inserting after the word "train" the words "without previous notice in the defendant company of the conductor's incompetency, carelessness, or negligence." We think this modification was not correct, in view of the pleadings and the testimony. No allegation is made in the complaint of incompetency on the part of the conductor, or that the master had notice thereof; nor was there evidence, if such incompetency existed, that the company had such notice, or that it could have had such notice by the use of reasonable diligence. We do not think the jury should have had left to them to determine the question of fact as to whether notice was given to the company of any incompetency of the conductor; and, if it were proper to leave this question for them

San Jose Land & Water Co. v. San Jose Ranch Co

to determine, it should not have been left in a form from which the jury might assume as a fact that the incompetency existed.

For the reasons stated, we think the judgment should be reversed, and the case remanded to the district court for a new trial.

SLOAN and DOAN, JJ., concur.

SAN JOSE LAND & WATER COMPANY, Plff. in Err., v. SAN JOSE RANCH COMPANY.

(Submitted December 2, 1902. Decided March 2, 1903.)

[23 Sup. Ct. Rep. 487.]

Error to State Court—Federal Question.

A Federal right is "specially set up or claimed in a state court," within the meaning of U. S. Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575), so as to confer jurisdiction on the Supreme Court of the United States of a writ of error to such court, where a claim of such right sufficiently appears in a motion for new trial and in the assignment of error in the state supreme court, and was fully considered in the opinions of that court, whose decision was adverse to such claim.

Railroad Land Grant—Forfeiture—Rights of Subsequent Grantee.

Land within the indemnity limits of the grant made by the act of Congress of July 27, 1866 (14 Stat. at L. 292, chap. 278), to the Atlantic & Pacific Railroad did not, by reason of the forfeiture of such grant by the act of July 6, 1886 (24 Stat. at L. 123, chap. 637), pass to the Southern Pacific Railroad Company, although such land was within the place limits of the grant to the Texas & Pacific Railroad made by the act of March 3, 1871 (16 Stat. at L. 573, chap. 122), the rights under which subsequently became vested in the Southern Pacific Railroad Company, which built the road and selected the land under the act, since the forfeiture of the earlier grant did not inure to the benefit of the later grantee, but to the benefit of the United States.

Same—Water Rights—Rights against Prior Appropriators.

One who enters on public land and constructs a pipe line thereon, under a claim of ownership of a water right, is entitled to the protection afforded vested ditch and water rights by the act of Congress of July 26, 1866 (14 Stat. at L. 251, chap. 262), § 9, as against subsequent purchasers of the land from the Southern Pacific Railroad Company, whose only claim to such land rests upon the right of purchase from the United States, given by the act of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), § 5, to bona fide purchasers from railway companies of forfeited lands.

Same—Forfeiture—Rights of Bona Fide Purchasers.

Bona fide purchasers of forfeited lands from a railroad company, who are not in possession and have not attempted to exercise their right under the act of Congress of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), § 5, to purchase the lands from the United States, are not, by reason of such right to purchase, entitled to maintain an action to quiet title against persons claiming an adverse interest therein.

In Error to the Supreme Court of the State of California to review a decree which affirmed a judgment of the Superior Court in favor of defendant in an action to quiet title. Affirmed.

See same case below, 129 Cal. 673, 62 Pac. 269.

San Jose Land & Water Co. v. San Jose Ranch Co

Statement by MR. JUSTICE BROWN:

This was an action brought in 1889 by the Land & Water Company, under the Code of Civil Procedure of California, to quiet the title of the plaintiff and determine the nature of the adverse claim of the defendant to the half of a quarter section of land, which had been sold by the Southern Pacific Railroad Company February 28, 1887, to plaintiff's predecessors in title, as part of its land grant of 1871.

The case was tried in 1890, though the decree was not entered until 1897. The facts found by the court were substantially that the Southern Pacific Railroad Company had accepted the benefit of a land grant made March 3, 1871, to the Texas & Pacific railroad, filed its map of location April 3, 1871, and on August 12, 1873, formed a new corporation, also known as the Southern Pacific Railroad Company; built and constructed a road from Tehachapi pass by way of Los Angeles to Yuma, and selected the land in question under the act of March 3, 1871; that such land was within the place limits of the Southern Pacific, and also within the indemnity limits of a land grant to the Atlantic & Pacific railroad by act of July 27, 1866. This latter company never complied with the terms of the grant, and never built its road.

That on February 28, 1887, the Southern Pacific agreed with two parties named Nolan and Heckenlively to sell them this land, and, after the receipt from the United States of a patent therefor, to deliver them a deed; that by subsequent conveyances, and on August 29, 1888, the right of the grantees became vested in the plaintiff, the San Jose Land & Water Company; that the land is situated in San Dimas canyon, through a portion of which the San Dimas creek flows; that prior to December, 1883, one Stowell claimed to own a water right in the waters flowing down such creek, the character and extent of which the court did not adjudicate, and about that time entered upon the land and constructed across a portion of it a 12-inch pipe line for the purpose of conducting the water so claimed by him from its point of diversion across said lands to other land; that prior to July, 1887, the San Jose Ranch Company, defendant, had, by mesne conveyances, succeeded to the rights of Stowell, and also constructed upon such land, at a point where the waters of San Dimas creek flowed, a brick and cement forebay, sand box, or dam, and laid therefrom across a portion of said land a 14-inch pipe line, both of which pipe lines it claims the right to maintain, but makes no other claim of right to such lands.

Upon this state of facts the superior court entered a judgment in favor of the defendant, which was affirmed by the supreme court. 129 Cal. 673, 62 Pac. 269. Whereupon the plaintiff sued out this writ of error.

Messrs. W. H. Anderson, James Anderson, and Richard Dunnigan for plaintiff in error.

Mr. John S. Chapman for defendant in error.

San Jose Land & Water Co. v. San Jose Ranch Co

MR. JUSTICE BROWN delivered the opinion of the court:

Motion is made to dismiss this writ of error upon the ground that no Federal right, title, privilege, or immunity was "specially set up or claimed" by the plaintiff in error, as required by the 3d clause of Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575). None such appears in the complaint, although we think it sufficiently appears in the motion for a new trial and in the assignments of error in the state supreme court. It also appears from the opinion of the court that plaintiff relied upon the act of Congress of March 3, 1887, for the readjustment of land grants (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595); and the question considered by the court, and upon which the case turned, was whether the plaintiff had brought itself within the scope of that act. This question was fully considered by the court, and it was held that the defendant, having acquired its rights prior to the act of 1887, must prevail against the right claimed by the plaintiff.

While the right under the act of 1887, thus considered, was not originally specially set up and claimed by the plaintiff, inasmuch as it was not an original right, but a right available in rebuttal of the defense, it is one which appears to have been insisted upon in the argument; and under the rule of this court requiring the opinions to be sent up with the record, it has been frequently held to be a sufficient compliance with the words "specially set up and claimed," that it was fully considered in the opinion of the court and ruled against the plaintiff in error. *Murdock v. Memphis*, 20 Wall. 590, 633, 22 L. Ed. 429, 443; *Gross v. United States Mortg. Co.*, 108 U. S. 477, 27 L. Ed. 795, 2 Sup. Ct. Rep. 940; *Fire Asso. of Philadelphia v. New York*, 119 U. S. 110, 115, 30 L. Ed. 342, 345, 7 Sup. Ct. Rep. 108; *Egan v. Hart*, 165 U. S. 188, 41 L. Ed. 680, 17 Sup. Ct. Rep. 300; *Sayward v. Denny*, 158 U. S. 180, 184, 39 L. Ed. 941, 942, 15 Sup. Ct. Rep. 777; *Mallett v. North Carolina*, 181 U. S. 589, 45 L. Ed. 1015, 21 Sup. Ct. Rep. 730. These must be considered as leading, under our change of rule, to a different result from that reached in some prior cases (*Williams v. Norris*, 12 Wheat. 117, 6 L. Ed. 571; *Rector v. Ashley*, 6 Wall. 142, 18 L. Ed. 733, and *Gibson v. Chouteau*, 8 Wall. 314, 19 L. Ed. 317), in which we held that the opinion of the state court could not be resorted to for the purpose of showing that a question of Federal cognizance was decided.

2. The case upon the merits presents but little difficulty. The action is brought under § 738 of the Code of Civil Procedure of California, which provides that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

The land in question was within the indemnity limits of the land grant of July 27, 1866 (14 Stat. at L. 292, chap. 278), to

San Jose Land & Water Co. v. San Jose Ranch Co

the Atlantic & Pacific Railroad Company. Plaintiff, however, claims nothing under this grant, as the railroad company never complied with its terms; never built its road; and the grant was forfeited by act of July 6, 1886 (24 Stat. at L. 123, chap. 637), and the land restored to the public domain. The act, however, becomes pertinent in another connection.

The land in question was also within the place limits of the grant to the Texas & Pacific Railroad Company by act of March 3, 1871 (16 Stat. at L. 573, chap. 122), and subsequently became vested in the Southern Pacific, which constructed the road and selected the land in question, claiming it under that act.

It was held by this court, however, in *United States v. Southern P. R. Co.* 146 U. S. 570, 36 L. Ed. 1091, 13 Sup. Ct. Rep. 152, that the forfeiture of the Atlantic & Pacific grant of July 6, 1886, did not inure to the benefit of the Southern Pacific, which held the later grant of the same land, but to the benefit of the United States, and thereby became a part of their public lands. In the next following case (*United States v. Colton Marble & Lime Co.* 146 U. S. 615, 36 L. Ed. 1104, 13 Sup. Ct. Rep. 163), this ruling was extended to the indemnity lands of the Atlantic & Pacific, which, upon forfeiture of its land grant, also reverted to the United States.

Hence, on February 28, 1887, when the Southern Pacific company contracted to sell these lands to Nolan and Heckenlively, it had really nothing to sell, and no interest in the land that could pass under that agreement. There was a stipulation in it to make a deed of the premises as soon as the railroad had received a patent therefor from the United States; that it would use ordinary diligence to procure such patent, and that if, in consequence of circumstances beyond its control, it failed to obtain a patent, it guaranteed nothing with regard to the title, but agreed to repay everything which had been paid by the grantees. There was a further agreement that the contract should not be assignable except by indorsement, and with the written consent of the company, and a written promise of the assignee to perform all the undertakings and promises of the grantees.

After making the first payment and paying the annual interest to February 28, 1892, the grantees ceased all further payments. The findings show that at the time of the execution of the contract "said tract of land was not in the bona fide occupation of any adverse claimant under the pre-emption or homestead laws of the United States, and the same had not been settled upon at the date of such purchase, or on the 3d day of March, 1887, or subsequent to December 1, 1882, by any person claiming to enter the same under the settlement laws of the United States." That neither the grantees nor their assigns ever settled upon the land, cultivated or fenced it, although Heckenlively did, shortly after the purchase, enter upon the land and begin the construction

San Jose Land & Water Co. v. San Jose Ranch Co

of a ditch and tunnel thereon. Subsequently the land passed by intermediate conveyances to the plaintiff. Manifestly, however, there was a clear failure of title on the part of the plaintiff to maintain this action. The Southern Pacific had no title to convey, and, beyond this, there is no finding that the contract was assigned by indorsement or with the written consent of the railroad company, or that there was any promise on the part of the assignees to perform the undertakings of the original grantees.

Plaintiff's claim to the land must rest, if at all, upon the act of Congress of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), entitled "An Act to Provide for the Adjustment of Land Grants made by Congress to Aid in the Construction of Railroads, and for the Forfeiture of Unearned Lands, and for Other Purposes,"—the main purpose of which act was to relieve bona fide purchasers from railway companies of forfeited lands, by permitting such purchasers or settlers to perfect their entries upon compliance with the public land laws. By § 5 of this act, "where any said company shall have sold to citizens of the United States, . . . as a part of its grant, lands not conveyed to or for the use of such company, . . . and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands, at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns." The section, however, contained provisos excepting from its terms all lands which at the date of such sales from the government were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws, and also of lands settled upon subsequent to the 1st day of December, 1882, by persons claiming to enter the same under the settlement laws of the United States.

There are two difficulties connected with the application of this statute: (1) Assuming that Nolan and Heckenlively were bona fide purchasers in good faith from the government, which, indeed, is a part of the finding, there is nothing to indicate that they had ever made payment to the United States for the lands, or ever applied to do so; nor does a patent ever appear to have been issued to them. In short, the plaintiff relies upon the statute without showing that anything was done under it. (2) The provisions of this section do not apply to lands occupied adversely under the pre-emption, homestead, or settlement laws of the United States, and the finding in this connection is that in 1883 one Stowell owned, or claimed to own, a certain water right in the waters of San Dimas creek, which flowed through a portion of the land, the character and extent of which water right the court did not find; and that in November of that year Stowell

San Jose Land & Water Co. v. San Jose Ranch Co

entered on the land, laid and constructed across a portion of it a 12-inch pipe line for the purpose of taking the water across the land to other lands, probably for the purposes of irrigation; and that in July, 1887, the defendant, which had by mesne conveyances, succeeded to this water right of Stowell, entered upon the land and built and constructed thereon a stone, brick, and cement forebay, sand box, or dam, and also a 14-inch pipe line across a portion of the lands. It still claims the right to these improvements, but makes no other claim of right, title, or interest to the land or any part thereof.

The record does not show exactly how Stowell obtained his rights to the waters of this creek, although the testimony sent up with the record indicates that one Haynes settled upon the land in question in 1869, and obtained a patent either in August or September, 1878; that he used the water from the creek to irrigate the land; made a dam and ditch and ran it down to the ranch; that he began using the water in March, 1870, and so used it up to the spring of 1878, when he obtained the patent, sold to Stowell, and conveyed the land by deed.

Conceding, however, that, under the findings, we cannot look back of 1883, when Stowell entered the land and laid a 12-inch pipe line there, under a claim of ownership of the water right, we see no reason why he and his grantees are not protected by § 9 of the act of July 26, 1866 (14 Stat. at L. 251, chap. 262), which declares that, "whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed."

Bearing in mind that these lands were from July 6, 1886, the date of the forfeiture, public lands, subject to the pre-emption, homestead, or settlement laws, and that at the time Stowell entered upon the land, and constructed a pipe line thereon (1883), which at that time seems to have been wholly unoccupied, we think the fact that Heckenlively, under his agreement of purchase of February 28, 1887, and shortly after the same was executed, entered upon the land and began the construction of a ditch and tunnel there, becomes immaterial, since there is a finding that he never settled upon the land, cultivated or fenced it, or took possession of it, and no finding how long he continued the construction of the ditch or tunnel, or the amount of work in connection therewith. For aught that appears he may have abandoned it immediately. There is no evidence that the original grantees from the railroad company, or their successors in interest, ever sought to

Judge *v.* Elkins

take advantage of the act of 1887, or ever applied to purchase the lands, or made payment to the United States, or did anything whatever before the beginning of this suit to indicate that they relied upon this statute. We agree with the supreme court of California that the plaintiff was not entitled, upon the showing of a mere right to purchase, to demand that its title be adjudged good and valid, and that the defendant had no estate or interest in the land, or that it should be enjoined from asserting any claim adverse to the plaintiff, or that it should recover possession of the land, with the right of ousting the defendant from the improvements which its predecessors had made thereon.

An inceptive right under the statute was an insufficient basis of recovery. A party cannot rest forever on such a right, but is required by the statute, before asserting it against innocent third parties, to take some steps to perfect it. The litigation seems to turn really upon the respective rights of the parties to the waters of San Dimas creek, and as defendant's predecessors first appropriated them, and the plaintiff shows no superior title, it cannot prevail against the ranch company. In view of the uncertain character of the finding that Heckenlively did, shortly after his purchase, enter upon the land and commence the construction of a ditch and tunnel thereon, we are unable to see how the case is affected by the fact that, in July and August of the same year, the defendant entered upon the land and constructed their forebay or dam, and laid a 14-inch pipe in addition to the 12-inch pipe which Stowell had laid in 1883. We express no opinion as to the possibility of the plaintiff maintaining a second action upon its patent since obtained, or how far this case may, if at all, operate as *res judicata* in that.

There was no error in the decree of the Supreme Court, and it is therefore affirmed.

MR. JUSTICE McKENNA took no part in the disposition of this case.

JUDGE *v.* ELKINS *et al.*

(*Supreme Judicial Court of Massachusetts, Norfolk, April 1, 1903.*)

[66 N. E. Rep. 708.]

Electric Railroads—Injuries to Pedestrians—Contributory Negligence—Failure to Look.*

Where plaintiff, before leaving a pathway and going onto a bridge, if he had looked could not have failed to have seen that the motorman in charge of an electric car was about to start the car and run the same over the bridge, and that the car would take up all the room between the sides of the bridge, but he failed to look, and proceeded onto the bridge, and was struck. he was guilty of contributory negligence.

*As to the care required of pedestrians in using street railway, see *Atherton v. Tacoma Ry. & Power Co.* (Wash.), 5 R. R. R. 668, 28 Am. & Eng. R. Cas., N. S., 668. See foot-note appended to *Chicago City Ry. Co. v. Tuohy* (Ill.), 4 R. R. R. 1, 27 Am. & Eng. R. Cas., N. S., 1.

Baker v. Boston Elevated Ry. Co

Report from Superior Court, Norfolk County; Edgar J. Sherman, Judge.

Action by one Judge against one Elkins and others for injuries alleged to have been caused by a defective warning bell on an electric car. Plaintiff was struck by the car while walking in a part of the plant of the New England Gas & Coke Company. A verdict was ordered in favor of defendants, and the case was reported to the Supreme Court. Judgment for defendants.

Hayes & Williams, for plaintiff.

John & James A. Lowell, for defendants.

LATHROP, J. We are of opinion in this case that on the evidence the plaintiff was not in the exercise of due care when he was struck by the electric car of the defendants. Before going from the pathway to the bridge he could see the car standing there, and, if he had looked, he could not have failed to see the motorman getting ready to start. He did not look, but proceeded on his way, having about eight yards to go. He knew that the car took up all the room between the sides of the bridge, and that if it started and overtook him he could do nothing to avoid it, unless he got under the car, which ran on overhead rails. It was dangerous to do so, for he might be struck by one of the hoppers, which came nearly to the surface of the ground. The car started soon after the plaintiff did, and came in contact with him. It could not have been going rapidly, for its rate of full speed was only three and a half miles an hour. The plaintiff testified that he did not see the car after he had started. He had worked near the place of the accident five or six months, and was entirely familiar with the place and the working of the car. While he had some reason to suppose that the car would not start so soon as it did, yet, if he had looked when he came from the pathway on to the course of the car, he could not have failed to see that the motorman was about to start. His not looking shows that he did not exercise due care, and the verdict ordered for the defendants was right. *Young v. N. Y., N. H. & H. R. R.*, 171 Mass. 33, 50 N. E. 455, 41 L. R. A. 193; *Martyn v. N. Y. & Boston Despatch Express Co.*, 176 Mass. 401, 57 N. E. 671; *Mathes v. Lowell, Lawrence & Haverhill St. Ry.*, 177 Mass. 416, 59 N. E. 77; *Tirrell v. N. Y., N. H. & H. R. R.*, 180 Mass. 490, 62 N. E. 745.

Judgment for the defendants.

BAKER *et al.* v. BOSTON ELEVATED RY. CO.

(*Supreme Judicial Court of Massachusetts, Suffolk, April 1, 1903.*)

[66 N. E. Rep. 711.]

Eminent Domain—Elevated Railroads—Abutting Property—Damages.

St. 1894, p. 764, c. 548, §8, provides that the location of a railway in any public way shall be deemed an additional servitude, and entitle

Baker v. Boston Elevated Ry. Co

persons having an estate in such way, or any abutting premises, and who are damaged by reason thereof, to recover compensation in the manner provided; and section 9 declares that in such a proceeding the findings shall be on the following question: "Has the petitioner's estate been damaged more than it has been benefited by reason of the location or operation of such railway; and, if so, how much?" *Held*, that the word "damage," as so used, should be construed to mean special, and not general, damage.

Same—Same—Same—Same—Private Nuisance.*

Where it was found that noise incident to the operation of an elevated street railway was such as to constitute a private nuisance, if it were not authorized, such noise constituted special and peculiar damage to abutting property, for which the owner was entitled to compensation, as authorized by St. 1894, pp. 764, 765, c. 548, §§ 8, 9.

Same—Same—Same—Noise—Concurring Causes.

Where, in an action for the assessment of damages to abutting property by an elevated street railway, there were other causes of damage connected with the operation of the railway, which, concurrently with noise, produced the damage, it was not necessary, in assessing the damages, to separate the effect produced by the noise alone from the effect of other concurring causes.

Same—Same—Same—Effect of Ownership of Fee.

Where, in a proceeding to assess damages arising from the maintenance of an elevated street railroad, plaintiff owned the fee in a part of the street on which part of the structure was erected, the fact that plaintiff's deed to his abutting property limited his occupation and use to a strip 10 feet in width along the line of the street did not limit plaintiff to a recovery for noise from the operation of the railroad to the difference between the depreciation in value of his property which would be caused by the noise if it existed just beyond its confines and the depreciation caused by the noise in its present location.

Report from Superior Court, Suffolk County; Mason, Judge.

Petition by one Baker and others against the Boston Elevated Railway Company for the assessment of damages to adjoining land by reason of the construction of defendant's road. On report from superior court. Judgment for petitioners.

Frank N. Nay, Wilfred Bolster, and Leon M. Abbott, for petitioner Baker.

H. E. Bolles, Chas. H. Tyler, Owen D. Young, and O. O. Partridge, for petitioners Wells and others.

Hayes & Williams, for petitioner F. Peabody, Jr.

H. M. Knowlton and Geo. C. Travis, for respondent.

KNOWLTON, C. J. This is a petition, under St. 1894, p. 764, c. 548, to recover damages to the petitioners' property caused by the location, construction, maintenance, and operation of an elevated railway through Harrison avenue—a street in Boston—in front of the petitioners' premises. The questions in the case relate to noise as an element of damage in such cases. The chief justice of the superior court, who

*As to whether smoke, noise, and vibration are elements of injury to property, caused by operation of railroad, for which damages are recoverable, see monograph appended to *Jenkins v. Pennsylvania R. Co.* (N. J.), 2 R. R. R. 210, 25 Am. & Eng. R. Cas., N. S., 210.

heard the case without a jury, "found that the noise occasioned by the operation of the respondent's elevated railway was such, in general character and extent, as, but for the statutory authority, would constitute a private nuisance, of a grave character, to the petitioners' estate," and decided that the petitioners were entitled to recover the sum of \$2,000, in all, as damages, one-half of which is for the damage from noise. The petitioner Baker owned the fee of the land to the center of the street, subject to the rights of the public, but there were restrictions in his deed which limited his occupation and use of a strip 10 feet in width along the line of the street. The width of the street in front of the estate, including the sidewalks, is 50 feet, and the width between the curbstones is about 31 feet. The respondent's structure, the width of which is 20 feet, is substantially in the middle of the street, and the west track, which is 5 feet in width from rail to rail, is wholly in that part of the street the fee of which is owned by the petitioner. The land is occupied by a brick building, 4 stories in height, used as a tenement or lodging house. At the conclusion of the evidence the respondent asked the court to rule as follows: "(1) As regards damages caused by the noise, the plaintiff is entitled to only the difference between the depreciation in value of his property which would be caused by the noise if it existed just beyond its confines, and the depreciation which is caused by the noise in its present location. (2) In estimating the damage caused by noise, the rule of law is as follows: First, estimate the depreciation in value of the plaintiff's property which would be caused by the noise if it existed just beyond the property confines; second, estimate the depreciation which is caused by the noise in its present location. The plaintiff is entitled to the difference between the two, but no more. (3) As regards the damage caused by the noise, it may be allowed for only in so far as increased proximity due to the taking is the source of the trouble. The difference between the annoyance just outside the petitioner's parcel and the same in its actual location is the measure of damages." The court declined to give these rulings, and, after finding the facts and assessing the damages, reported the case to this court, at the request of the parties, under a stipulation that such judgment shall be entered upon the facts found as the law requires. The judge also found that, if damage for noise were to be assessed under the rules stated in the respondent's requests, the amount to be awarded would be only \$100.

It would seem as if the trial proceeded upon an assumption by both parties that the petitioner was entitled to recover for noise, and that the only question was how much. But under the terms of the report the broader question, whether noise can be considered at all as an element of damage, has been much discussed in this court. We think it pretty plain, for reasons which we shall state hereafter, that the rulings re-

Baker v. Boston Elevated Ry. Co

quested were rightly refused, and we shall first consider the broader general question above referred to. The answer to this depends upon the meaning of the statute under which the petition is brought, material parts of which are as follows: "The location, construction, maintenance and operation of said lines of railway in any public or private way, shall be deemed an additional servitude, and entitle lessees, mortgagees, and other parties having an estate in such way, or in premises which abut thereon, and who are damaged by reason of the location, construction, maintenance and operation of said lines of railway, to recover reasonable compensation in the manner herein provided." St. 1894, p. 764, c. 548, § 8. "Findings shall be on the following questions, to wit: First, has the petitioner's estate been damaged more than it has been benefited or improved in value by reason of the location, construction, maintenance or operation of such railway? Second, if so, how much? If the answer to the first question shall be no, a verdict shall be rendered for the corporation; otherwise a verdict shall be rendered for the petitioner for the amount found in answer to the second question, including interest from the day of the filing of the petition." St. 1894, p. 765, c. 548, § 9.

This statute deals with conditions materially different from those contemplated by any previous statute under which action has been taken in this commonwealth, and, of course, it must be interpreted in reference to these conditions. At the same time, it belongs to a department of legislation, which includes many previous enactments, and which concerns a large part of the fixed property in the commonwealth. In the absence of plain indications to the contrary, a legislative intention to make it harmonious with existing legislation of the same class may be presumed.

The statement of the questions on which the findings are to be made in a statute of this kind is a new departure in this commonwealth, and the broad statement of the benefit or improvement in value which is to be set off against the damage suggests the possibility of an intention that everything should be considered, causing an increase of value, on one side, or a diminution in value, on the other, and that a balance should be struck, showing the resulting effect upon the value of the property, and, if the diminution from all causes is greater than the increase, damages should be awarded accordingly. Such a rule would enable a landowner on the street to recover as damages possible elements of diminution in value which might be common to the property throughout a large neighborhood, from causes which might affect all persons in the neighborhood, whether permanently or temporarily there; and, on the other hand, it would compel the landowner to set off against his damages elements of enhancement of value which might be common to property owners throughout a large territory, or even to all in the city. It would be unjust

Baker v. Boston Elevated Ry. Co

to him that he should be compelled to set off such benefits against his claim for damages, when others, who have no claim for damages, receive them without charge; and it would be unjust to the taxpayers, or to the private corporation which represents the public, if he should be allowed damages for diminution in value from causes affecting a large part of the public, who must endure these effects without compensation. For this reason the word "damage," in statutes of this kind, is held to include only damage that is direct and proximate, as distinguished from that which is remote and consequential, and to include only that which is special and peculiar to the petitioner and to those similarly situated, as distinguished from that which is common, affecting generally persons and property in the vicinity. The fact that all precedents would require us to allow only damage of this kind, under section 11 of this chapter, and the improbability that two different rules for assessing damage of this kind would be established by the same statute, lead us to interpret the word "damage" in the statutory question as meaning special and peculiar, and not general, damage.

But it is to be noticed, in passing, that the benefits to be set off under this section may include more than can be included in assessing damages for the taking of land for highways or railroads. Increase in value in such cases may be of three kinds: First, that relating to the particular estate, such as the size or shape in which it is left, or its frontage upon a desirable street. This is always to be set off against the damages in making an award, unless there is to be a subsequent assessment of benefits. Secondly, benefits which are not limited to estates, a part of which are taken, but which extend to other estates in the vicinity, materially increasing their value by reason of their proximity to a great public improvement, and which are benefits beyond those shared by the public and by property owners generally. These are subject to assessment under most statutes which provide for an assessment of benefits. Then there is an increase of value from causes which affect the whole community, which possibly raise the market value of all the real estate in a city or town, or in a large part of a city or town, but which have no such relation to the particular territory as specially and peculiarly to affect property there, or properly to constitute a reason for special taxation. The statute before us calls for a set-off of such improvement in value as would be a subject for the assessment of benefits under ordinary statutes calling for such an assessment, as distinguished from the improvement from a more restricted line of causes, which alone could be considered on the question of set-off in estimating damages for the taking of land for a highway or railroad, apart from betterment laws, and as distinguished, on the other hand, from the general increase in value of property in the city which is not subject to set-off or assessment under any statute.

Baker v. Boston Elevated Ry. Co

In determining the meaning of the statute before us, we look at its provisions. It declares that the use of a street for an electric railway shall be deemed an additional servitude upon the land. It expressly provides for abutters who do not own land in the street, as well as for persons who own the fee of the street; and, in express terms, it gives damages for detriment caused by the operation of the railway, as well as for that caused by its construction. By its express provisions it precludes the possibility of doubt upon any of these subjects. It is obvious to every one that noise from the almost constant running of the cars is a large element of damage to owners of houses along the street. If, therefore, detriment from noise can be a special and peculiar damage, as distinguished from a general damage, to the property, it seems pretty plain that this kind of damage is to be a matter to be compensated under this statute.

In dealing with the question which it presented, we have a helpful analogy in the rules of common law. Noise is necessarily incident to the transaction of many kinds of business, and so long as it is not excessive it is not unlawful. But when it is so great as to become a nuisance to property in the vicinity it is actionable. It is judged by its effect, and not merely by its cause. In England the difference in effect between damage which, as between private persons, would give a right of action for a nuisance, and that which is permissible in the use of land, is often treated as an important consideration, if not an absolute test, in deciding what shall be paid for by a corporation acting under public authority. *Brand v. Hammersmith & City Railway Company*, L. R. 2 Q. B. 223; 4 L. R. Eng. & Ir. App. 171; *Ricket v. Directors of the Metropolitan Railway Company*, 2 H. L. Eng. & Ir. App. 175. Disturbance which constitutes a private nuisance may be treated as causing damage different in kind, and not merely in degree, from that caused by disturbance which falls short of being a nuisance. Damage from noise which is unlawful by reason of its excess may well be considered unlike the detriment which is so slight as to be legally permissible in the ordinary use of property.

In the case at bar it is found that, but for the statutory authority, the noise "would constitute a private nuisance of a grave character to the petitioner's estate." At common law, in such a case, the rights of the owner of the property affected, and his relations to the cause of the disturbance, are treated as very different from those of the general public who are also affected by it, and he is entitled to compensation in damages. *Wesson v. Washburn Iron Company*, 13 Allen, 95, 90 Am. Dec. 181. We are of opinion that noise, such as would constitute a private nuisance to abutting property if it were not authorized, should be treated as causing special and peculiar damages, under this statute, which entitled the landowner to compensation.

Baker v. Boston Elevated Ry. Co

There are decisions in other states which tend to confirm us in our view, but, in the main, we rest upon the language of the statute, taken in connection with the conditions to which it applies, and the character of our previous legislation, as construed by this court. It would be contrary to a long line of authorities to hold that, under a statute like this, the Legislature intended to authorize the creation of a private nuisance, of a grave character, without providing compensation for the damage to abutting owners. The decisions in the state of New York were made under laws so different from ours, both in reference to the rights of property in and along streets in the city of New York, and the statutes relating to elevated railways, that they furnish us little aid. In *re New York Elevated Railway Co.*, 70 N. Y. 327; *Kane v. New York Elevated Ry. Co.*, 125 N. Y. 164, 26 N. E. 278; *Story v. New York Elevated Ry. Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *American Bank Note Co. v. New York Elevated Ry. Co.*, 129 N. Y. 252, 29 N. E. 302. A similar statement might be made in reference to other cases. *Beseman v. Pennsylvania R. Co.*, 50 N. J. Law, 235, 13 Atl. 164; *Id.*, 52 N. J. Law, 221, 20 Atl. 169; *Cleveland & Pittsburg R. Co. v. Speer*, 56 Pa. 325, 94 Am. Dec. 84; *Carroll v. Wisconsin Central R. Co.*, 40 Minn. 168, 41 N. W. 661; *Scott v. St. Paul & Chicago R. Co.*, 21 Minn. 322; *Hanlin v. Chicago & Northwestern R. Co.*, 6 Wis. 515, 21 N. W. 623.

The statute before us gives abutters on streets who have no property in the street the same right to receive compensation as abutters who are owners of the fee in the street. This fact in itself makes it impossible to apply the rule as to damages stated in the requests for rulings. These requests are founded on the opinions in *Presbrey v. Old Colony & N. R. Co.*, 103 Mass. 1, and *Walker v. Old Colony & N. R. Co.*, 103 Mass. 10, 4 Am. Rep. 509. The difficulty of applying this rule in proceedings under the Public Statutes was brought to the attention of the court, and somewhat considered, in *Rand v. Boston*, 164 Mass. 354, 41 N. E. 484. Under the present statute the difficulty is insurmountable. When the abutters on the line of the street are given damages from the same enumerated causes as the owners of the fee, it cannot be that the damage to an abutter from noise is to be estimated in one way if he happens to own the fee of the street, and in a different way if he owns only to the line of it. In the case of a mere abutter there is no opportunity to subtract the damage which would result from noise if the railway were just outside of his property from the damage from noise by reason of its coming upon his property, for it does not come upon it at all. But if there were no special provision for abutters, and the rule were to be considered in reference to the owners of the fee alone, its application would work great injustice.

It seems that at the trial no question was raised in regard to any cause of damage except noise. Accordingly the dis-

Witherington v. Lynn & B. R. Co

cussion in this court has been confined to this subject; but it appears from the report that there are other causes of damage connected with the maintenance and operation of the railway, which act concurrently with noise to produce the harmful result. Whenever the effect of noise, acting with such causes, is to produce a result like that from a private nuisance, the damages are special and peculiar, for which the abutter has a remedy under a statute. It is not necessary, in assessing damages, to separate the effect produced by noise alone from the effect of other concurring causes.

In reference to the amount to be recovered, the principle on which the statute is founded seems analogous to the common law in regard to noise as a disturbance to neighboring landowners. In actions at law, so long as the noise is not so excessive as to constitute a private nuisance to the neighboring property, it is treated as permissible, and there is no liability for the effect of it. But when it increases so as to become a private nuisance, its effect is treated as of a different character; and the party injured by it may recover all the damage caused by the nuisance, without attempting to determine how much of the effect is produced by that part of the noise which might have been innocently made, and how much by that part which is in excess of that which is allowable. So, under this statute, whose language in regard to compensation is very broad, if the effect is such as would constitute a private nuisance in the absence of authority from the statute, it is treated as of a different character from the effect which would be permissible without statutory authority, and it is considered special and peculiar damage, for which the statute gives compensation, treating it as a unit, without seeking to determine how much of this effect is due to that part of the noise which alone would not create a liability, and how much to the excess which, in connection with the other, makes the condition like that from a private nuisance.

We are of opinion that there was no error in the proceedings at the trial. The entire court agree in the result reached, and a majority agree in the mode of reaching it. A minority of the court think that the finding that the noise would constitute an actionable nuisance if not authorized by the statute is immaterial. Judgment on the findings.

WITHERINGTON *v.* LYNN & B. R. Co.

(Supreme Judicial Court of Massachusetts, Suffolk, Feb. 25, 1903.)

[66 N. E. Rep. 206.]

Carriers—Injuries to Passengers—Gross Negligence—Evidence.*

Plaintiff's intestate boarded an open street car, and took a seat at the

*As to carriers' duties during transportation, see monograph appended to *Chicago City Ry. Co. v. Morse* (Ill.), 4 R. R. R. 215, 27 Am. & Eng. R. Cas., N. S., 215.

Witherington v. Lynn & B. R. Co

extreme left end. There were other unoccupied seats in the car. The conductor approached deceased for his fare, when he arose, put his hand in his trousers pocket, and, while doing so, leaned to the left and backwards, and fell from the car, receiving a fatal injury. The car was running at a speed of about 16 miles per hour, but there was no evidence of any jolt or jar: *held*, that the speed at which the car was running, and the failure of the conductor to tell deceased to sit down, or to warn him of the danger of standing so near the edge of the car, was not such gross negligence as would entitle plaintiff to recover for decedent's death.

Exceptions from superior court, Suffolk county; Edward P. Pierce, Judge.

Action by Adelaide S. Witherington, as administratrix of John Witherington, deceased, against the Lynn & Boston Railroad Company. From a judgment in favor of defendant, plaintiff brings exceptions. Overruled.

John E. Hannigan, for plaintiff.

H. F. Hurlburt and Damon E. Hall, for defendant.

HAMMOND, J. At the close of the evidence the plaintiff conceded that the action could not be maintained unless there was a gross negligence on the part of the motorman or conductor. As to this, it appeared that the car was a long, open, double-truck car, having a partition at each end. Of the two rear seats as the car was going, one faced the rear dasher; and the other, being upon the other side of the partition, faced to the front. The extreme left end of this seat was occupied by the plaintiff's intestate, and the only other person upon the seat was a woman, who sat at the opposite end of it. There were a number of unoccupied seats in the car, and there was no evidence that any passenger was standing. There was no trouble with the car or the track. The plan used at the trial and at the argument before us shows that at or near the place of the accident there was a decline in the road of about 2 feet in 100, and a long, easy curve in the street and the track. The evidence as to the rate of speed at which the car was going was not very satisfactory, but it tended to show that the car might have been going at the rate of 16 miles an hour. There was no evidence of any jolt or jar, and two of the witnesses called by the plaintiff testified that at the time of the accident the car was running smoothly. There is no evidence that there was any other vehicle upon the road, and it is not argued by the plaintiff that there was any danger of collision. The accident occurred at about 8 o'clock p. m., August 8, 1899, and "it was getting towards dark." The evidence tended to show that while the car was thus moving, under these circumstances, the conductor asked the plaintiff's intestate for the fare, and that thereupon the latter rose, and, standing near the edge of the side of the car, put his hand in his right-hand trousers pocket, as if to get the money, and while doing this he leaned a little "to the left and backwards," and his body left the car, striking the ground with such force as to cause fatal injury.

Florida Cent. & P. R. Co. v. Sullivan

The plaintiff contends that the gross negligence consisted in allowing the car to go at an unusual and dangerous rate of speed, or in not warning the deceased of the danger. We are of opinion that the evidence was not sufficient to warrant a finding of gross negligence in either respect, and that a verdict for the defendant was properly ordered. This is not a case where the speed was so great as to result in any unusual motion or jar of the car. The track, although slightly curved, was very nearly straight, and the car was running smoothly. It cannot be said that, if there was any negligence on the part of the motorman, it was such as would come under any reasonable definition of "gross negligence." *Galbraith v. West End Street Railway*, 165 Mass. 572, 43 N. E. 501. And the same may be said of the failure of the conductor to tell the man to sit down, or to warn him of the danger of standing so near to the edge of a moving car. So far as respects the obvious danger to one standing in that position, the conductor may reasonably have supposed that the deceased needed no warning, but would look out for himself during the brief time required to get from his pocket the money for the fare.

Exceptions overruled.

FLORIDA CENT. & P. R. CO. v. SULLIVAN.

(*Circuit Court of Appeals, Fifth Circuit, March 3, 1903.*)

[120 Fed. Rep. 799.]

Death by Wrongful Act—Foreign Administrator—Right to Sue.

Under Rev. St. Fla. §§ 2342, 2343, authorizing actions for death by wrongful act, and providing that such an action may be brought by the widow, surviving husband, minor child, person dependent for support, or executor or administrator, an administratrix appointed in Alabama of a deceased resident of that state may sue in Florida for negligence causing the death of her intestate, though the statutes of the two states relative to the distribution of damages in such cases are dissimilar, the Florida statute governing distribution in Alabama.

Same—Railroads—Passenger—Contributory Negligence.

In an action against a railroad company for the death of a passenger, caused by the engine striking cattle on the track and being forced through the car in which deceased was riding, which car was the one provided exclusively for colored passengers, though deceased, a white person, remained in this car in violation of the rules of the company and the directions of the conductor, *held*, that deceased was not, as a matter of law, guilty of contributory negligence in riding in the car reserved for colored passengers.

Same—Recovery by Administrator.

Under Rev. St. Fla. §§ 2342, 2343, authorizing suits for wrongful death by administrator, and providing that in every such action the jury shall give such damages as the parties entitled to sue may have sustained, in an action by an administrator the jury should determine from the testimony as to the age, character, and health of deceased, and the natural expectancy of life, and estimate the amount of the net earnings and accumulations he would reasonably have acquired during such expectancy, and find the cash value of such amount at the time of the trial, and find their verdict for such sum.

Pardee, Circuit Judge, dissenting.

Florida Cent. & P. R. Co. v. Sullivan

In Error to the Circuit Court of the United States for the Southern District of Florida.

This was an action by Helen A. Sullivan, as the administratrix of the estate of John T. Sullivan, deceased, against the Florida Central & Peninsular Railroad Company. The plaintiff was a citizen of Dallas county, Ala., of which state and county John T. Sullivan, deceased, was a citizen up to the time of his death. The action was brought in the United States Circuit Court for the Southern District of Florida. The plaintiff in her pleading showed that the deceased, on the 14th day of December, 1898, was a passenger on the railroad of the defendant, and while being carried as such passenger, by reason of the negligence of the defendant and of its servants, he received injuries that resulted in his death. The proceedings presented the usual features, and resulted in a judgment in favor of the plaintiff. The case is brought here by the defendant on writ of error.

J. C. Cooper, for plaintiff in error.

A. W. Cockrell, A. W. Cockrell, Jr., R. S. Cockrell, and Wm. W. Quarles, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, after stating the case, delivered the opinion of the court.

In this case many errors are assigned, but it would be unprofitable to notice them in detail. They present substantially only three questions: (1) Can the administratrix, appointed in Alabama, maintain this suit in the state of Florida? (2) Does the matter offered by the defendant in support of its plea of contributory negligence tend to establish contributory negligence on the part of the deceased? (3) Is the case one in which the administrator can recover damages?

As to the first of these questions: The administratrix was appointed by proper proceedings in the proper court in the state of Alabama, and at the institution of her action she filed in the Circuit Court a properly authenticated copy of the letter of administration granted to her by the probate court in the matter of the deceased's estate. In the case of *Sullivan v. Honacker*, 6 Fla. 374, the Supreme Court of Florida, in discussing the law of that state, said:

"Our statute was intended to place foreign executors and administrators, mentioned in it, with respect to the institution and maintenance of suits in our courts, upon the same footing as executors or administrators who had obtained their letters testamentary or of administration in this state, whenever they should produce such letters duly obtained and properly authenticated."

It is, however, insisted by the plaintiff in error that the statutes of Florida which fix the liability of the defendant for

such injuries as are alleged to have been ~~done~~ the deceased, and which provide who may sue to recover ~~the~~ same, ~~taken~~ in connection with the provision for the distribution of ~~the~~ proceeds when recovered, compared and contrasted with the statutes in Alabama fixing similar rights, providing for the recovery of damages for such injuries, and for the distribution thereof, show such a dissimilarity and substantial conflict as to exclude this administratrix from prosecuting this action.

The law upon which the action is based is embraced in sections 2342 and 2343 of the Revised Statutes of Florida. It is unnecessary to quote the sections in full, or to give even the substance of section 2342, further than to say that it fixes the liability of persons committing such injuries. The other section provides that the action may be brought by the widow or surviving husband, as the case may be, and, where there is neither widow or husband surviving, then by the minor child or children, and where there is no widow nor husband, nor minor child or children, then by any person or persons dependent on such person killed for support, and, where there is neither of the above classes of persons to sue, then the action may be maintained by the executor or administrator, as the case may be, of the person so killed; and in every such action the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed. In the case of Florida Central and Peninsular Railway Company v. Foxworth, reported in 41 Fla. 1-77, 25 South. 338, 79 Am. St. Rep. 149, in discussing this statute, the Supreme Court of Florida used this language (on page 70, 41 Fla., page 347, 25 South., 79 Am. St. Rep. 149):

“Our statute, unlike the English one, by giving a right of action to the administrator of the deceased, imposes the liability whether there be a family to compensate or not. Its effect was to abrogate the common-law rule, for which, if any reason ever existed, the world has long since outgrown it, denying damages for human life, and to affix a penalty, by an award of pecuniary damages, for a careless or wrongful act resulting in another's death. In authorizing suits to enforce this liability, our act gives the right to those who are supposed to suffer most by the death of the deceased, but on no account does the action fail for want of a person to sue, as with Lord Campbell's act.”

As to the objection grounded on the different disposition of the fund by the laws of Florida and the laws of Alabama, it is enough to say that the law of Florida which gives the right, and gives direction to the proceeds of such a recovery, is the law of the case both as to the recovery and to the disposition of the proceeds. But it would be a reproach to the laws of Alabama to say that, when the money recovered in such an action to this came into the hands of the administratrix, the courts of that state could not compel its distribution

Florida Cent. & P. R. Co. v. Sullivan

as the law of Florida applicable thereto directs. *Dennick v. Railroad Co.*, 103 U. S. 11-21, 26 L. Ed. 439; *Stewart v. Baltimore & Ohio R. R. Co.*, 168 U. S. 445, 18 L. Ed. 105, 42 L. Ed. 537.

In reference to the second question: The bill of exception showed that:

“The plaintiff introduced evidence tending to show that on the date of the accident, the deceased, John T. Sullivan, was an enlisted soldier in the United States Army, a member of Battery D., Fifth Artillery, and was going from St. Augustine, Fla., through Jacksonville to New Orleans, La., and that he got upon the train of the defendant at Jacksonville, on the morning of the accident, with 23 other soldiers, members of the company, all of whom were traveling upon one ticket to the party, and held by an officer in charge, and that, at the time the deceased and the rest of the party of soldiers got upon the train at Jacksonville, there were not seats enough in the regular passenger coach, to wit, the second car in the rear of the baggage car, for the entire party to obtain seats. That the train was composed of engine, baggage car, colored passenger coach, white passenger coach, Pullman car, and a special or private car; and that at the time of the accident the deceased, John T. Sullivan, and another soldier, known as Henry Lowenberg, were sitting in the car known as the ‘colored car,’ a car provided for colored persons; and that the train was running on a down grade about 45 or 50 miles an hour, and struck some cattle on the track, and that the engine was forced into the car on which Sullivan was riding, and the people on the left of the car were crushed under the boiler, causing the death of Sullivan.

“The defendant introduced evidence that some years before, and at the time of the alleged accident, the defendant had issued a rule or regulation providing for separate cars on its train for white passengers and colored passengers, requiring white passengers while traveling on its trains to take seats in and remain in the car for white passengers, and colored passengers to take seats in and remain in the car for colored passengers, and not to allow white passengers to take seats in and remain in the cars for colored passengers, or colored passengers to take seats in or remain in the car for white passengers, while riding on the trains of the defendant, and that these separate cars were provided exclusively for seating white and colored persons, respectively, in making up trains of the defendant; and that upon the train upon which the deceased, John T. Sullivan, was a passenger at the time of the accident, there was a car provided exclusively for colored passengers, and a car provided exclusively for white passengers; and that John T. Sullivan was a white person; and that when the train left Jacksonville the deceased was sitting in the car provided for white persons, and afterwards went into the car in the train provided for colored persons,

Florida Cent. & P. R. Co. v. Sullivan

with two or three soldiers of the company (and that John T. Sullivan and the two or three soldiers with him were boisterous, talked loud, drinking, and disturbing passengers), and the defendant's conductor and other employees of the defendant upon the train several times directed John T. Sullivan, on the date of the accident, before the same, and on one occasion immediately before, to leave the said car provided for colored persons, in which John T. Sullivan was, and go into the car provided for white persons, and the conductor informed him that the rules and regulations of the defendant company required white persons to sit and be in the car provided for white persons, and not to travel in the car provided for colored persons in which Sullivan was sitting and traveling, but Sullivan refused to leave the car provided for colored persons, and would not and did not return to the car provided for white persons; and that at the time of the accident John T. Sullivan was still sitting and riding in the car so provided for colored persons, on the left-hand side of the same, about the middle of the car. That there was sufficient room in the car provided for white persons for John T. Sullivan to obtain a seat in the same; and that each time the conductor and other employees of the defendant company directed Sullivan to go into the car for white persons there was room in the car for Sullivan to obtain a seat in the car; and that the car provided for colored persons was immediately behind the baggage car in the train, and nearer to the engine than the car provided for white persons; and that this was the order in which the cars were usually placed in the defendant's train; and that the train on which Sullivan was riding consisted of an engine, immediately behind which was a baggage car, then a car for colored persons, then followed a car for white persons, then followed a Pullman car, and behind the Pullman car was a special car. That the accident was caused by the engine striking cattle on the track; that the engine was turned around, the baggage car was thrown from the track and damaged, but not destroyed, and the engine and boiler were forced back into the car provided for colored persons, and the front half on the left-hand side of the car was destroyed for one-half of the length of the car; and that none of the persons sitting in the rear of the car, and none of the persons sitting in the car for white persons, were injured at all; but that the deceased, who was sitting on the left-hand side of the car provided for colored persons, about the middle of the car, was killed, and several colored persons on the left-hand side and on the front of the car provided for colored persons were killed or injured."

On this issue the Circuit Court, in the charge to the jury, used this language:

"The next important question for consideration is the plea of contributory negligence. This question should be sub-

mitted to the jury as a question of fact only when it appears, by a reasonable construction of the facts proven, considering them most favorably in behalf of the person presenting them, it might be found that the deceased was guilty of some conduct of which a reasonable, prudent man would not have been guilty. This is to be judged of by the acts of the deceased, and the prospect of danger or otherwise, at the time of such acts, and not by the result. In this case it is contended that the deceased was guilty of negligence in remaining in the car set aside for colored passengers; not that the car, on account of its being so set apart for that purpose, was any more exposed to danger, but because it was the forward car nearer the engine. But it is not contended that he was guilty of negligence in being in the forward car of a train, but on account of its being the forward car and at the same time the colored car.

“In all the cases cited, or which I have been able to find, in which passengers have been held to be guilty of negligence on account of the place or position in which they were riding, it has been because the place or position, per se, was one of danger—on the pilot, in the baggage car, or on the platform—where passengers were prohibited from riding on account of being exposed to greater danger, and not on account of their belonging to a different class.

“It is not considered necessary to pass upon the constitutionality or validity of the statute of the state, or the regulations of the corporation under which it is claimed the passenger was prohibited from occupying the car where he was, for the purpose for which it was enacted or established, but it was not so enacted or established for the protection of passengers from danger, and the defendant is estopped, by the law which requires equal accommodations for both classes, from claiming that the colored coach was a place of danger, and that a white person was, by taking a seat there, placing himself in a place of danger, and removing himself from the right of the protection of the carrier. It cannot be claimed that the colored coach was a place of danger of itself, nor can it be considered that the forward coach was a place of danger, nor that, when both of the peculiarities are combined, can it so be considered; and, in order to find that the deceased was guilty of contributory negligence, it would be necessary to so find, which, under the most favorable consideration of the testimony, the court considers should not be done. I therefore take the responsibility of relieving you from the consideration of the plea of contributory negligence, and instruct you that you exclude from your consideration all testimony relating to the deceased being in the colored coach, or relating to the law, rules, or regulations concerning the separation of the classes and designation of different cars.”

We concur in the view of the learned judge of the Circuit

Florida Cent. & P. R. Co. v. Sullivan

Court, and approve his action in withdrawing this issue from the jury. *Railroad Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506; *Northern Pacific R. R. Co. v. Egeland*, 163 U. S. 93, 16 Sup. Ct. 975, 41 L. Ed. 82; *Kresanowski v. Northern Pacific R. R. Co. (C. C.)* 18 Fed. 229.

As to the third question: We find this paragraph in the brief filed by counsel for the plaintiff in error:

"The statute in Florida authorizing the administrator to sue for death of his intestate does not designate any person as the beneficiary for whose benefit the recovery is had, and therefore such a recovery is a general asset of the state, and is applicable to the payment of debts and other administration purposes."

The language of the statute is:

"And in every such action the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed."

In the *Foxworth Case*, *supra*, the Supreme Court of Florida said:

"It is a difficult matter to lay down general rules by which to estimate damages in this class of cases. Those which occur to us as being applicable to this case (the action was by the widow), so far as we can judge from the evidence in the record, are as follows: In estimating the pecuniary loss sustained by the widow, the jury may properly take into consideration her loss of the comfort, protection, and society of the husband in the light of all the evidence in the case relating to the character, habits, and conduct of the husband as husband, and to the marital relations between the parties at the time of and prior to his death; and they may also consider his services in assisting her in the care of the family, if any; but the widow is not entitled to recover for her mental anxiety or distress over the death of her husband, nor for his mental or physical suffering from the result of the injury. She is also entitled to recover reasonable compensation for the loss of support which her husband was legally bound to give her, based upon his probable future earnings and other acquisitions, and the situation or condition in society which he would probably have occupied according to his past history in that respect, and his reasonable expectations in the future; his earnings and acquisitions to be estimated upon the basis of general health, business capacity, habits, experience, energy, and his present and future prospects for business success at the time of his death; all these elements to be based upon the probable joint lives of herself and husband. She is also entitled to compensation for loss of what she might reasonably have expected to receive in the way of dower or legacies from her husband's estate in case her life's expectancy be greater than his. The sum total of all these elements to be reduced to a money value, and its present worth to be given as damages."

Pennsylvania Co. v. Lenhart

In analogy to the foregoing, it would be easy to define the elements of recovery in an action by a minor child, or by one dependent upon the deceased for support, and it would seem to be not difficult to draw from the foregoing, as the trial judge did, instructions to the jury as to the elements of recovery in this case, where the suit was by the administrator for the recovery of a general asset of the estate, applicable to the payment of debts and other administration purposes.

Upon this subject the trial judge instructed the jury, substantially, that they were to determine, from their "own best, honest, and enlightened judgment" from the testimony before them of the age, character, and health of the deceased, the period of his natural expectancy of life at the time immediately preceding his death, and estimate the amount of the net earnings and accumulations he would reasonably have acquired during the period of such expectancy, and then find the cash value of this amount at the time of the trial, according to well-recognized rules, and, for this present cash value of the estimated reasonable net earnings and acquisitions of the deceased, find their verdict in favor of the plaintiff.

Our examination of the case has discovered no error in the action of the Circuit Court for which the judgment should be reversed, and it is therefore affirmed.

PARDEE, Circuit Judge (dissenting). I think the court erred in taking away from the jury the question of contributory negligence. Contrary to the rules of the company, and in violation of the directions and orders of the company's agents, the deceased, Sullivan, a white person, persisted in remaining in the car set apart for colored people, which, from its location in the train and in the nature of things, and as the result showed, was a place of greater danger than the place set apart by the rules of the company for Sullivan to occupy.

Conceding it was the duty of the company to provide a place in the train for colored people, of equal accommodations and equal safety with that provided for white persons, yet this was not a duty that the company owed to Sullivan. I do not care to elaborate.

The question should have been submitted to the jury under all the evidence adduced in the case, with proper instructions as to the rules of law concerning contributory negligence in personal injury cases.

PENNSYLVANIA CO. v. LENHART.

(Circuit Court of Appeals, Seventh Circuit, January 6, 1903.)

[120 Fed. Rep. 61.]

Carriers—Ejection of Passenger—Breach of Contract.

Plaintiff held a mileage ticket good on defendant's railroad, which provided that it must be presented at the ticket office at the starting point, where the agent would issue a mileage exchange ticket for the

Pennsylvania Co. v. Lenhart

desired trip in exchange for coupons from 'the book. It also provided that conductors might issue such exchange tickets, where the holder took the train at a station where there was no ticket office, or where such office was closed. Plaintiff presented his book to the agent at a station, and desired an exchange ticket, but the agent was not supplied with such tickets, and promised to explain such fact to the conductor. Plaintiff got on board, and presented his book to the conductor, who refused to give him an exchange ticket, and on plaintiff's refusal to pay fare ejected him at the next station. The ticket office there was closed, and plaintiff called the conductor's attention to such fact, and desired to again enter the train, but was refused: *held*, that such action was a breach of the contract on the part of defendant, which rendered it liable in damages for plaintiff's wrongful ejection.

Same—Duty to Pay Fare to Prevent Threatened Wrongful Ejection.

Plaintiff was not required to pay his fare when demanded and trust to its recovery by suit for the purpose of saving defendant from the consequences of its threatened breach of contract if he did not, but having presented a legal ticket, was entitled to stand upon his rights under the contract.

Same—Action for Damages—Evidence.

In an action to recover damages for such breach of contract and wrongful ejection it was error to permit plaintiff to testify to transactions and conversations between him and a ticket agent after his ejection or between him and the conductor of the succeeding train, such evidence not being relevant to the issues.

Same.

A railroad company is liable in damages, without notice or demand, for the action of a conductor in wrongfully ejecting a passenger, where the conductor acted without malice, and in an action to recover such damages evidence of negotiations between the parties for a settlement is not admissible on the theory that it shows a ratification by the company of the conductor's action.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Lenhart brought this action to recover damages for ejection from a train and for refusal to allow him to re-enter. He was the holder of a mileage book issued by the Pennsylvania and other railroad companies jointly. The second clause of the mutual contract between Lenhart and the railroad companies read as follows: "That this ticket is not good for passage on trains, but must be presented at ticket office at starting point, where the agent will issue in exchange for mileage coupons a mileage exchange ticket, good only for continuous passage on train to be designated thereon, commencing on date stamped on back thereof, and will detach in consecutive order one coupon for each mile or fraction thereof, except that for any distance less than five miles not less than five coupons will be detached. Conductors of trains may issue such exchange tickets upon surrender of coupons from this mileage ticket when the owner of the mileage ticket takes a train at a station where there is no ticket office, or where the ticket office is closed; or will detach and accept mileage coupons to the terminal point of his run only, without issuing exchange ticket; and it will then be necessary for owner of mileage ticket to obtain exchange ticket of ticket

Pennsylvania Co. v. Lenhart

agent at said point as provided for above, otherwise this ticket will not be accepted for passage from point referred to on that trip." October 8, 1897, Lenhart desired to ride on the Pennsylvania Railroad from Tiffin to Toledo, Ohio. The agent at Tiffin had no exchange tickets. August 21, 1897, the Pennsylvania Company had instructed all its agents that a change had been made in the form of mileage tickets issued by it; and the agent at Tiffin, by inadvertence, had sent to the proper general office of the company not only all the exchange tickets of the company's own form, but also those applicable to joint mileage books like Lenhart's. Down to October 8, 1897, the company had failed to supply the agent at Tiffin with the necessary exchange tickets. Lenhart presented his mileage book, containing sufficient coupons, and asked for an exchange ticket to Toledo. The agent was unable to furnish it, and explained why. Lenhart thereupon claimed the right to ride by surrendering coupons on the train conformably to clause 2 of the contract, and requested the agent to explain the situation to the conductor when the train arrived. This the agent agreed to do. Lenhart testified that he saw the agent speak to the conductor, but did not hear what was said, except the agent's remark, "That is the man," as he pointed out Lenhart to the conductor; and that he got upon the train in their presence without objection. The agent and conductor testified that all that took place between them was that the agent asked the conductor if he had exchange tickets for joint mileage, and the conductor answered, "Yes." On the train the conductor refused to accept mileage coupons, and gave as his reason, "I got positive instructions only a few days ago not to accept any mileage on trains." Lenhart then read to the conductor clause 2 of the contract, stated that the company had failed to provide him with an exchange ticket at Tiffin, and insisted upon his right to be carried as a passenger. The conductor thereupon telegraphed the "ticket receiver" (his superior officer, with authority to act for the company), and was instructed to have Lenhart pay his fare and take up the matter later with the passenger department for adjustment. Lenhart refused to pay, and the conductor said, "Then we will have to put you off." Thereupon Lenhart, under protest, left the train at Gibsonberg, a regular station. Lenhart at once went to the ticket office, and found it closed. He then came back to the conductor, called his attention to the fact that the ticket office was closed, and demanded that he be permitted to re-enter the train and ride. The conductor refused. Lenhart proceeded to Toledo, his original destination, by the next regular passenger train, paying his fare in cash. Under its assignments, the company's principal contentions are that the conductor was right in ejecting Lenhart, and that Lenhart, after seeing that the conductor would not accept mileage coupons, should have paid a cash fare, and then have sued for

Pennsylvania Co. *v.* Lenhart

its recovery, if it was unlawfully exacted. Other question are strongly urged concerning the admission of evidence, the facts in relation to which are sufficiently stated in the opinion.

Before JENKINS, GROSSCUP, and BAKER, Circuit Judges.

Geo. Willard, for plaintiff in error.

E. A. Shurburne, for defendant in error.

BAKER, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

Lenhart paid for and received a binding contract to be carried 5,000 miles if he complied with the conditions on his part. By clause 2 he agreed not to present mileage coupons for passage on trains unless he embarked at a station where there was no ticket office, or where the ticket office was closed. On its part the company covenanted that it either would maintain a ticket office at every station, and have that ticket office open a proper length of time before each train, and ready to supply him with exchange tickets for mileage coupons, or would accept the coupons on the trains. The agent at Tiffin had inadvertently returned to headquarters his supply of exchange tickets. But for eight weeks his superior officer had failed to send them back or supply others. This is not a case where the ticket agent furnishes an intending passenger with the wrong ticket, which the passenger carelessly accepts, and then demands that the conductor shall take his explanation as paramount to the company's rules. By its contract the company had agreed that coupons should or should not be good on trains, depending on the existence or nonexistence of certain facts when the holder of the coupons duly presented them at the station. To the conductor was delegated the authority to ascertain the facts for the company. He was not a mere automaton. He was as much bound to exercise his intelligence and judgment in determining Lenhart's right to be on the train as in deciding whether money tendered him was counterfeit, or a seemingly regular ticket was forged. The company could not withdraw that authority, and command the conductor "not to accept any mileage on trains," and then justify its ejection on the ground that the conductor was simply obeying instructions. But the conductor did not rest upon his general instructions. He communicated with his superior officer, and was directed to eject Lenhart unless he paid a cash fare. The breach of the contract did not arise at Tiffin. Nothing occurred there except the establishment of the facts on which accrued Lenhart's right to have coupons accepted on the train. After Lenhart was rightfully on the train, the breach was committed. The company, therefore, is liable for ejecting Lenhart at Gibsonberg, and for refusing to permit him to re-enter the train. Railroad Co. *v.* Winter's Adm'r, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71; Railroad Co. *v.* Russ, 6 C. C. A. 597, 57 Fed. 822;

Pennsylvania Co. v. Lenhart

Railroad Co. v. Pauson, 17 L. R. A. 287, 70 Fed. 585, 30 L. R. A. 730.

Lenhart paid for and presented a legal ticket. To the proposition that he could not stand upon his rights, but was compelled, for the sake of saving the company from the consequences of its threatened breach of contract, to pay his fare again in cash, if he had it, and then sue for its recovery, we do not yield our assent. After a breach of contract has been committed, the injured party is not allowed to aggravate his damages, and is required to use reasonable diligence to minimize them. But beforehand one is not forced to abandon his legal right under a contract, and waive the damages that may arise from its breach, in order to induce his adversary not to proceed as he wrongfully claims is his right.

Lenhart was permitted, over the company's objection, to detail occurrences between him and the ticket agent at Gibsonberg after the train from which he had been ejected had departed. Lenhart presented his mileage book to the agent and demanded an exchange ticket. The agent had none. Lenhart then read to the agent clause 2 of the contract, and requested him to have the conductor of the next train issue an exchange ticket. The agent declined to take up the matter with the conductor. Lenhart was also allowed to testify to his differences with the conductor of the next train, how he tendered coupons and insisted upon his right to be carried, how the conductor refused to accept coupons, and demanded a cash fare, and how Lenhart paid it under protest. The transactions counted on the declaration were complete when the first train left Gibsonberg. Lenhart's subsequent controversies with the ticket agent at Gibsonberg and with the conductor of the second train were incompetent. This evidence might have supported an action for the recovery of the cash fare paid under protest, but was utterly irrelevant to the causes of action pleaded and proven. It is impossible to determine from the record how influential this evidence was in getting the jury to return the verdict they did.

It was also prejudicial error to permit Lenhart to testify, over the company's objection, to the oral negotiations between himself and the officers of the company looking to a settlement. The ruling is sought to be upheld on the ground that the evidence tended to sustain an allegation in the declaration that the company, after full notice of the conductor's intentionally malicious acts, ratified and adopted them. But there was no evidence that the conductor acted maliciously. Lenhart himself testified that he had no reason to believe that the conductor was not acting in good faith. For what the conductor did without actual malice, and within the scope of his employment, the company was liable without notice, and subject to an action without demand. Along the same line Lenhart was permitted to introduce in evidence

Larkin v. Chicago & G. W. Ry. Co

a series of letters between himself and officers of the company on the matter of a compromise. If this were the only error assigned, it might be doubtful, on account of the uncertainty of the record with respect to the company's objections and exceptions thereto, whether the judgment should be reversed.

Further error was committed in allowing Lenhart to give hearsay in regard to losing a sale at Toledo.

The judgment is reversed, with the direction to order a new trial.

LARKIN v. CHICAGO & G. W. RY. CO.

(*Supreme Court of Iowa, Dec. 20, 1902.*)

[92 N. W. Rep. 891.]

Injury to Passenger—Collision—Negligence—Evidence.

Where evidence in an action for injury to a passenger from collision tended to show that the force of the collision threw the passengers forward at the front end of the car, testimony of a passenger that, as he got up, he "noticed the boys,—the blood running from their heads,"—is admissible, as helping to indicate the violence of the impact producing plaintiff's injury.

Same—Same—Rebutting Testimony.

Whether the prima facie case of negligence made out by injury to a passenger by a train breaking in two parts, and the parts afterwards colliding, is overcome, is a question for the jury; there being testimony tending to show that the separation was occasioned by a broken pin, and the pin not being produced, and no one undertaking to testify to its condition; the switchmen who made up the train, and the brakeman who first discovered its separation, not being witnesses, though there was testimony of inspection on the trip by employees passing along the train with a torch or lantern.

Same—Degree of Care—Instruction.*

A charge that common carriers of persons are required to do all that human care, vigilance, and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accidents to passengers, sufficiently and clearly covers the thought which would be expressed were the words "and consistent with the practical prosecution of their business" inserted after the word "adopted."

Appeal from district court, Union county; W. H. Tedford, Judge.

Action at law to recover damages for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Cummins, Hewitt & Wright and P. C. Winters, for appellant.

J. G. Bull, for appellee.

WEAVER, J. Plaintiff, being in custody of certain live stock in the course of transportation over defendant's road, was riding in the caboose of a freight train. As the train was approaching the city of Marshalltown from the south, it was by some accident broken or separated in two parts; and, as

*See foot-note appended to *Clerc v. Morgan's Louisiana & T. R. Co.* (La.), 4 R. R. R. 690, 27 Am. & Eng. R. Cas., N. S., 690.

Larkin v. Chicago & G. W. Ry. Co

the forward section was brought to a stop for the crossing of another railroad, the rear section overtook it, causing a collision, in which plaintiff claims to have received a severe injury. He alleges that said accident and injury were occasioned by negligence and want of skill on the part of the defendant, and without negligence on his own part. The fact that plaintiff was a passenger upon defendant's train under the circumstances stated, that the train did break in two, that a collision occurred between the sections, and that plaintiff did receive some degree of injury therein, is not seriously disputed; but the defendant contends that in the making up and management of its train it exercised all due care and vigilance for the safety of its passengers, and that there is no evidence to sustain the verdict of the jury. Complaint is also made of certain rulings of the trial court in the course of the trial, and of the charge to the jury.

1. It is first urged that the evidence does not sustain plaintiff's claim as to the serious and permanent character of the injuries sustained by him. It is sufficient to say that upon this branch of the case the plaintiff was corroborated by several witnesses, including one or more physicians who examined or treated him, and the jury were justified in their verdict in this respect. The amount of the damages found (\$1,183) does not indicate an extravagant allowance, even if the jury failed to find the plaintiff's injuries of a permanent character. If the defendant is chargeable with negligence, as the jury has found, the only question left is the amount of plaintiff's recovery. There can be no doubt, under the evidence, that he sustained painful bruises, and was thereby put to inconvenience and loss of time, extending over a protracted period. Compensation for physical and mental suffering cannot be measured by any unvarying mathematical rule or standard. For want of a better term, we say it must be "reasonable," but what is reasonable is for the jury to ascertain and assess under the facts in each particular case. That finding, if not so flagrant and excessive as to clearly indicate prejudice or passion, the court will not disturb.

2. One Donnor testified as a witness in plaintiff's behalf that he was a passenger in the caboose at the time of the collision, and described the circumstances attending the accident. In reply to the question, "How did it affect the car you were in?" he answered, among other things, "When I got up, I began to work out, and sat down on a seat, and I noticed the boys,—the blood running from their heads." The defendant moved to strike the latter clause of this answer as "incompetent, immaterial, and irrelevant," and to the ruling of the court denying said motion an exception is taken. We see no error in this ruling. The testimony tended to show that the force of the collision threw the passengers forward "all in a bunch together in the front end of the car," and the answer

Larkin v. Chicago & G. W. Ry. Co

of this witness helped to indicate the violence of the impact which produced the alleged injury to the plaintiff.

3. The third and fourth propositions argued by counsel are to the effect that the exercise of due care by the defendant was conclusively established by the evidence, and the court should have directed a verdict accordingly. Counsel say: "The plaintiff relied wholly, and the question was submitted to the jury, upon the prima facie case that was made by proof of the happening of the accident, and as to which there was in fact no dispute in the evidence. We do not dispute the proposition that, in case of an injury to a passenger, proof of such injury, or proof of the happening of the accident which caused it, makes a prima facie case of negligence upon the part of the carrier; i. e., creates a presumption of negligence, which must be overcome by proof or evidence of care. This case, therefore, upon this proposition, resolves itself into two questions, viz.: First. How much proof is necessary to rebut such a prima facie case, or to rebut a mere legal presumption of negligence? And, second, when the plaintiff relies wholly upon such legal presumption, and the defendant introduces pertinent and important testimony indicating care, and tending strongly to show that no negligence occurred, is the question as to whether the legal presumption is overcome by the evidence of care one of law for the court, or of fact for the jury?" We think it hardly correct to say that plaintiff "relied wholly" upon the mere presumption which obtains from the occurrence of the injury. It is true that he did not undertake to point out the specific defect which caused the break in the train, but there was evidence tending to establish facts which plaintiff was entitled to have the jury consider in aid of the presumption referred to. For instance, there was testimony from which the jury would be justified in finding that the train had been separated by reason of a broken link, and other testimony tending to show that the separation was occasioned by a broken pin. The link was produced by the defendant upon the trial, though not offered in evidence; and defendant claims that it was a standard link of proper weight, and showed a clean, fresh break, without any indication of a defect or flaw. But the pin was not produced, and no one undertakes to testify to its condition or freedom from defects. The switchmen who made up the train, and the brakeman who first discovered its separation, were not witnesses; and, while certain employees of the defendant testified that on one or more occasions during the trip they inspected the couplings by passing along the train with torch or lantern, it is obvious that there may have been defects in links or pins which proper inspection by the switchmen would have revealed, but would not be apparent upon an inspection by trainmen after the train was made up and coupled together. Moreover, one of the links making the coupling seems to have been lost entirely. At any rate, it is

Larkin v. Chicago & G. W. Ry. Co

not accounted for in the testimony. This is not to be understood as holding or suggesting that the jury was justified in indulging in conjecture as to any specific defect in the coupling, but simply that, defendant having assumed the burden of overcoming the prima facie or presumptive case of negligence which it conceded had been established, it remained a question for the jury to say whether the showing of diligence and care in respect to the coupling was sufficient to relieve the company from the effect of such presumption. *Brann v. Railroad Co.*, 53 Iowa, 595, 6 N. W. 5, 36 Am. Rep. 243. Taking this view of the testimony, it is not necessary here to decide whether, in any case where a passenger rests his right to recover damages solely upon the presumption of negligence arising from his injury, a verdict can be directed against him because of the strength of the showing of due care on part of the defendant. It is proper, however, to observe that the right of a plaintiff to recover for injuries received rests upon the proof of facts from which the conclusion or finding of negligence may properly be derived. This being done, it rests upon the defendant by other evidence to disprove the existence of the alleged facts tending to show its negligence, or to prove the existence of other facts affirmatively establishing its exercise of due care. These are issues of fact to be determined by consideration of the testimony offered by the respective parties, the credibility of witnesses, and all the facts and circumstances developed on the trial having any bearing upon the truth of the matters in controversy. To say the least, if it should require a peculiarly strong and conclusive array of proof to justify the court in withdrawing such an issue from the jury. The question thus presented involves something more than burden of proof or order of trial. *Greenfield v. Railroad Co.*, 83 Iowa, 270, 49 N. W. 95; *Bartelott v. Bank*, 119 Ill. 259, 9 N. E. 898. There was no error in refusing to direct a verdict for the defendant.

4. Error is assigned upon the first paragraph of the court's charge to the jury, which was as follows:

"The jury is instructed that common carriers of persons are required to do all that human care, vigilance, and foresight can reasonably do, in view of the character and mode of conveyance adopted, to prevent accidents to passengers.

"Therefore you are instructed in this case that when the defendant received the plaintiff upon his car as a passenger for hire upon the 13th of December, 1898, that the defendant was bound to make up its train, couple its cars, and manage and control the same, in such a careful, skillful, and prudent manner as to carry the plaintiff with reasonable safety as such passenger.

"You are therefore instructed that if you find the plaintiff was injured by reason of the negligent acts of the defendant's agents or servants, whereby they used a defective link or pin to couple said cars; that human care, vigilance, and foresight

Larkin v. Chicago & G. W. Ry. Co

could have reasonably discovered such defect; and you further find that the defendant did not contribute to such injury, and was using all reasonable care and caution to avoid said injury, —then your verdict would be for the plaintiff.”

In support of this objection, counsel quote the rule in 1 Fet. Carr. p. 13: “For the safety of their passengers, common carriers are required to exercise the highest degree of care reasonably to be expected from human vigilance and foresight, in view of the mode and character of the conveyance adopted, *and consistent with the practical prosecution of their business.*” It is insisted that the omission of the italicized words from the instructions operates as a misdirection of the jury. It seem to us, however, that the very thought expressed by these words is sufficiently and clearly covered by the language actually used by the court. When the jury’s attention is directed to the character and mode of the conveyance, this has distinct reference to the “practical prosecution” of the carrier’s business, and no juror of average intelligence could be thereby misled. The lack of merit in the objection here being considered is made evident when we note that in the next following paragraph of the charge of the court instructed the jury that:

“On the other hand, you are instructed that the defendant is not required to use the utmost degree of care which the human mind is capable of inventing, but is only required to use the highest degree of care and diligence which is reasonably practicable under the circumstances of the case in question. The defendant was not an insurer against accidents, nor is the defendant compelled to insure the absolute safety of it passengers. What the defendant was required to do was to do all that human care, vigilance, and foresight could reasonably do, consistent with the practical operation of the road, in order to prevent injury to the plaintiff, its passenger.”

This states the rule precisely as contended for by the defendant, and there is no conflict or inconsistency between the paragraphs.

It is further said in argument that the last clause of the first paragraph of the charge above quoted “is so confused in statement that we are at a loss to understand what meaning the court sought to convey. We infer that the court meant to say that, if human vigilance and foresight could have discovered the defect in the link or pin, that notwithstanding the defendant did not contribute to such injury, and was using all reasonable care to avoid it, still the defendant would be liable. Possibly the word ‘and’ was inadvertently omitted in the fifth line of paragraph 3, so that the sentence should have read, ‘and that human care, etc.’” This criticism is ingenious rather than ingenuous. The omission of the conjunction “and” between successive clauses of a compound sentence has the sanction of common usage by writers of

Central of Georgia Ry. Co. *v.* Dorsey

recognized authority, and no one, whether learned or unlearned, has any difficulty in understanding what is meant. The thought of the trial court embodied in the instruction is too clear to require interpretation, and is in strict accord with appellant's own interpretation of the law of the case.

Other objections argued by counsel are necessarily governed by the conclusions already announced, and none of them can be sustained.

The judgment of the district court is affirmed.

CENTRAL OF GEORGIA RY. CO. *v.* DORSEY.

(*Supreme Court of Georgia, Dec. 11, 1902.*)

[42 S. E. Rep. 1024.]

Remote Damages.

Damages traceable in some measure to a tortious act, but resulting chiefly from other and contingent circumstances, and not the legal or natural consequence of the act, are too remote to be the basis of recovery against the wrongdoer.

Same—Female Passenger Obligated to Walk at Night without Escort.*

It follows that, where a female passenger on a railroad train was carried beyond her station, and the train stopped near the next station, and the passenger walked at night, and without escort, through the town, to the house of a friend in that town, she would not be allowed to show that she was frightened by hearing loud voices of negro men, who were walking behind her, unless it is also made to appear that the locality was one in which such occasion for fright was likely to occur, and that the railroad company had notice of this.

Continuing Tort—Jurisdiction.

Where a continuous tort by a railroad company is commenced in one county and completed in another, the principal damage being done in the latter county, the courts of that county have jurisdiction of the cause of action.

(Syllabus by the Court.)

Error from superior court, Henry county; W. A. Brown, Judge pro hac.

Action by N. E. Dorsey against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

R. L. Berner and Hall & Cleveland, for plaintiff in error.

W. T. Dickens, G. W. Bryan, and L. R. Ray, for defendant in error.

SIMMONS, C. J. It appears from the record that Mrs. Dorsey purchased a ticket of the Central of Georgia Railway Company at East Point, Ga., one of its stations, for transportation to Lovejoy, Ga., another of its stations,—a distance of about 16 miles. The conductor at East Point stood at the

*See foot-note appended to *St. Louis, I. M. & S. Ry. Co. v. Power* (Ark.), 16 Am. & Eng. R. Cas., N. S., 1; note appended to *Texarkana, etc., Ry. Co. v. Anderson* (Ark.), 18 Am. & Eng. R. Cas., N. S., 37.

Central of Georgia Ry. Co. v. Dorsey

front end of the ladies' coach, and Mrs. Dorsey boarded the coach at the rear end. During the passage of the train between the two points, the conductor failed to discover Mrs. Dorsey, and she failed to call his attention to her presence on the train, or that her destination was Lovejoy. The train was not stopped at Lovejoy for her to get off. After she discovered that she had passed her destination, she requested another passenger to find the conductor. The fellow passenger did so. The conductor then stopped the train. Before the stop was made, the train had run a short distance beyond the station at Hampton, the station on the road which was next beyond Lovejoy. The conductor assisted Mrs. Dorsey off, and she undertook to walk to the house of a friend, who resided in the town of Hampton. In her testimony she said that she walked back to the station, and there was no light there. She then went on along the road leading to her friend's house. On her way to the station she heard loud voices of people, whom she supposed to be negroes, and after she left the station these negroes followed her, talking loudly. She became very much frightened and alarmed on account of the voices of the negroes and their following her. At a cross-street she turned toward the house of her friend, and the negroes took another street. This testimony as to her fright because of the voices of the negroes and their following her was objected to by defendant's counsel, and the objections overruled by the court. The jury returned a verdict for the plaintiff. The defendant moved for a new trial, and the admission of the evidence just referred to was made one of the grounds of the motion. The court overruled the motion, and the movant excepted.

1, 2. This is the third time this case has been before this court (106 Ga. 826, 32 S. E. 873; 113 Ga. 564, 38 S. E. 958), but the last trial seems to have been the first at which objection was made to the evidence as to the plaintiff's hearing the negroes following her, and as to her consequent fright, and the damages resulting to her therefrom. The principal objection made to this evidence was that it did not show such damages as could be recovered, because the damages sought to be proved were too remote and consequential in character. We think this objection well founded. Our Civil Code declares (sections 3912, 3913): "If the damages are only the imaginary or possible result of the tortious act, or other and contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote to be the basis of recovery against the wrong-doer." "Damages which are the legal and natural result of the act done, though contingent to some extent, are not too remote to be recovered. But damages traceable to the act, but not its legal or material consequence, are too remote and contingent." The damages claimed by the plaintiff as arising from her being frightened

Central of Georgia Ry. Co. *v.* Dorsey

by the negroes' voices were imaginary and contingent, and were not the legal or natural result of the tortious act of the defendant. It was not shown or intimated in the evidence that the defendant or its agent knew, or had any reason to believe, that there were any negroes at the station or in the vicinity, or that disorder was prevalent or common in the neighborhood, or that it was the custom of negroes to congregate there, and talk in a boisterous manner. The defendant was not bound for anything which happened to Mrs. Dorsey, after she had left the train, which was not the natural and probable result of its putting her off at that place. It was no more bound to pay for her nervousness and fright occasioned by the voices of negroes than if she had claimed to have seen a ghost and been thereby frightened. Upon this question, see *Hopk. Pers. Inj.* § 14 et seq., where all of the decisions of this court upon the subject are collected. Under these decisions we are clear that the evidence was, in this case, inadmissible, and that the court erred in overruling the objections thereto. Defendant in error relied mainly upon decisions made in other states in regard to the question of proximate cause; but, whatever may be the rule in those states, this court is bound by the sections of the Code above quoted, and by the decisions made thereunder. Of course, we do not intend to hold that plaintiff is not entitled to recover for fatigue resulting from her walk to her friend's house and damages resulting therefrom. We do hold simply that she cannot recover for damages resulting from the fright she so graphically described, arising from hearing the negroes' voices, when it does not appear that the locality was one in which such occasion for fright was likely to occur, or that the defendant had any notice of this. What has been just said disposes of the question made by the motion for new trial in regard to the admission of evidence and to the refusal to give in charge a request substantially embodying the law laid down in the first headnote.

3. It appears that the station at which the plaintiff expected to leave the train, and for which she had purchased a ticket, was in Clayton county, while the station near which she was put off was in Henry county, in which latter county the suit was brought. The defendant requested the court to charge the jury as follows: "A party must sue for a tort in the county where the tort is committed, and, under the facts of the case, the plaintiff cannot recover for any damages for any tort that occurred in Clayton county. If Hampton is in Henry county, the plaintiff cannot recover for being carried beyond Lovejoy, or for not putting her off at Lovejoy." In our opinion, there was no error in refusing to give this charge. While, under the plaintiff's theory, it was a tort not to stop the train at Lovejoy, and this tort was committed in Clayton county, the carrying her on beyond Hampton made it all a continuous tort. We think plaintiff might have

Thomas v. Southern Ry. Co

brought suit in either county. *Railway Co. v. O'Bryan*, 112 Ga. 127, 37 S. E. 161.

4. The question as to the remarks made by plaintiff's counsel, and claimed by the defendant to have been improper, is not likely to arise again, and no opinion is expressed thereon.

Judgment reversed. All the justices concurring, except LUMPKIN, P. J., absent.

THOMAS v. SOUTHERN RY. CO.

(*Supreme Court of North Carolina, Dec. 20, 1902.*)

[42 S. E. Rep. 964.]

Carriers—Baggage—Destruction—Presumption of Negligence.*

The presumption of negligence arising from the derailment of a train, by reason of which a passenger's baggage was destroyed, is not rebutted by the fact that the derailment and wrecking of the train were caused by a slide of dirt and rocks on the track.

Cook, J., dissenting.

Appeal from superior court, Haywood county; Justice, Judge.

Action by Josephine Thomas against the Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

G. F. Bason, for appellant.

Crawford & Hannah and R. D. Gilmer, for appellee.

CLARK, J. The "facts agreed" are defective, in that the essential element of negligence upon which the validity of the contract depends is not determined and stated. The law is well settled and thus summed up in 2 Fet. Carr. section 580: "A common carrier of passengers is an insurer of the passenger's baggage against all loss or damage, except for that caused by the act of God or by the public enemy." Section 627: "A common carrier of a passenger's baggage may by express contract relieve himself from his common-law liability as insurer; but, by the weight of authority, he cannot exempt himself from liability for negligence of himself or his servants." In *Capehart v. Railroad Co.*, 81 N. C., at page 444, 31 Am. Rep. 505, Ashe, J., citing *Smith v. Railroad Co.*, 64 N. C. 235, and *Glenn v. Railroad Co.*, 63 N. C. 510, and other authorities, says that the common carrier cannot stipulate against any loss caused by negligence. To same purport, *Wood v. Railroad Co.*, 118 N. C., at page 1063, 24 S. E. 704. *Brown v. Telegraph Co.*, 111 N. C., at page 191, 16 S. E. 179, 17 L. R. A. 648, 32 Am. St. Rep. 793, citing from *Cooley, Torts*, 687, says: "The old principle that one cannot provide by contract against liability for negligence applies to every species and degree of negligence or tort."

*See generally, foot-note appended to *Texas & P. Ry. Co. v. Gardner* (C. C. A.), 3 R. R. R. 759, 26 Am. & Eng. R. Cas., N. S., 759.

Thomas v. Southern Ry. Co

The facts here agreed admit the destruction of the trunk "by fire in a wreck of the train caused by a slide of dirt and rocks upon the track." There is a presumption of negligence from the fact that the train was derailed by running into a pile of dirt and rocks upon the track. 2 Fet. Carr. § 482. "Res ipsa loquitur." This presumption is not rebutted in the facts agreed. It is not agreed that there was no negligence, and the plaintiff contends that the defendant admits negligence by submitting the case upon the validity of the contract on that state of facts. The validity of such contract, as applied to the facts of any case, depends upon whether there was negligence on the part of the defendant; and, upon the facts agreed, if there is not a presumption of negligence, there is certainly no presumption to the contrary, and the case should go back, that this may be ascertained by a jury, if not agreed upon by the parties.

Error.

DOUGLAS, J. (concurring). I concur in the opinion of the court that this case should be remanded in order that the essential fact of negligence may be found by verdict or agreement. In fact, I am somewhat inclined to think that the plaintiff is entitled to judgment on the facts agreed, under the decision of this court in *Marcon v. Railroad Co.*, 126 N. C. 200, 35 S. E. 423, where it is said: "The principles governing the case at bar are well settled. It is the duty of every railroad company to provide and maintain a safe roadbed, and its negligent failure to do so is negligence per se.

* * * As the law places upon the company the positive duty of providing a safe track, including the incidental duties of inspection and repair, its unsafe condition, whether admitted or proved, of itself raises the presumption of negligence. This is always the case where there is a failure to perform a positive duty imposed by law. The burden of proving such a failure of legal duty rests upon the plaintiff, but, when that fact is proved or admitted, the burden of proving all such facts as are relied on by the defendant to excuse its failure rests upon the defendant. Its plea, then, is in the nature of confession and avoidance." If it be contended that no presumption of negligence arises against the defendant from the naked fact of obstruction stated by the case agreed, there is certainly no presumption in its favor. The landslide may not originally have been caused by the negligence of the defendant, but that would not excuse the failure of proper inspection, or negligently permitting the roadbed to remain in a dangerous condition, without repair and without warning, after its condition was or might have been discovered by due diligence. In the view most favorable to the defendant, its negligence is an open question.

COOK, J. (dissenting). Upon the facts stated in the case agreed, plaintiff is bound by her special contract with defendant company, and can recover only the sum of \$100 for the

Hannon v. Boston Elevated Ry. Co

baggage destroyed by fire in the wreck. There is a distinction between a passenger ticket in the ordinary form, which is regarded as a mere voucher or token, and a ticket which is, and purports on its face to be, the entire contract between the carrier and passenger. Am. & Eng. Enc. Law (2d Ed.) 560. The regular local first-class fare was three cents per mile; but in buying a 1,000-mile ticket, paying for that much mileage at one time, which could be used from time to time, at convenience, until exhausted, plaintiff obtained transportation at a reduced rate,—2½ cents per mile,—and defendant received the lump sum, which was an advantage to both parties. The right to make such a special contract is too well settled to be controverted. It was founded upon a valuable consideration, which consisted in a reduction of the fare. The limit of \$100 for liability on account of the baggage was a reasonable and valid one. Compensation for the carriage of baggage is included in the passenger's fare (*Railroad Co. v. Cox.*, 95 Am. Dec. 640; *Warner v. Railroad Co.*, 92 Am. Dec. 389), so that which was being taken by plaintiff in excess of the amount agreed upon was not covered by the contract and fare paid, but was being carried without compensation. Plaintiff's failure to read the ticket was not the fault of the defendant. She knew that she was obtaining transportation at a reduced rate, and, being required to sign the ticket in the presence of the witness who attested her signature, had express notice that she was obligating herself in some way. It does not appear that she did not understand the contract, nor that she did not read it after signing it, and before boarding the car. She had it in her possession and could have done so. This being a special contract, as distinguished from an ordinary passage ticket, and in writing, and signed, there was no obligation resting upon defendant's agent to read it, or to notify her of its conditions and limitations. Counsel for plaintiff argue, orally and by brief, that defendant cannot contract against its negligence, and therefore a recovery should be had for the full value, and cite the authorities to sustain that proposition of law. But the facts in the case agreed do not show that the destruction of the trunk was caused by defendant's negligence. The sliding of dirt and rocks upon the track, causing the wreck of the train, nothing else appearing, does not show or raise presumption of negligence, and this is the only fact as to the wreck submitted to us.

HANNON v. BOSTON ELEVATED RY. CO.

(*Supreme Judicial Court of Massachusetts, Suffolk, Jan. 8, 1903.*)

[65 N. E. Rep. 809.]

Carriers—Elevated Railways—Injuries to Passenger—Negligence.*

For the rapid handling of the throngs of passengers on an elevated

*As to the care required in setting down passengers, see monograph appended to *Phillips v. St. Charles St. R. Co.* (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

Hannon v. Boston Elevated Ry. Co

road, the cars were so arranged that the side doors for the exit of the passengers were opened by guards on platforms at the stations. A passenger who had his hand on one of the doors was injured by the guard's opening it before the train came to a full stop. The guard had no knowledge of the position of the passenger's hand, and the train was so nearly stopped that the opening of the door was the occasion of no danger: *held*, that the guard was not guilty of negligence.

Exceptions from superior court, Suffolk county.

Action by Hannon against the Boston Elevated Railway Company. Judgment for defendant, and plaintiff brings exceptions. Exceptions overruled.

Alfred S. Hayes, for plaintiff.

E. P. Saltonstall, for defendant.

KNOWLTON, C. J. The defendant is engaged in carrying great numbers of passengers on its trains above the surface and through the subway in Boston. Its cars are fitted with doors at the end, through which passengers enter, and sliding doors at the side, through which they pass out. The stations are not far apart, and during the busy hours of the day throngs of passengers are very great. In order to accommodate them with rapid transit, it is important that arrangements be made for their exit and entry at the stations with the least possible delay. To do this, guards are provided at the stations, who open the doors when the trains arrive, so that passengers can quickly leave the cars, and other guards on the trains who open the gates at the ends of the cars, so that other passengers can quickly enter. The plaintiff was accustomed to ride on these cars three or four times a day, and was familiar with the method of managing them. At the time of the accident the car was not crowded, and he had a seat. There were plenty of straps by which one could hold, if he desired, when standing. When the station was called, he arose, walked across the car to the middle door, and took hold with his right hand of the wooden upright part of the side of the door. There was nobody standing in the aisle. As the car came to a stop it jerked somewhat, and he was thrown off his balance, and, in order to steady himself, put out his left hand, the fingers of which rested against the glass of the door near the casing. Before the car had come to a complete stop, the guard on the platform outside the car pulled back the door; and as he did so the middle finger of the plaintiff's left hand, which was resting against the glass of the door, was jammed between the window frame of the door and the door casing. The only negligence relied on by the plaintiff is the opening of the door before the train had come to a full stop.

We need not consider the question whether there was any evidence of due care on the part of the plaintiff in allowing his fingers to rest against the glass of the door at a time when he knew it was about to be opened, for we are of opin-

Chicago & A. R. Co. v. Murphy

ion that there was no evidence of negligence on the part of the defendant. To save time for the multitudes of traveling people, to whom time is valuable, it is necessary to have the doors ready to permit exit as soon as the passengers safely can begin to pass out. A little time must be consumed in unfastening and opening the doors. To hold that the guard outside shall not be permitted to begin the process until the cars come to a complete standstill would impose an unnecessary and unreasonable restriction, whose effect would delay passengers and prolong the running time of the trains. Ordinarily there is no reason to anticipate danger from beginning to get ready the places of exit while the train is in the last part of its movement before coming to a full stop. Passengers are not expected to have their fingers in such position as to be endangered by the opening of the doors at such times. Of course, the guard must be careful not to open the car when, from the speed of the train or from any other cause, he has reason to anticipate danger to passengers. In the present case there is nothing to show that he knew that the plaintiff's fingers were on the glass.

Exceptions overruled.

CHICAGO & A. R. Co. et al. v. MURPHY.

(*Supreme Court of Illinois, Oct. 25, 1902.*)

[64 N. E. Rep. 1011.]

Torts—Pleading—Amendment.

Where a declaration in an action for tort alleged that it was brought by plaintiff, "suing for the use" of another, an amendment striking out such words was only a matter of form, and properly allowed.

Same—Misjoinder of Counts.

It is improper to join in the same declaration in an action for negligence a count against two defendants, with counts against each of them separately.

Injury to Passenger—Derrick near Track—Question for Jury.

Where a passenger in a railroad train was injured by a stone on a derrick near the track swinging against the car in which he was riding, and the track for a distance of 1,000 feet was straight, and no obstruction prevented the engineer from seeing the stone as his train approached, and the negligence of the men in charge of the derrick was clearly shown, a motion in an action against both the railroad company and the owner of the derrick to take the case from the jury was properly denied.

Same—Same—Evidence.

In an action against a railroad company and a person unloading stone near the track by means of a derrick, testimony of the engineer and of other witnesses produced by the person unloading the derrick that the engineer could have seen the stone being unloaded which struck the train on which plaintiff was a passenger, and that he actually did see it, was properly admitted against the railroad company.

Carriers of Passengers—Degree of Care.*

A railroad company is bound to exercise the highest degree of care

*As to the degree of care required of carriers of passengers, see footnote appended to *Louisville & N. R. Co. v. Mitchell* (Ala.), 4 R. R. R. 425, 27 Am. & Eng. R. Cas., N. S., 425.

Chicago & A. R. Co. v. Murphy

reasonably consistent with the due operation of its road, and an instruction requiring of the company the highest degree of care "under the circumstances" was not erroneous, and relieved the company of responsibility for an injury resulting from a want of the highest degree of care under any and all circumstances.

Burden of Proof.

An instruction in an action for personal injuries that, if the jury believe "from a preponderance of the evidence" that defendant was not negligent, their verdict must be, "Not guilty," was erroneous, as casting the burden of proof on the defendant to show want of negligence.

Same.

Where, under the evidence, the jury could not have properly found other than that defendant's employees were grossly negligent, an instruction placing on defendant the burden of proof was harmless error.

Appeal from appellate court, First district.

Action by T. J. Murphy against the Chicago & Alton Railroad Company and F. P. Bagley. Judgment for plaintiff, and defendants brought separate appeals to the appellate court (99 Ill. App. 126), where the judgments were modified and affirmed, and defendants appeal. Affirmed.

James H. Teller and Defrees, Brace & Ritter, for appellants.

C. M. Hardy and L. P. Wilcox, for appellee.

WILKIN, J. This action on the case was brought by the appellee against the Chicago & Alton Railroad Company and Frederick P. Bagley in the superior court of Cook county. The declaration contained three counts, in the first of which it was alleged that the plaintiff on the 4th day of May, 1897, purchased of the railroad company a passenger ticket from the city of Chicago to Springfield, Mo., and then became a passenger from said city of Chicago to said destination, and thereupon it became and was the duty of the said defendant railroad company to use due care and diligence in carrying him, and in the management and running of its trains for that purpose; to use due care and diligence to prevent the plaintiff from being injured by dangerous structures and things in and upon said train, and in and upon and along the course of said railroad, while he was thus being carried; to use due care and diligence in watching for and avoiding impending danger and dangerous structures and things in and upon said train, and in and upon and along the course of said railroad, while said plaintiff was being carried by said defendant; yet it did not regard its duty as aforesaid, but, on the contrary thereof, ran and managed said train in such a manner as to bring it with force and violence in contact with a certain large stone, weighing 40 tons, which was then possessed and controlled by the said defendant Frederick P. Bagley at a point near Eighteenth street, upon said railroad, in the city of Chicago, and that the said Bagley did then and there willfully, maliciously, wantonly, carelessly, and negligently handle and manage said stone, by means of a derrick and

Chicago & A. R. Co. v. Murphy

crane, in such a manner as to bring said stone with great force and violence in contact and collision with said train wherein said plaintiff was a passenger, and by means aforesaid the said stone was then and there carelessly, willfully, maliciously, and negligently hurled with great force and violence by said defendant Frederick P. Bagley into, upon, and against said train wherein the plaintiff was then and there a passenger, by means of which the plaintiff was then and there thrown with great force and violence to and upon the floor of a certain car in said train to and upon the ground, by means of which his head was greatly injured, etc.; describing at length the nature of his injuries, and alleging the expenditure of money in being cured of such injuries. The second and third counts are for the same injury, but the second charges the railroad company alone, and the third the defendant Bagley alone. The suit was first brought in the name of the plaintiff, "suing for the use of August Haley." Pleas of not guilty were filed by both defendants. During the trial, which was by jury, the plaintiff was asked whether he had assigned his claim to Haley, which was objected to by counsel for the plaintiff, and the objection sustained. Thereupon the plaintiff, by leave of the court, amended his declaration by striking out "suing for the use of August Haley." Counsel then asked leave to plead over, but that leave was denied, and the trial proceeded upon the issues made by the pleas of not guilty then on file. The jury returned a verdict in favor of the plaintiff for \$6,000. The defendants entered their motions for a new trial and in arrest of judgment, both of which were overruled, and judgment entered upon the verdict. The defendants prosecuted separate appeals to the appellate court for the First district, and the branch of that court, after requiring the plaintiff to enter a remittitur of \$3,000, affirmed the judgment of the superior court. The defendants both appeal to this court, and have filed separate briefs and arguments. At the close of plaintiff's evidence, and again at the close of all the evidence, the usual motions for an instruction to the jury to find the issues for the defendants were made and overruled.

It is insisted by counsel for Bagley that the trial court erred in allowing plaintiff to amend his declaration by striking out the words "suing for the use," etc. The claim was not assignable, and the use of those words was mere surplusage. *Railroad Co. v. Lundahl*, 183 Ill. 284, 55 N. E. 667. The amendment was only a matter of form, and no further pleas were necessary, or could have been filed.

It is urged by both defendants that the refusal to sustain the motion in arrest of judgment, which was based upon the fact that there was a misjoinder of counts in the declaration, was error. It was improper to join in the same declaration a count against the two defendants, with counts against each of them severally. Of course, joint tortfeasors may be sued

Chicago & A. R. Co. v. Murphy

jointly or severally, but they cannot be sued severally in the same action. It is undoubtedly also true that at common law a misjoinder of counts could be taken advantage of by motion in arrest of judgment or on error, but we do not think that rule should be applied in this state. By section 24 of our practice act, amendments before final judgment may be allowed on such terms as are just and reasonable, introducing new parties plaintiff or defendant, discontinuing as to any joint plaintiff or defendant, changing the form of action, and in any matter either of form or substance, or in any process, pleading, or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought, or the defendant to make a legal defense. Section 6 of the statute of amendments and jeofailes (Hurd's Rev. St. 1899, p. 142) is as follows: "Judgment shall not be arrested or stayed after verdict, nor shall any judgment upon verdict or finding by the court, or upon confession *nil dicit* or *non sum informatus*, or upon any writ of inquiry of damages, be reversed, impaired, or in any way affected, by reason of any of the following imperfections, omissions, defects, matters or things in the process, pleadings, proceedings or records, namely: * * * Fifth, for any misleading, insufficient pleading," etc. A misjoinder of counts in the same declaration is a "misleading," as that term is used in this statute. It was so held in *Lovett v. Pell*, 22 Wend. 375, in which Senator Verplanck said: "I think that, according to the sense and intention of our enlarged statute of amendments, 'misleading' includes within its sense a misjoinder of counts. The word is frequently employed in a narrower sense, but it may very well be used with various degrees of latitude, since the word 'pleading,' on which it is formed, is used with still greater. Neither that word, nor its derivative, 'misleading,' are words of precise definition and unvarying meaning, but are understood with more or less latitude, according to the context and the intent and object for which they are used. * * * 'Misleading,' in its immediate, and, I suppose, more usual, sense, signifies essential errors or omissions in the defendant's defense, but it is also expressly defined to comprehend 'any mistakes or omissions essential either to the action or defense occurring either in the declaration or the subsequent pleading.' See *Tidd*, Prac. 954. According to this larger and broader sense, the word must comprise, as one species of mistakes essential to the action, such a misjoinder of counts as would be bad on demurrer, and it would fall strictly within the intention of our statute that such a mistake should be cured after verdict, when no prejudice has been done by it to the substantial justice of the cause and all rights of the parties." If the contention on the motion in arrest of judgment had been urged by way of demurrer to the declaration, the plaintiff could readily have removed the objection by striking out the second and third counts, and

Chicago & A. R. Co. v. Murphy

would doubtless have done so. We entertain no doubt as to the correctness of the ruling upon the motion in arrest of judgment. There was a count against both defendants, which the verdict of the jury followed, and upon which the judgment below is based.

It is again contended that the trial court erred in refusing to take the case from the jury, which raises the legal question whether there was any evidence fairly tending to prove the plaintiff's cause of action. The facts, as developed by the evidence, show that on the morning of the accident the plaintiff became a passenger upon a south-bound train of the defendant railroad company; having purchased a ticket from Chicago to Springfield, Mo. The train left the depot in the city on schedule time, and proceeded on the westerly of two tracks used by the company in coming into and going out of the Union Depot. Immediately south of Eighteenth street, on the west of said west track, was a marble yard operated by F. P. Bagley. In the marble yard was a derrick and crane used for hoisting stone from flat cars, which were run upon a side track belonging to the stone yard, and which derrick, in its use, was liable, as it lifted a stone from the flat car, to swing so near to the west track of the railroad as to come in contact with trains passing thereon. On that morning employees of Bagley were unloading the stone mentioned in the declaration. It was suspended on a chain which ran through a pulley attached to the derrick boom. Four men were at a windlass, hoisting the stone, and one man was usually on the flat car for the purpose of pulling it around so as to prevent it from swinging toward the track, by means of a rope attached to it for that purpose; but at the time of the accident the employee who should have managed the rope had left it, and gone to the place in the yard where it was intended to deposit the stone, for the purpose of placing timbers to receive it. As the train passed the derrick, the stone swung against the front part of it, rebounded, and then struck the front of the rear car, in which plaintiff was seated, tearing out the side of the car, demolishing the seats, throwing the plaintiff upon the floor, and seriously injuring him. For a distance of 1,000 or 1,500 feet north of the stone yard the railroad track was straight, and no obstructions intervened to prevent the engineer from seeing the stone as his train approached it. The plaintiff's testimony alone, with its reasonable intendments and inferences, fairly tended to prove that his injury resulted through the joint negligence of the servants of the railroad company and those of the defendant Bagley, and he was corroborated by witnesses introduced by him who were present at the time, assisting in unloading the stone. The motion to take the case from the jury at the close of plaintiff's testimony was properly denied.

It is conceded by counsel for the railroad company that the added testimony of the engineer, and perhaps other witnesses

Chicago & A. R. Co. v. Murphy

produced by Bagley, tended to prove that the engineer not only could have seen the block of stone and impending danger, but that he actually did see it, and signaled to the parties in charge of the derrick to get it out of the way; but it is contended that evidence was improperly admitted against the railroad company, over its objection. We are unable to see how the court could properly have sustained the objection to the competency of that evidence. The defendants were sued jointly, and, in the introduction of testimony, either had a right to offer such evidence as he or it deemed material to his or its own defense. If the other party regarded any testimony admissible only against the one offering it, he or it should have asked the court to limit its application by a proper instruction submitted for that purpose, but could not deprive the other party of its benefit. There was no error in the admission of that testimony, or in the final refusal to instruct the jury to find either of the defendants not guilty.

The railroad company asked the court to instruct the jury that unless they found from the evidence that the company, by its servants in charge of the train, while there was yet time to stop the same before reaching the place at which the accident occurred, had notice or reason to suppose that said derrick would be operated while said train was passing it, and that such operation would endanger the safety of the passengers in said train, they must find the said railroad company not guilty. The court refused to give it as asked, but added, after the words "reason to suppose," "or by the exercise of the highest degree of care, under the circumstances, in running its said train, consistent with the due operation of its road, would have known that said derrick," etc. It is insisted that this modification was erroneous, because the language "highest degree of care" was not qualified by the word "reasonable" or "practicable." A railroad company, in the protection of its passengers against injury or danger, is bound to exercise the highest degree of care and skill reasonably consistent with the due operation of its road. It is not an insurer against danger or injury, but is held to the exercise of extraordinary care and vigilance. The qualification, "the highest degree of care under the circumstances," relieved the company of the responsibility for any injury resulting from a want of the highest degree of care under any and all circumstances. The modification was not improper. *Railroad Co. v. Kromshinsky*, 185 Ill. 92, 56 N. E. 1110, and cases cited.

The defendant Bagley asked the court to instruct the jury that if they believed from the evidence that the employees of the Chicago & Alton Railroad Company were negligent, and that the employees of Bagley were not negligent, then their verdict must be, "Not guilty," as to the defendant Bagley, but the court modified it so as to read as follows: "The jury are further instructed that if they believe from a preponderance

Southern Ry. Co. v. Reeves

of the evidence that the employees of Bagley were not negligent, then their verdict must be, 'Not guilty,' as to the defendant Bagley.' The instruction as asked was improper. Whether the employees of the railroad company were negligent was a matter of no concern of Bagley. It was enough for the purposes of his defense if there was no negligence on the part of his own employees. But as modified it was manifestly erroneous. It cast the burden of proof upon him to prove that his employees were not negligent. Nor can we agree with counsel for the appellee or the appellate court that the error was cured by the ninth instruction given by the court of its own motion, which properly told the jury "that the plaintiff must establish his case by the greater weight of the evidence." The most that can be said is that this ninth instruction tells the jury that on the question of negligence the burden of proof is upon the plaintiff, whereas the seventh, purporting to be given at the instance of the defendant Bagley, casts that burden upon him; and, as has been frequently said in such cases, it is impossible to tell which the jury adopted as announcing the correct rule or which it followed. But should the judgment below be reversed for this error? We think not. There was no conflict in the evidence as to what the employees of Bagley did. They raised the stone, by means of the derrick, from the flat car, knowing that it was liable to swing so near to the railroad track as to endanger passing trains. They also knew that a train on the company's road on that track was due about that time. They had provided a rope to prevent the result, but negligently failed to use it. Treating the case against Bagley as depending upon the question of negligence, the jury could not properly have found otherwise than that his employees were grossly negligent. The error in giving the seventh instruction was therefore harmless error.

There is no force in the point that the negligence of Bagley's servants was not the proximate cause of the accident. His instructions on that theory were properly refused.

On the whole record, the judgment of the appellate court will be affirmed. Judgment affirmed.

SOUTHERN RY. CO. v. REEVES.

(*Supreme Court of Georgia, Dec. 12, 1902.*)

[42 S. E. Rep. 1015.]

Duty to Assist Passenger to Alight.*

Ordinarily it is no part of the duty of the employees of a railway company in charge of a passenger train to assist passengers to alight therefrom, but this duty on their part may arise when the circumstances are such as to suggest to them the necessity

*See monograph appended to *Phillips v. St. Charles St. R. Co.* (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

Southern Ry. Co. v. Reeves

of assistance. Whether, in a given case, the circumstances were such as to suggest the necessity of assisting a passenger to alight, is a question to be determined by the jury.

Carriers of Passengers—Stations and Depots—Degree of Care.†

While a carrier of passengers may not be held to so high a degree of care in the matter of keeping and maintaining station facilities as in the act of transportation, it is the duty of such a carrier to see that all reasonable precautions are adopted to insure both the safety and comfort of persons who are on the premises as passengers. The carriers must exercise at least ordinary care and caution with respect to such matters.

Same—Degree of Care.‡

Carriers of passengers are bound to exercise extraordinary diligence for the preservation of the lives and persons of their passengers, but the rule of extraordinary diligence applies only to the receiving, keeping, carrying, and discharging of passengers.

Same—Stational Facilities—Degree of Care.†

While a railroad company may be bound to exercise only ordinary care and diligence in the construction and maintenance of station facilities, it is bound to exercise towards a passenger extraordinary diligence while he is in the act of alighting from the train.

Instructions.

The charges complained of were, when read in the light of the entire charge, not erroneous for any of the reasons assigned. The charge, when taken as a whole, seems to be in accord with the principles above stated.

Evidence.

The evidence, though conflicting, was sufficient to authorize the verdict, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Polk county; C. G. Janes, Judge.

Action by E. R. Reeves against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Shumate & Maddox and Fielder & Mundy, for plaintiff in error.

J. C. Clark, Westmoreland Bros., and Bunn & Trawick, for defendant in error.

COBB, J. The principles stated in the headnotes seem to be clearly deducible from the following decisions of this court: Railroad Co. v. Perry, 58 Ga. 461 (3); Railroad Co. v. Thompson, 76 Ga. 770 (2); Daniels v. Railroad Co., 96 Ga. 786, 22 S. E. 956; Railroad Co. v. Bates, 103 Ga. 333 (2), 347, 30 S. E. 41; Wilkes v. Railroad Co., 109 Ga. 794, 35 S. E. 165. The evidence, though conflicting, was sufficient to authorize a finding that the plaintiff was injured while attempting to alight from one of the trains of the defendant; that this injury resulted from the fact that the step of the car was a long distance from the ground, which was soft; and that the stool used for the purpose of enabling her to alight was set upon ground which was soft, and when the plaintiff stepped

†See monograph appended to Muhlhouse v. Monongahela, etc., R. Co. (Pa.), 2 R. R. R. 131, 25 Am. & Eng. R. Cas., N. S., 131.

‡See monograph appended to West Chicago St. R. Co. v. Tuerk (Ill.), 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1.

Beringer v. Dubuque St. Ry. Co

upon the stool it overturned and threw her, causing injuries which were painful and serious. The motion for a new trial complains that the verdict was contrary to the evidence, and also that the court erred in giving certain instructions to the jury. When the charge is taken as a whole, the extracts upon which error is assigned were not erroneous for any of the reasons set forth in the motion for a new trial, and the evidence authorized the verdict.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent.

BERINGER v. DUBUQUE ST. RY. CO.

(Supreme Court of Iowa, Oct. 23, 1902.)

[91 N. W. Rep. 931.]

Injury to Passenger—Premature Starting of Car—Appeal—Review.

Where, in an action for injuries to a passenger by the premature starting of a street car, the evidence warranted a finding that the conductor knew plaintiff was attempting to alight, and, while seeing her in that attitude, permitted the car to start before she had safely alighted, a judgment for plaintiff will not be reversed on appeal for lack of evidence, though it also tended to show that the car had not stopped to discharge passengers, but in the middle of a block, to repair a wire.

Same—Same—Same—Same.

Where, in an action for injuries to a passenger by the premature starting of a street car, the evidence was conflicting as to whether or not the car was in motion when plaintiff attempted to leave it, a verdict in her favor would not be reversed on appeal because of her alleged contributory negligence in attempting to alight while the car was in motion.

Same—Same.*

Where plaintiff was injured by the premature starting of a street car, an instruction that if the car was stopped near the middle of a block, and, while it was still, plaintiff attempted to alight, and was seen by the conductor either when she arose or when she was on the footboard, and while she was there the cars were started by the conductor, and she was thrown to the ground and injured, and the conductor, seeing her about to get off the car or on the footboard, started the car, and did nothing to stop it or prevent the starting, if he saw her attempt to get off before it was started, that was negligence, etc., was proper.

Damages—Expert Testimony.

Where a physician stated that he knew the value of services for nursing, his evidence as to value was properly admitted.

Same—Nursing—Services of Daughter.

In an action for injuries, evidence of plaintiff's daughter that she would not charge her mother anything for nursing, because the mother had nothing, but, if she was to do the nursing for a stranger, she would want \$200, "and that she did that as a daughter would do it for a mother," and did not expect her brother to pay for it, did not preclude the mother from recovering for the nursing, the value of which was fully proved.

Excessive Verdict.

Where plaintiff suffered a fracture of the neck of the femur by the premature starting of a street car as she was attempting to alight, a verdict of \$3,000 was not excessive.

*See monograph appended to *Phillips v. St. Charles St. Ry. Co.* (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

Beringer v. Dubuque St. Ry. Co

Appeal from district court, Dubuque county; Fred O'Donnell, Judge.

Action at law to recover damages for personal injuries received by plaintiff while attempting to alight from a street car on defendant's line of road. Trial to a jury. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

Lyon & Lyon, for appellant.

Matthews & Frantzen, for appellee.

DEEMER, J. Defendant operates an electric railway in the city of Dubuque. One of its lines runs north and south over what is known as "Rhomburg Avenue." This avenue crosses what are known as "Stafford and Windsor Avenues" at right angles, Stafford avenue being the next street north of Windsor. Decker's corner is at the intersection of Rhomburg and Windsor avenues, and on the north side of Windsor avenue. On the day of the accident in question, defendant was operating a train consisting of a motor car and a "trailer," or open car, attached thereto, from Eagle Point, near the northern limits of the city, down to and across Stafford and Windsor avenues, and on into the business part of the city. From Windsor avenue south there is a steep down grade on Rhomburg avenue, and, while the evidence shows that the general rule of the company was to stop on the farther or south side of street crossings when trains were going south, yet the jury was authorized to find that on account of the grade on Rhomburg avenue, just mentioned, trains frequently, if not usually, stopped on the north side of the street (Windsor avenue), and at or near Decker's corner. On August 17, 1899, plaintiff and her daughter and their children, constituting a party of ten, took the open car or trailer at or near Eagle Point to go to their homes, which were on Windsor avenue, west of its junction with Rhomburg; and while plaintiff was alighting therefrom, some place between Stafford and Windsor avenues, she received the injuries of which she complains. Plaintiff claims that as the train approached Windsor avenue the conductor gave a stop signal, and that in obedience to the signal the car stopped at or near Decker's corner, and that just as she was attempting to alight, and while she had one foot on the ground and the other on the car steps, the employees in charge of the train caused it to be started without warning, throwing her to the ground, and inflicting severe injuries on her person, from which she has not yet recovered. On the other hand, defendant says that the train stopped near the middle of the block without signal, and for the sole and only purpose of fixing a defective wire; that plaintiff was neither invited to alight at the place in which she attempted to get off, nor did defendant's employees know she was about to leave the car when they started the train, and that, in any event, plaintiff was guilty of contributory negligence in attempting to leave the

Beringer v. Dubuque St. Ry. Co

car while in motion. These issues were submitted to the jury, which evidently found that plaintiff's version of the affair was the correct one. We are now asked to say that the verdict is without sufficient support in the evidence. This we cannot do, in view of the conflict therein. True, the great weight of the evidence shows that the train was stopped a short distance before it reached Decker's corner, and we may, for the purpose of the case, agree with defendant's counsel that it was stopped near the middle of the block; yet the jury was warranted in finding from the evidence that the defendant's conductor knew plaintiff was attempting to alight from the car, and, while seeing her in that attitude, caused or permitted the train to start before she had safely alighted, and in this manner caused the injuries of which she complains. This would be sufficient, in law, to constitute negligence on the part of the company. *Root v. Railway Co.*, 113 Iowa, 675, 83 N. W. 904, and cases cited.

2. There was a decided conflict in the evidence on the question as to whether or not the car was in motion when the plaintiff attempted to leave it. In the *Root Case*, supra, we held that it is not negligence, as a matter of law, for one to attempt to leave a street car while in motion. Of course, there may be cases where such conduct would constitute contributory negligence; and in this case the court instructed that, if plaintiff attempted to leave the car while in motion, she could not recover damages. This must be accepted as the law of the case. But in view of the conflict in the evidence, we should not interfere with the verdict on this ground. There is some little conflict in plaintiff's own evidence regarding this matter, but, in view of her nonfamiliarity with our language, the weight and value of her testimony were for the jury.

3. Some of the instructions are complained of,—among others, the first. This was simply a statement of the issues made by the pleadings. The exact matters in dispute were fully covered by the charge, and a reference to the claim made in the petition that the train was in charge of an inexperienced conductor was not erroneous, in view of the very full presentation of the exact issues in the subsequent paragraphs of the charge. The fifth paragraph referred in general terms to the duty of the defendant as a common carrier of passengers, and was not erroneous. The same may be said of the sixth paragraph. The eleventh is also complained of. It is as follows:

"If you find from the evidence that the cars were stopped at or near the middle of the block in question, and that, while the cars were still and not moving, the plaintiff arose and attempted to get off the car; that she stepped on the footboard, and while thus on the footboard she reached to secure a basket; that she was seen by the conductor either when she arose and started to get off the car, or when she was on the

Fielders v. North Jersey St. Ry. Co

footboard reaching for the basket, and that, while thus reaching, the cars started, either by the whistle of the conductor or otherwise, and she was thrown to the ground and injured, and the conductor, seeing her about to get off the car, or on the footboard, as above stated, started the cars, or did nothing to stop the cars, or prevent the start of the cars if he saw her attempt to get off before they were started, that she might have time to alight,—this would be negligence on the part of defendant, and, if you find she was free from negligence on her part, then in such case your verdict should be for the plaintiff." There was evidence to support it, and that it announces a correct rule of law has already been decided by this court. *Root v. Railway Co.*, supra.

The twelfth, thirteenth, and fourteenth instructions presented defendant's theory of the case, but the jury evidently found it was not supported by the evidence.

Evidence from a doctor as to the value of services for nursing plaintiff was properly admitted, as he stated that he knew the value of such services.

The court instructed that plaintiff might recover the value of services for care and nursing. There was evidence, as we have seen, that such services were performed, and of their value. But the defendant says that the services were performed by an adult daughter, who made no charges against her mother therefor. The daughter testified: "Well, of course, I won't charge my mother anything, because she has nothing; but, if I was to do it for a stranger, I would really want \$200, and no less. I did that as a daughter would do it for her mother. I don't expect to have my brother pay it."

Under such a state of facts, the instruction was proper. *Varnham v. City of Council Bluffs*, 52 Iowa, 698, 3 N. W. 792. Defendant asked many instructions, each and all of which were refused. In so far as they embodied correct rules of law, they were given by the court in its charge.

Lastly it is argued that the verdict is excessive. It was for \$3,000. In view of the character of the injury,—the head or neck of the femur being fractured,—and the evident pain and suffering caused thereby, we are not disposed to interfere.

There is no error in the record, and the judgment is affirmed.

FIELDERS v. NORTH JERSEY ST. RY. CO.

(Court of Errors and Appeals of New Jersey, Nov. 17, 1902.)

[53 Atl. Rep. 404.]

Injury to Street Car Passengers—Negligence in Discharging Passenger—Sufficiency of Evidence.

Shortly after plaintiff alighted from one of defendant's street cars, she fell in the street and was hurt. The immediate occasion of her fall was a defect in the street pavement between the rails of defendant's track. She charged the defendant with negligence in three particulars: (a) That the car was brought to a stop at an unsafe and improper place;

Fielders v. North Jersey St. Ry. Co

(b) that the conductor negligently directed her towards her destination; and (c) that the defendant had neglected to repair the street pavement as required by the terms of a municipal ordinance. The trial judge withdrew from the jury's consideration the first and second grounds of complaint, because of want of evidence to support them, and submitted the case to the jury solely upon the third ground. A verdict having thereupon gone against the defendant: *held*, that the judgment cannot be sustained on the theory that the evidence would have justified a finding against the defendant on either of the first two grounds.

Street Railways—Duty to Pave Street—Rights of Injured Pedestrian.

A city ordinance in terms requires all street railway companies to pave, repave, and keep in repair, under the direction and to the satisfaction of the proper municipal authorities, the space between the rails of their tracks, and between the tracks, and the space for one foot outside of each outer track, at the same time providing that, if any company fail so to pave or repave or to keep the pavement in repair, the city authorities may cause the work to be done, and the company shall, on demand, pay the cost thereof: *held*, as a matter of construction, that the ordinance does not confer a right of action upon any member of the traveling public who may sustain damage through the non-repair of the street.

Same—Paving Street—Police Power.*

Held, further, that the ordinance in question is an assumption of the power of taxation, and cannot be supported under the police powers conferred upon the municipality by the legislature.

Precedents.

The case of *North Hudson Co. Ry. Co. v. City of Hoboken*, 41 N. J. Law, 71, commented on and explained.

(Syllabus by the Court.)

Error to supreme court.

Action by Louise E. Fielders against the North Jersey Street Railway Company. Judgment for plaintiff was affirmed by the supreme court (50 Atl. 533), and defendant brings error. Reversed.

George T. Werts, for plaintiff in error.

Frederick E. Hodge and Samuel Kalisch, for defendant in error.

PITNEY, J. So far as the opinion of the supreme court bases the affirmance of the judgment of the trial court upon the theory that the plaintiff at the time of her injury was in the exercise of her rights as a passenger in the act of leaving the defendant's car, it cannot be sustained. Whatever inference might have been drawn from the evidence upon that subject is a matter of no consequence, for no verdict has been rendered against the defendant upon the ground of neglect of any duty that it owed to the plaintiff as a passenger. The trial court charged the jury (apparently with the acquiescence of plaintiff's counsel) that the evidence sufficiently showed that the plaintiff had left the car, and, being in safety upon the highway, was thenceforth a traveler upon the highway, and subject to all the duties and obligations imposed upon such travelers, and thereupon proceeded to sub-

*As to whether street railway companies may be required to pave street, see *City of Philadelphia v. Hestonville, M. & F. Ry. Co.* (Pa.), 5 Am. & Eng. R. Cas., N. S., 659, and note, 663 et seq.

Fielders v. North Jersey St. Ry. Co

mit the case to the jury solely upon the question whether the defendant had been guilty of a breach of duty owed by it to the plaintiff as a traveler upon the highway. The verdict and judgment, having gone upon this theory, cannot be sustained upon the theory that the defendant's conductor had negligently misdirected the plaintiff about alighting from the car and reaching the sidewalk, or had negligently stopped the car at an unsafe and improper place. The defendant in the pavement, therefore, instead of being a mere circumstance to be viewed with other circumstances as bearing upon the question of negligence in stopping the car, or negligence in directing the plaintiff towards her destination, becomes the essential fact upon which alone the negligence of the defendant company is to be predicated. And if the judgment can be sustained, it must be upon the ground that the plaintiff has an action against the defendant for a personal injury occasioned by the nonrepair of the street pavement, while she was a foot passenger upon the street, and irrespective of the consideration that she had ridden upon the defendant's car. The defect in question was a deep hole in the street pavement between the rails of the track, and, according to the plaintiff's evidence, this was the immediate occasion of her injury. There was evidence tending to show that the hole was the result either of nonrepair or improper repair of the pavement, and that it had existed for a sufficiently long time to put the defendant upon notice, if the defendant was bound, in law, to take notice of the condition of the pavement. Of course, if the defendant was under an absolute duty to repair the pavement, it was at the time under a duty to observe its condition. Therefore in all aspects the case was one proper for the jury's consideration, if there existed a legal obligation upon the defendant to repair the pavement. There is nothing in the case to show that the pavement in question had been laid or maintained by the defendant, or that the defect resulted from any act of commission on the defendant's part. Nor is there anything to connect the defect with the defendant's rails or sleepers, or to show that anything done or omitted in the construction, maintenance, or operation of the railway produced the defect. The location of the hole between the rails is a mere circumstance, without causative significance. And the only default attributable to the defendant is the failure to repair.

It is familiar law that a railway company, having the right to lay tracks in a public street, is bound, by the general principles of the common law, and without either a specific statute or ordinance or a contractual obligation, to lay its tracks in a proper manner, and to keep them in a proper state of repair. 2 *Thomp. Neg.* (2d Ed.) § 1353. But the question of the liability of such a company for failing to keep the surface of the street in repair is quite a different question. Such a liability does not result from the mere fact that the

Fielders v. North Jersey St. Ry. Co

corporation has been vested with a franchise or license of using the public street. The liability to maintain the pavement as such, if it exists, must either be rested upon some valid statute or ordinance imposing such a duty, or must arise out of the obligations of a contract. It has been repeatedly held that, where some burden is lawfully imposed by a municipality upon a street railway company as a condition of the grant of its franchise, the acceptance of such a condition by the company constitutes a contract between the company and the municipality. *Wilbur v. Railway Co.*, 57 N. J. Law, 212, 31 Atl. 238; *Cape May, D. B. & S. P. R. Co. v. City of Cape May*, 58 N. J. Law, 565, 34 Atl. 397; *City of Cape May v. Cape May Transp. Co.*, 64 N. J. Law, 80, 44 Atl. 948; *Dean v. City of Paterson* (N. J. Sup.) 50 Atl. 620. Were an ordinance of such a character invoked in the present case, the question would remain whether the plaintiff, having no privity therein, could sue for a breach of its provisions. In *Appleby v. State*, 45 N. J. Law, 165, Mr. Justice Depue, speaking for this court, said: "A duty, the breach of which is an actionable wrong, may arise from a contract, or be imposed by positive law, independent of contract. In the first case the party to the contract only can sue. In the other case any person injured may sue, if he be one of the class of persons for whose benefit the duty is imposed." The rule here recognized was enforced by the supreme court in *Safe Co. v. Ward*, 46 N. J. Law, 19; *Styles v. F. R. Long Co.* (N. J. Sup.) 51 Atl. 71. But the present case is devoid of evidence to show that any liability for the repair or maintenance of the street pavement was imposed upon the defendant as a condition of its right to exercise its franchise, or that the defendant, by any contract, has undertaken such a duty. The plaintiff introduced in evidence an ordinance adopted by the board of street and water commissioners of the city of Newark, September 6, 1894, purporting to apply to all street railways, and imposing upon the operating companies the duty of paving, repaving, and repairing the space between the rails. Its terms will be set forth more fully below. Defendant's duty to repair was rested upon that ordinance alone. The trial court, and also the supreme court, treated it as a valid police regulation, imposing an absolute duty upon the defendant for the general benefit of the traveling public, so that an action would lie at the instance of any traveler injured through a neglect of the imposed duty to repair the pavement. The bill of exceptions clearly raises the question whether a duty of repair was lawfully imposed upon the defendant by the ordinance in question, and whether the plaintiff, as a traveler upon the highway, was one of the class for whose benefit that duty was imposed.

It is certainly well settled that a specific duty, the violation of which is actionable, may arise from a valid statute of municipal ordinance, as well as from the general principles of

Fielders v. North Jersey St. Ry. Co

the common law. Familiar examples among our statutes are the so-called law of the road (Gen. St. p. 2823, § 91), and the requirement that a railroad locomotive shall sound a bell or whistle on approaching a highway crossing (Gen. St. p. 2645, § 29). The books contain many cases arising out of breaches of the latter duty. The duty imposed upon railroad companies "to use all practicable means to prevent the communication of fire from any locomotive engine," and making them liable in damages to the person injured, is an instance. Gen. St. p. 2670, §§ 13, 14; *Railroad Co. v. Salmon*, 39 N. J. Law, 299-303, 23 Am. Rep. 214. So is the duty to provide spark arresters. Gen. St. p. 2671, §§ 15, 16; *Wiley v. Railroad Co.*, 44 N. J. Law, 247; *Hoff v. Railroad Co.*, 45 N. J. Law, 201; *Railroad Co. v. Abbott*, 60 N. J. Law, 150, 37 Atl. 1104. So, doubtless, are such of the provisions of the act relating to factories, etc. (Laws 1885, p. 212; Gen. St. p. 2345), as are expressly designed for the personal safety of the operatives. Other instances may be cited. Nor does there seem to be any distinction between a valid statute and a valid ordinance, in respect to the binding force of a duty created thereby. A lawful municipal ordinance is an exercise of the delegated power of legislation, and is the law of the place. When adopted in the exercise of that power which is commonly called the "police power," ordinances frequently prescribe for persons subject thereto a rule of conduct, for the purpose of insuring the safety of others. Familiar instances of municipal ordinances imposing duties, for a breach of which an action may be maintained by any person specially injured, are those regulating the speed of vehicles in streets, those requiring railroad companies to place gates or flagmen at street crossings, those regulating excavations in the streets, the use of explosives, and the like. In *Express Co. v. Nichols*, 32 N. J. Law, 166-169; *Id.*, 33 N. J. Law, 434-441, 97 Am. Dec. 722,—the plaintiff was attempting to pass along a sidewalk in the city of Newark, when he was caught and injured by the wagon of the defendant being backed up to the side of the building adjoining the walk for the purpose of taking in packages from the building. The fact that the wagon was thus backed in violation of a city ordinance was a circumstance considered as material by the supreme court and by this court, upon the question of defendant's negligence. In *West v. Transportation Co.*, 32 N. J. Law, 91; *Transportation Co. v. West*, 33 N. J. Law 430,—the plaintiff was watching a railroad train approaching a street crossing from one direction at a rate exceeding that limited by the city ordinance, and was struck by a train coming from the opposite direction at a less speed. The ordinance required no flagman at this crossing, and the defendant company relied upon the ordinance, and claimed to have complied with it. This court treated the fact that the fast train was exceeding the limit fixed by the city ordinance as a circumstance tending to show negligence on the

Fielders v. North Jersey St. Ry. Co

part of the defendant, and to rebut the allegation that there was contributory negligence on the part of the plaintiff.

In some jurisdictions, contention has arisen as to whether the violation of a statute or ordinance intended to regulate the conduct of the individual constitutes negligence per se, or conclusive evidence of negligence, or whether, on the other hand, such violation is only prima facie evidence of negligence. Abundant citation of authorities will be found in 21 Am. & Eng. Enc. Law (2d Ed.) Tit. "Negligence," pp. 460, 478, 483; Thomp. Neg. (2d Ed.) §§ 10, 773, 1094, 1196, 1226, 1394, 1396, 1528, 1538, 1554, 1900, 1905, 2103. Perhaps the doubts have arisen from confusing the action for violation of a specially imposed duty with the action for violation of the common-law duty of exercising care under given circumstances. It would seem that a correct definition of "actionable negligence" must include the notion that a legal duty has been violated. Whether the duty arose from the common law, or from a valid statute or municipal ordinance, would seem immaterial. See Thomp. Neg. (2d Ed.) §§ 1-12. Assuming the party injured in a given case to be one of a class for whose benefit a duty has been by statute or ordinance imposed upon the opposite party, and assuming that the evidence shows an actual breach of that duty, it would seem the sole remaining inquiries should be whether the violation of the imposed duty was the proximate cause of the injury, and, if so, whether any faulty conduct of the injured party was a contributing cause. This view of the matter would give to the party aggrieved by a violation of a duty that had been imposed for his benefit the right to maintain an action for an injury thereby sustained, irrespective of the question whether the conduct complained of could be properly termed negligent, in the general sense. This is the case with those statutory actions that stand quite apart from negligent conduct,—such, for instance, as the action for damages for excessive distress under the statute of Marlbridge (52 Hen. III), embodied in our act concerning distresses as section 1 (Gen. St. p. 1207), and the special action for a mere irregularity in the proceedings consequent upon a lawful distress for rent, which action was conferred by the statute (11 Geo. II, c. 19, § 19), whose provisions are found in section 12 of our act concerning distresses.

Without pursuing the subject further, we assume, for the purposes of the following discussion, that there is no distinction between a common-law duty and one imposed by statute or ordinance, with respect to entitling a party injured to his damages, and no distinction between a valid statute and a valid ordinance, with respect to its effect in imposing a duty for violation of which an action will lie.

But the action for breach of a duty, however the duty be created, is only for the benefit of the party aggrieved. We are at once confronted with the inquiry, to whom is the duty

owing; for whose benefit was it created? Hence arises a rational distinction that seems to have been recognized from the earliest times. Thus, in Com. Dig., "Action upon Statute" (F), it is laid down that, "in every case where the statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute," etc. See, also, Cooley, Torts, pp. 650-658. A leading English case is *Couch v. Steel* (1854) 3 El. & Bl. 402, 23 Law J. Q. B. 121. There was a statute which enacted that every ship on a foreign voyage should be supplied with certain medicines, and the action was brought against the ship owner by a seaman, alleging a breach of this duty, and consequent loss of health to the plaintiff. Lord Campbell, C. J., said, "The enactment provides a benefit for the seaman; and thereby the plaintiff, being a seaman on board, was deprived of that benefit, and his health was injured." Accordingly the action was sustained. This decision was not distinctly overruled, but the generality of Lord Campbell's reasoning was criticised, by the court of appeal, in *Atkinson v. Waterworks Co.* (1877) 2 Exch. Div. 441, 46 Law J. Exch. 775. The water company failed in its statutory duty to maintain fire plugs, with pipes filled with water at a certain pressure. The court held that a property owner, whose buildings had been burned in consequence of the water company failing in this duty, had no action against the company. These cases are cited by Mr. Justice Dixon in *Weller v. McCormick*, 52 N. J. Law, 472, 19 Atl. 1101, 8 L. R. A. 798, as authority for the discriminating statement of the rule to which he there gives expression, viz.: "For it is a general principle that where there rests upon any person a public duty, either arising at common law or created by statute, and that duty is due to the public, considered as composed of individuals, and for their protection, each person specially injured by breach of the obligation is entitled to a private action to recover compensation for his damage." And the same distinction is recognized in the language already quoted from *Appleby v. State*, 45 N. J. Law, 165. The decision in *Sonn v. Railroad Co.*, 66 N. J. Law, 428, 49 Atl. 458, affirmed in this court for the reasons given in the court below (51 Atl. 1109), recognizes this distinction. There the railroad company was required by the charter under which its road was constructed and operated (P. L. 1867, p. 306, § 9) "to construct and keep in repair good and sufficient bridges over or under the said railway where any public or other road shall cross the same, so that the passage of carriages, horses and cattle across the said railway shall not be impeded thereby." Here was a positive, unconditional duty imposed for the express benefit of the traveling public; and although the same section provided that, if the company neglected to perform the duty, the public officers having charge of the repairs or maintenance of the road, and having unsuccessfully warned the company, might proceed to do the work, and recover the

cost for the company, it was held by the supreme court that the plaintiff was one of the class of persons for whose benefit the duty was imposed, and might sustain an action for damages arising from its breach. In the argument of the case in this court, the construction adopted by the supreme court was not, in this respect, questioned.

In examining a municipal ordinance in the effect to determine its scope and purview, an important and sometimes controlling inquiry is whether it was passed in the exercise of the police powers of the municipality, for the regulation of the conduct of persons within the corporate limits, in order to conserve the safety of persons or property, or whether it is an exercise of the taxing power of some other governmental power. We find running through the adjudicated cases a rule of construction almost universally adopted,—that where the provisions of an ordinance are intended, not for the benefit or protection of individuals comprising the public, but for the benefit of the municipality as an organized government, and more particularly if they impose upon property owners the performance of a part of the duty of the municipality to the public, a legislative intent is indicated that a breach of such ordinance shall be remediable only at the instance of the municipal government, or by enforcement of the penalty prescribed therein, and that there shall be no right of action to an individual citizen especially injured in consequence of such breach. The most conspicuous cases of this sort are those that deny liability to private suit for violation of the duty imposed by ordinance upon abutting property owners to maintain sidewalk pavements, or to clean ice and snow from the walks. *Moore v. Gadsden*, 93 N. Y. 12; *City of Rochester v. Campbell*, 123 N. Y. 405, 25 N. E. 937, 10 L. R. A. 393, 20 Am. St. Rep. 760; *Kirby v. Association*, 14 Gray, 249, 74 Am. Dec. 682; *City of Hartford v. Talcott*, 48 Conn. 425, 40 Am. Rep. 189; *Flynn v. Canton Co.*, 40 Md. 312, 17 Am. Rep. 603; *Taylor v. Railroad Co.*, 45 Mich. 74, 7 N. W. 728, 40 Am. Rep. 457. Two reported decisions in our circuit courts indicate the general acceptance of this distinction in this state. *Snowden v. Dodd* (Essex circuit, 1885; *Depue, J.*) 8 N. J. Law J. 296; *Courtney v. Railroad Co.* (Union circuit, 1895; *Van Syckel, J.*) 18 N. J. Law J. 173. That the New York and Massachusetts cases just referred to proceed upon the distinction now asserted, and not in denial of the binding effect of ordinances in general, is evidenced by the fact that in those same states the liability to private suit for violation of ordinances passed in the exercise of the police power is fully recognized. *Knupfle v. Ice Co.*, 84 N. Y. 488; *Connelly v. Ice Co.*, 114 N. Y. 104, 21 N. E. 101, 11 Am. St. Rep. 617; *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153; *Wright v. Railroad Co.*, 4 Allen, 283; *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354; *Hall v. Ripley*, 119 Mass. 135.

Fielders v. North Jersey St. Ry. Co

Turning now to the ordinance sub judice, upon which alone the defendant's liability is rested, we find it is entitled "An ordinance regulating street railways and providing for paving and repairing in the street through which street railways are built or operated." It consists of eight sections. Section 1 provides that, when the tracks of any street railway have been or shall be laid in any street in the city which at the time of laying the tracks shall be unpaved, it shall be the duty of the railway company laying the track or operating the railway to pave between the rails of the tracks, and between the tracks, and for the space of one foot outside of each outer track, with such pavements and in such manner as the board of street and water commissioners shall determine; and said pavements so laid shall by said company or its successors be kept in good and complete repair, to the satisfaction of the board of street and water commissioners, or, if not so kept and maintained, the repairs thereto may be made by the board, and the costs thereof shall be paid on demand by the railway company to the board: provided, the board shall give at least 10 days' notice to the company of its intention to make such repairs. Section 2, that, where the tracks of any street railway company have been or shall be laid in any paved street, it shall be the duty of the company laying the tracks or operating the railway to repave between the rails of the track, and between the tracks, and for the space of one foot outside of each outer track, and to such further distance as may be necessary to bring the whole pavement of the street into proper conformity; the pavement to be of the same character and equal in quality to the pavement with which the remaining portion of the street is paved; such pavement to be laid under the direction of the board, and to its satisfaction, and to be thereafter kept in repair by the company or its successors to the satisfaction of the board, or, if not so kept and maintained, the repairs thereto may be made by the board, and the cost thereof shall be paid on demand by the company to the board: provided, the board shall give at least 10 days' notice in writing to the company of its intention to make such repairs. Section 3, that, where the board shall cause any street to be paved or repaired [repaved?], it shall be the duty of the railway company owning or operating a street railway in such street at the same time to pave or repave between its tracks and for the space of one foot on the outside of each outer track, with such pavement and in such manner as the remaining portion of the street is paved or repaved by the board; the pavement to be laid and relaid under the direction of the board, and to its satisfaction; and the pavement so laid to be thereafter kept by the company in repair to the satisfaction of the board, or, if not so kept and maintained, the repairs thereto may be made by the board, and the costs thereof shall be paid on demand by the railway company to the board: provided, the

Fielders v. North Jersey St. Ry. Co

board shall give at least 10 days' notice in writing to the company of its intention to make such repairs. Section 4, that, where the tracks of any street railway company, or any portion thereof, shall be taken up by the company for any reason, or the pavement under the charge of the company shall in any way be disturbed, it shall be the duty of the company to at once relay the pavement so disturbed or taken up, not only to the full width to which it has been so disturbed, but to such further distance as may be necessary to again bring the whole pavement of the street into proper conformity; said work to be done under the direction of the board, and to its satisfaction. Section 5, that it shall be the duty of every street railway company owning or operating a street railway to keep in thorough repair, to the satisfaction of the board, the cross-walks crossing the railway, and for one foot outside of the outer track of the railway; said cross-walks to be in every way equal in quality to the remaining cross-walks, and all new cross-walks laid by the company to consist of stone not less than four feet in width, and reaching between the tracks. Section 6, that no company owning or operating any street railway shall take up any pavement or cross-walk, except for the purpose of repair, without the consent of the board or of the superintendent of works, and no street railway shall alter or change the grade of its tracks without the consent of the board. Section 7, that in case any street railway company shall fail to pave any portion of its tracks pursuant to the terms of this ordinance, to the satisfaction of the board, the board, upon 10 days' notice to the company, may cause the pavement to be laid or taken up, and the said portion of the street to be paved or repaved to the satisfaction of the board, and the company shall upon demand pay to the board the cost thereof. Section 8, that the board reserves to itself the right to appoint inspectors to supervise any paving or repaving to be done by any street railway company pursuant to the terms of this ordinance, and the cost of such inspectors shall be refunded and paid to the board by the company on demand; and all permits to lay down street railway tracks or to locate street railways, or to open the streets for the relaying of tracks, shall be expressly subject to all the terms of this ordinance.

Assuming the validity of the ordinance, it seems to us not to admit of the construction that it was designed for the safety of travelers upon the street as a class. On the contrary, the design is to impose upon the street railway company a share of the public burdens of the municipal government. The prime object is the relief of the municipal treasury. The duties imposed are to be performed by the company as one of the municipal agencies, and under the immediate supervision of a municipal board; and the ordinance provides that for any omission by the company to comply with its terms the remedy shall be applied by the board.

Fielders v. North Jersey St. Ry. Co

itself in proceeding to do the work and recovering the costs thereof from the company. There is no penalty imposed upon the company. There is nothing to indicate that it is done for the safety or protection of travelers upon the street. There is nothing in the language to indicate that it was the intent of the municipal authority in passing the ordinance that it should give rise to an action against the company by any citizen aggrieved through a breach of its provisions. There is no discretion given to the company as to the mode or style of paving or repairs; on the contrary, it is within the fair intendment of the ordinance that all work which is required to be done by the street railway company shall be done under the immediate direction of the board of street and water commissioners, or its inspectors and supervisors. In the opinion of the supreme court it is said that the ordinance was passed under due legislative authority for the regulation of all street railways; that it is a police regulation, in which the traveling public are concerned; and that the burden thus laid upon the operating companies is one fairly within proper police regulation, and could constitutionally be imposed as a condition of the exercise of a franchise in a public street, whether under an irrepealable contract or otherwise. This statement, it will be perceived, recognizes the importance of seeking out the source of power as having a bearing alike upon the validity of the ordinance and upon its proper construction if valid. By way of legislative authority we are referred to Laws 1857, p. 116, and Laws 1891, p. 262, § 12. No other legislation was referred to in the argument before us. The enactment of 1857, is the revised charter of the city of Newark, by which a common council was established, with power to make ordinances to regulate and keep in repair the streets, to license and regulate vehicles and carriages used for the transportation of passengers and merchandise, to grade and pave the sidewalks, etc. The act of 1891 had the effect of establishing a board of street and water-commissioners, who became vested with the powers formerly vested in the common council, including the general control over the streets, and with the express power to pass ordinances to regulate and control the use of streets and public places by foot passengers, vehicles, railways, and engines, and to grant franchises and locations to street railway companies for the operation of railways; subject, however, to the limitations contained in the general laws of the state relative thereto. The constitutionality of this statute has been sustained by the supreme court in *Re Haynes*, 54 N. J. Law, 6, 22 Atl. 923. The powers to which we are thus referred are properly classed among the police powers of the municipality. The distinction between the police power and the taxing power is entirely clear. The former extends merely to the regulation of those matters that are confided by the legislature to the municipal corporation for that purpose, including the

Fielders v. North Jersey St. Ry. Co

power to exact reasonable fees, not for the purpose of revenue, but only as incidental to the power of regulation. The power of taxation is exerted in order to compel citizens and property owners to contribute to the support of the municipal government. Tied. Mun. Corp. §§ 116, 123, 124, 253; Dill. Mun. Corp. (4th Ed.) § 141; Id. §§ 357-360; Id. § 768. The power to regulate the use of the public streets, including limitations upon the speed of travel, the exclusion of vehicles from the sidewalks, the regulation of public conveyances, and the like, are instances of the exercise of the police power. Dill. Mun. Corp. (4th Ed.) § 393. Nowhere, it is believed, has the distinction between the police power and the taxing power been kept more clearly in view than in New Jersey. Our courts, while giving full scope and reasonable construction to the powers delegated by the legislature to the municipalities, have been careful to check any usurpation of the taxing power attempted under the guise of police regulation. A conspicuous example is to be found in the decision of the supreme court in *North Hudson County Ry. Co. v. City of Hoboken*, 41 N. J. Law, 71. As this decision is cited in the opinion now under review as authority for the proposition that an ordinance requiring a street railway company to pave the street and maintain the pavement is fairly within proper police regulation, and as it has been elsewhere cited to the same effect (*Booth, St. Ry. Law*, § 243, note; *Cape May, D. B. & S. P. R. Co. v. City of Cape May*, 59 N. J. Law, at p. 401, 36 Atl. 698, 36 L. R. A. 653), it deserves more than a passing mention. The report of the case shows that, after the railway company had constructed, under legislative sanction, certain lines of street railway operated with horses, the municipal council adopted certain ordinances, general in their effect, which, among numerous other provisions, required all street railway companies to take out licenses for the running of their cars, and thereupon to pay into the city treasury annual license fees of \$15 for each one horse car and \$25 for each two horse car; at the same time imposing a penalty for each time any car should be run without license. These ordinances were brought under review by writ of certiorari. The report shows that the argument of the counsel of the prosecutor was directed to the validity of those parts of the ordinances that required the taking out of licenses and the payment of license fees. The opinion of the supreme court was delivered by Mr. Justice Depue (afterwards chief justice), who, near the outset of the discussion, used this language: "A municipal corporation, under the ordinary powers of local government, in virtue of its control over its streets, may adopt reasonable regulations for the government of the city, for the preservation and safety of its streets, and for the maintenance of good order. The provisions in these ordinances requiring the tracks to conform to grade, and to be laid under the direction of the street commissioners, for keeping in repair the space between

Fielders v. North Jersey St. Ry. Co

the rails, requiring bells to give warning of the approach of the cars, providing for the removal of snow, and the like, are of the character of regulations which may be adopted, and, if reasonable, are valid. Such regulations do not appreciably interfere with the exercise of its franchise by a corporation having the franchise to use the public streets for its business. They are necessary for the good government of the city, and the legislature is presumed to have intended, when it authorized the use of the public streets for such purposes, that its grantee should hold its privileges subject to such regulations as are reasonably necessary for the common use of the streets for the purposes of a street railway and for ordinary travel. But an ordinance requiring a license as the condition under which a railway company shall be permitted to run its cars, and exacting a license fee therefor, is quite a different thing." The learned justice then proceeds to show that the function of granting licenses is an incident of the police power of regulation; that the grant of power to license does not carry by implication the power to charge license fees for revenue; and that the exaction of license fees for revenue purposes is clearly an exercise of the taxing power, and cannot be sustained, unless the charter plainly shows an intent to confer that power. And so the ordinances were set aside so far as they affected the prosecutor by imposing license fees. If the language quoted from this opinion were intended to mean that the police power justified the imposition upon street railway companies in general of the duty of repairing the streets and of removing snow therefrom, it would be quite incongruous with the point actually decided, and to which much stress of argument was devoted. What the learned justice said, however, was merely that "the provisions in these ordinances" (meaning the ordinances before the court), so far as they applied to certain things that he mentioned, were "of the character" (that is, within the category) for regulations that, if reasonable, would be valid. He did not say that the regulations in question were either reasonable or valid. He did not undertake to say specifically what they were. They do not appear in the report of the case, because they were not the subject of attack, or even of discussion. The opinion shows that he referred to them only causally, as instances of the exercise of the power of regulation, so that he might illustrate by antithesis the character of the licensing clauses that were under criticism. If any greater significance was intended to be given to the language quoted, it was manifestly obiter dictum.

An examination of the ordinances that the learned justice had before him, which may be found among the files of the supreme court, shows the correctness of what has just been said. The original ordinance was approved June 27, 1861, and contains 10 sections, the first of which enacts, in substance, that when any permission shall hereafter be granted to

Fielders v. North Jersey St. Ry. Co

any person or corporation to lay tracks and run cars over the streets of the city, such person or corporation shall be subject to the following conditions and restrictions: That the tracks shall be laid under the direction of the street commissioner and committee on streets; that the rails shall be laid on the established grades, and shall at all times conform to grades hereafter established; that such person or corporation shall keep in good repair the space between the rails and two feet on each side of the outer rails, etc. Section 2 requires all companies to keep bells upon their horses to give warning of their approach, limits the speed to six miles an hour, requires the cars to be lighted at night, and further provides that in clearing or removing the snow or ice from the tracks it shall be done so as not to interrupt public travel or interfere with the rights of abutting property owners, and that no salt or other melting substance shall be used for removing the snow. The remaining sections, so far as they apply to companies already existing, are regulative merely, excepting the one that imposed the annual license fee for each car; and this, by its terms, applied not only to companies thereafter to be authorized to construct tracks, but also to companies already in operation. The amendatory ordinances relate solely to the system of licensing attempted to be established by the ordinance of 1861. It will be seen that there was nothing in the ordinances requiring the repair of the streets by companies already established. The declaration was that companies obtaining permission in the future to lay tracks must take it subject to the condition indicated. These were the days of horse railroads, whose operations had the effect of concentrating the wear and tear upon a limited portion of the street; and the proposition was that as a quid pro quo for a local franchise any new horse railroad company should agree, not, indeed, to pave or repave, but to repair, the street. It will also be noticed that nothing in the ordinances required the removal of snow. The requirement was that, if the company desired to remove the snow for its own convenience, it should so in a manner not to interfere with the rights of others. So much for the City of Hoboken Case. It has been much misunderstood. It is a clear authority against, not in favor of, any construction of the police power that would permit it to be employed for purposes of revenue. That case was followed by the supreme court in *City of Cape May v. Cape May Transp. Co.*, 64 N. J. Law 80, 44 Atl. 948, where it was again held that an ordinance imposing license fees for revenue upon a street railway company could not be supported as an exercise of the police power.

In the following cases the supreme court has sustained municipal regulations imposed upon street railways in the exercise of the police power, viz.: An ordinance requiring horse railroad companies to have an agent upon each car, in addition to the driver, to assist in the control and care of the car

Fielders v. North Jersey St. Ry. Co

and its passengers and to prevent accidents and disturbances of the good order and security of the streets,—*Trenton Horse R. Co. v. Inhabitants of City of Trenton*, 53 N. J. Law, 132, 20 Atl. 1076, 11 L. R. A. 410; an ordinance prohibiting the placing of salt upon street railway tracks, except on curves leading from one street to another,—*Traction Co. v. City of Elizabeth*, 58 N. J. Law, 619, 34 Atl. 146; an ordinance limiting the rate of speed of electric cars running in the streets,—*Cape May, D. B. & S. P. R. Co. v. City of Cape May*, 59 N. J. Law, 393, 36 Atl. 679, 36 L. R. A. 656; an ordinance requiring the use of fenders on the front of electric cars to prevent accidents,—*Cape May, D. B. & S. P. R. Co. v. City of Cape May*, 59 N. J. Law, 396, 36 Atl. 696, 36 L. R. A. 653; an ordinance requiring electric cars to come to a full stop at each street before crossing it,—*Cape May, D. B. & S. P. R. Co. v. City of Cape May*, 59 N. J. Law, 404, 36 Atl. 678, 36 L. R. A. 657; an ordinance having the effect of prohibiting a trolley company, already authorized to string electric wires upon poles in the streets, from cutting or trimming any trees in so doing, without first obtaining permission from the governing body,—*Consolidated Traction Co. v. East Orange Tp.*, 61 N. J. Law, 202, 38 Atl. 803. No criticism is now made upon any of these decisions. They give no support to the present ordinance.

This court, as it happens, has not been called upon to deal directly with the question of municipal regulation of street railways. But the power of the municipality to regulate the crossings of streets by steam railroads has been more than once brought here for consideration. In *Pennsylvania R. Co. v. Jersey City*, 47 N. J. Law, 286, it was held that an ordinance prohibiting the obstruction of a crossing for more than three minutes at a time was within the granted powers of regulation of the streets and of railways; that such regulations must be reasonable; and, the ordinance in question being plainly reasonable in its general application to crossings throughout the city, and open to question in this respect only as to three streets near the terminal of one railroad, this court refused to set aside the ordinance in toto, leaving the railroad company to raise the objection of unreasonableness with respect to either of the three crossings in any proceeding that might be taken to enforce the ordinance. In *Morris & E. R. Co. v. City of Orange*, 63 N. J. Law, 252, 43 Atl. 730, 47 Atl. 363, this court held that the police powers of government are sufficient to authorize imposing upon a steam railroad company the duty of protecting the public at grade crossings over city streets by the erection and maintenance of gates and the employment of flagmen; and that, therefore, in proceedings taken by the municipality to ascertain damages allowable for the opening of a street, the railroad company, while entitled to compensation, was not entitled to have the cost of

Fielders v. North Jersey St. Ry. Co

gates and flagmen included in the allowance. In many other cases in the supreme court, the distinction between the police power and the taxing power has been discussed. *Kip v. City of Paterson*, 26 N. J. Law, 298; *Benson v. Hoboken*, 33 N. J. Law, 280; *Delaware, L. & W. R. Co. v. East Orange Tp.*, 41 N. J. Law, 127; *Muhlenbrink v. Commissioners*, 42 N. J. Law, 364, 36 Am. Dec. 518; *Clark v. City of New Brunswick*, 43 N. J. Law, 175; *Morgan v. Orange*, 50 N. J. Law, 389, 13 Atl. 240; *Mulcahy v. City of Newark*, 57 N. J. Law, 513, 31 Atl. 226; *City of Cape May v. Cape May Transp. Co.*, 64 N. J. Law, 80, 44 Atl. 948. And two cases in this court may be mentioned: *Haynes v. City of Cape May*, 52 N. J. Law, 180, 19 Atl. 176; *Johnson v. Borough of Asbury Park*, 60 N. J. Law, 427-430, 39 Atl. 693. It is needless to say that this extended reference to familiar decisions has been made, not for the purpose of showing the existence of a distinction that is so universally recognized, but for the purpose of showing how rational is the distinction, and how easy of application, and in order to demonstrate how impossible it is that a power conferred by the legislature for the purpose of regulating the streets of a city, and the use of the streets by traction companies and others, can, by any defensible interpretation, be so stretched as to cover an ordinance of the character of that now before us. The traction company is in the enjoyment of a public franchise granted by the legislature. It has a use of the streets differing only in kind from that of other citizens using them, and has no interest in the soil. It is under a general obligation to keep its rails in repair so they shall not become an obstruction to travel. It is also bound by any contract it may lawfully have made with the municipality in consideration of the grant of its local privileges. But entirely independent of any such consideration, and irrespective of any disturbance of the street surface in the operation of the railway, this ordinance attempts to impose upon every traction company the duty to pave a considerable portion of every street over which it passes, although it may bring no additional wear and tear upon the pavement, and the further duty to keep such pavement, when laid, at all times in repair. To call this "regulation," or an exercise of the police power, is a misuse of terms. It is taxation pure and simple. It calls upon the company to perform a function not essentially different in character, although vastly more onerous, than the once familiar operation known as "working-out" the township road taxes by the labor of the inhabitants. Gen. St. p. 2817, § 51 et seq. A power that will not support the imposition of license fees fixed on a revenue basis will certainly not support an ordinance of this character. We therefore hold that the ordinance is not supportable as an exercise of the police power, and, since no other legislative authority exists for its enactment, it imposed no duty upon the defendant company to repair the pavement between its rails, or to repave that portion of the street.

Kibler v. Southern Ry

We have not forgotten the "act to provide for the incorporation of street railway companies and to regulate the same," approved April 6, 1886 (Laws 1886, p. 185; Gen. St. p. 3216). Section 18 is as follows: "That every street railway company incorporated under this act shall keep in repair, to the satisfaction of the local authorities, the paving, upper planking or other surface material of the portions of streets, roads and bridges occupied by its tracks, and if such tracks occupy unpaved streets or roads, shall, in addition, so keep in repair eighteen inches on each side of the portion occupied by its tracks: provided, that nothing in this section shall be deemed to affect or repeal existing provisions of any municipal charter or any ordinance or regulation heretofore passed or adopted." There is nothing in this case to show when, or under what legislative authority, the defendant company was incorporated. Nor was this statute invoked in the argument of the learned counsel for the plaintiff in this court. We cannot assume that the defendant was incorporated under that act, in view of the existence of other legislation to which its origin may as naturally be attributed. We are therefore relieved from considering whether section 18 of this act creates a liability in favor of any member of the traveling public who may sustain damage through the nonrepair of the street.

The judgment should be reversed, and a venire de novo awarded.

KIBLER v. SOUTHERN RY.

(*Supreme Court of South Carolina, June 14, 1902.*)

[41 S. E. Rep. 977.]

Carriers—Insult to Passenger—Punitive Damages.*

Where a complaint alleged that a conductor willfully, wrongfully, unlawfully and intentionally refused plaintiff passage on a train on tender of the legal fare, it sets up a cause of action for punitive damages, and where there was evidence to support the allegation a nonsuit was properly refused.

Appeal from common pleas circuit court of Newberry county; Gary, Judge.

Action by Wm. Kibler against the Southern Railway. From a judgment for plaintiff, defendant appeals. Affirmed.

T. P. Cothran, for appellant.

Johnstone & Welch, for appellee.

POPE, J. The pleadings and (in the main) the facts in this cause are fully set forth in the report of the first appeal herein. Kibler v. Railway, 62 S. C. 252, 40 S. E. 556. Under the judgment of this court, a new trial was had before his honor Judge Ernest Gary and a jury, resulting in a verdict for plaintiff for \$400. After entry of judgment, an appeal was taken from such judgment on the following grounds:

"First. Error in overruling the defendant's motion for a

*See foot-note appended to Louisville & N. R. Co. v. Champion (Ky.), 3 R. R. R. 732, 26 Am. & Eng. R. Cas., N. S., 732.

Kibler v. Southern Ry

nonsuit upon the following grounds: (1) The complaint does not allege facts which would warrant a verdict for punitive damages, and there is no evidence of actual damages. (2) There is no evidence tending to show malice, fraud, wantonness, or oppressive, insulting, or rude conduct, on the part of the defendant or its servants. (3) In an action for punitive damages resulting from an alleged willful tort, damages resulting from ordinary negligence are not recoverable.

“Second. Error in refusing defendant’s first request to charge, and in holding that the complaint stated sufficient facts to warrant a recovery of punitive damages.

“Third. Error in refusing the defendant’s eighth request to charge, as follows: ‘A railroad company has the right to impose an excess charge of twenty-five cents upon passengers who fail to buy tickets when opportunity is offered, and rebate check is furnished;’ and in charging: ‘I refuse to charge you that, because it is in conflict with the statute law of this state. The statute has defined what they shall charge, and they have no right, under any construction of the law, to charge in excess of that amount;’ and in charging: ‘The railroad company would have no right, where the passenger refuses to pay the legal rate of transportation,—and I mean by “legal rate” that fixed by the act of the general assembly,—that the railroad company has no right to charge him any excess, either by rebate check or drawback check or otherwise.’ Specifications: (1) The right to impose this excess has been settled upon the former trial of this case by the decision of Judge Izlar, from which there was no appeal. It is the law of the case. (2) The imposition of this excess is not a charge, but a reasonable regulation, conducive to the orderly conduct of business, and is valid. (3) The defendant had the right, under the statutes of this state, and under the regulations of the railroad commissioners offered in evidence, to impose this excess.”

1. As to the exception that the circuit judge erred in his refusal to grant a nonsuit:

(1) We think the allegations of fact in the complaint herein, in its third, fourth, fifth, and sixth paragraphs, abundantly warrant a verdict for punitive damages. When the conductor of a train willfully, wrongfully, unlawfully, and intentionally refuses a citizen passage thereon after he has offered to pay the legal fare for such passage, and actually causes him to leave the train before arriving at his destination, a cause of action for punitive damages exists. Thus subdivision 1 is overruled.

(2) The evidence tended to show that the citizen who tendered the legal fare was ordered from the train, and that there were other passengers on board to witness the plaintiff’s humiliation when required to leave the train. This testimony was before the jury. It was before the court when this motion for nonsuit was refused. It was for the jury to weigh

Kibler v. Southern Ry

it, to see if there was malice, fraud, wantonness, etc. The circuit judge committed no error, as here pointed out. Subdivision 2 of exception 1 is overruled.

(3) It is quite true that punitive damages do not result from ordinary negligence. Nevertheless, such damages do arise from wantonness, oppression, or rude and insulting conduct of a conductor to a passenger. It was the duty of the jury, and not the circuit judge, to determine if the testimony offered by the plaintiff established such a delict in the conductor towards this passenger. The circuit judge did his duty when he declined to weigh the testimony. Its existence was his duty to determine on this motion. There was no error here. Subdivision 3 is overruled.

2. It is complained that the circuit judge erred in refusing to charge the first request of the defendant. The case for appeal fails to state to us what this request was. On page 43 there is a blank space left for its insertion in the "case." It is overruled.

So far as the second branch of exception 2 is concerned, to wit, that the complaint failed to state facts to warrant a recovery of punitive damages, we have already held that the allegations of paragraphs 4, 5, and 6 of the complaint are sufficient upon which to bottom a recovery of punitive damages, if the same are sustained by the testimony, and that there was testimony offered by the plaintiff tending to establish such damages. This exception is overruled.

3. The circuit judge refused to charge defendant's eighth request, which request is copied in the third exception already quoted in this opinion. The legality of Judge Izlar's charge during the first trial in relation to the right of railroads to charge an excess of 25 cents where a person fails to purchase a ticket was not involved in the former appeal in this case. Hence this court could not and did not pass upon Judge Izlar's charge. It is only where this court passes upon a question brought before it by exception that our judgment is conclusive upon parties to a cause in a second or new trial.

We think Judge Gary was right in refusing to charge the eighth request of defendant. But whether he was right or wrong in such declaration of the law, it will not affect this case, for the reason that defendant railroad had no tickets for sale at its agency in Newberry for less than 10 cents. Its own agent testified that he would not have sold the plaintiff a ticket from Newberry to Helena for 3 cents, or, rather, for any amount less than 10 cents. This being so, such ruling was not necessary in this cause. It became an abstract question of law. The ruling, as before said, whether right or wrong, did not affect this case. So, therefore, subdivisions 1, 2, and 3 of the third exception do not fairly arise upon the record, and are therefore overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

FOSTER *v.* OLD COLONY ST. RY. CO.*(Supreme Judicial Court of Massachusetts, Bristol, Jan. 6, 1903.)*

[65 N. E. Rep. 795.]

Injury to Alighting Passenger—Snow on Car Steps—Duty to Sprinkle Sand.*

Plaintiff was injured while alighting from a street car by reason of the slippery condition of the steps. The accident occurred during a storm of snow and sleet. The route of the car was about five minutes each way. Before the car started on its trip during which the accident occurred, it had waited at least 15 minutes. By the rules of the company, it was the duty of the conductor, in case of a storm, to sprinkle sand on the platform and steps. The conductor testified that there was a sand pail at each end of the car: *held* to warrant a finding that defendant had undertaken to prevent, and could have prevented, the steps from being slippery.

Same—Same—Negligence.

This evidence, with the testimony of the conductor that about half an hour before the accident he had put a quart of sand on the step while the car was waiting, and the testimony of plaintiff's witnesses that there was no sand on the step when the accident happened, and that there was no sand pail on the platform, was sufficient to warrant the jury in finding that defendant was negligent.

Same—Contributory Negligence.

Plaintiff testified that she knew that she had to look out for herself, because it was slippery, and so held the handle of the car dasher: *held*, that the jury were warranted in finding that she knew that the step was slippery, and exercised due care in view of that knowledge.

Exceptions from superior court, Bristol county; Henry K. Braley, Judge.

Action by Wilbertina A. Foster against the Old Colony Street Railway Company. Judgment for plaintiff, and defendant brings exceptions. Overruled.

J. E. Hannigan and R. P. Coughlin, for plaintiff.

F. S. Hall, for defendant.

LORING, J. The plaintiff in this case came to Taunton from Clinton by train one Monday morning in February, 1901. She left Clinton at 7:30, and arrived at Taunton at 9:30. On leaving the station of the steam railroad at Taunton, she took a car of the defendant corporation, which was waiting a few feet from the station, and which runs from the steam railroad to the business center of the city. The car stopped when it got to the Taunton Hotel, and the plaintiff proceeded to get off the car. She put in evidence that she took hold of the handle of the dasher with her right hand, and stepped onto the step with her left foot; as she raised her right foot and threw her weight on her left foot, that foot went out from under her, by reason of the slippery condition of the step, caused by snow and ice which had accumulated upon it. It was undisputed that it was snowing when the plaintiff left Clinton, and that the storm had not stopped

*See monograph attached to *Herbert v. St. Paul City Ry. Co.* (Minn.), 3 R. R. R. 152, 26 Am. & Eng. R. Cas., N. S., 152.

Foster v. Old Colony St. Ry. Co

when the accident happened, but that the snow had then turned to rain and sleet. The plaintiff's witnesses testified that it was a bad storm; the plaintiff and one of her witnesses, who had come with her from Clinton, testified that when they reached Taunton it was raining, sleeting, and freezing; and the other witness of the plaintiff who testified on the point said that in Taunton there was a slight rain, which froze as it struck the ground.

The defendant contends that it is not practicable for a street railway company to prevent the open steps of its cars from becoming slippery during the continuance of such a storm as that in question in the case at bar, either by shoveling off the snow, sleet, or ice which must accumulate on the steps, or by spreading sand or sawdust on them. *Kelly v. Railway Co.*, 112 N. Y. 443, 20 N. E. 383, 3 L. R. A. 74; *Fern v. Ferry Co.*, 143 Pa. 122, 22 Atl. 708, 13 L. R. A. 366. But under the special circumstances of this case, we do not think that that question arises. It appeared that the route over which the car in question ran was a short one, apparently about five minutes each way; at the time of the accident in question, to wit, a quarter before 10 in the morning, or thereabouts, the car was on its fifth trip. It further appeared that the car had waited at the railroad station 15 minutes, if not more. In addition to this, the defendant's motorman testified that by "our rules" it was the duty of the conductor, in case of a storm, to sprinkle sand on the platform and step of the car, and that this could be done every two or three minutes, if necessary; and the conductor testified that he had sprinkled sand on the step where the plaintiff fell three times on the morning in question, and before the accident; and, lastly, that there was a sand pail at each end of the car. On this evidence the jury were warranted in finding that under the circumstances of this case the defendant could have prevented, and had undertaken to prevent, the open steps of this car from being slippery when the plaintiff alighted from it. For these reasons, we think that the presiding judge was right in not directing a verdict for the defendant.

We think that the foregoing evidence, coupled with the testimony of the conductor that he put "about a quart" of sand on the step at about half past 9 o'clock, while the car was waiting at the railroad station, and the testimony of the plaintiff's witnesses that there was no sand on the step when the accident happened, and that there was no sand pail on the platform, was evidence on which the jury were warranted in finding that the defendant was negligent. See *Holmes, J.*, in *Gilman v. Railroad Co.*, 168 Mass. 454, 455, 47 N. E. 193.

The defendant contends that the jury were not warranted in finding that the plaintiff was in the exercise of due care. We think that such a finding was warranted. The plaintiff testified, in answer to the question, "So you got off without looking at the steps?" that "I knew I had to look out for my-

Galligan v. Old Colony St. Ry. Co

self, because it was slippery, and I had hold of this handle,"—meaning the handle of the dasher of the car. The defendant argues that she was not in the exercise of due care, because, "upon her own evidence, she did not observe the condition of the car step when she entered or when she alighted." The jury were warranted in finding that she knew that the step was slippery, and did all that due care demanded with that knowledge. That is enough. *Fitzgerald v. Paper Co.*, 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537; *Fleck v. Railway Co.*, 134 Mass. 480; *Dipper v. Inhabitants of Millford*, 167 Mass. 555, 46 N. E. 122.

Exceptions overruled.

GALLIGAN v. OLD COLONY ST. RY. CO. (two cases).

(*Supreme Judicial Court of Massachusetts, Plymouth, Oct. 30, 1902.*)

[66 N. E. Rep. 48.]

Exceptions.

A request by the attorney for the plaintiffs to "save 4 and 8 of the defendant's requests, which were given," and an assent thereto by the court, constituted a sufficient exception to the general nature of the charge given by the court covering such requests, though they were not given in the language used in the requests; but not to inconsistencies in different sentences of the charge, relating to the same subject.

Injury to Passengers—Derailment—Negligence—Instruction.

Where plaintiffs in an action for injuries received in a street car accident have shown that the derailment was owing to the presence on the track of a stone which had rolled from an adjacent bank, and the question as to whether the stone was there by the company's fault has been treated on the trial as the decisive issue, the plaintiffs cannot complain of an instruction that negligence cannot be imputed to the company by the mere fact of the derailment.

Street Railway—Maintenance of Tracks—Degree of Care.

A street railway company, whose track is upon a highway, but in a cut not used for travel, is bound to the same degree of care in preventing accidents from the fall of material therefrom upon the tracks as it would be if its tracks were upon its own land.

Same—Same—Same.*

A street railway company is bound to the highest degree of care in the maintenance of its tracks consistent with the nature of the undertaking.

Same—Same—Same.

A charge that the degree of care required by a street railway company to prevent material falling from an embankment upon the track was different from "the highest degree of care consistent with the proper management of the road," but which describes the care required as a "reasonable degree of care * * * commensurate with * * * the danger," and a care to be "considered in connection with the business which is carried on," was not open to objection, as the degree of care specified amounts in reality to the highest degree consistent with the undertaking.

Exceptions from superior court, Plymouth county; John H. Handy, Judge.

*As to the duties of carriers of passengers with respect to their roadbeds and tracks, see monograph appended to *Edwards v. Southern Ry. Co. (S. Car.)*, 2 R. R. R. 761, 25 Am. & Eng. R. Cas., N. S., 761.

Galligan v. Old Colony St. Ry. Co

Actions by Henry W. Galligan and Margaret E. Galligan against the Old Colony Street Railway Company. Verdicts for defendant, and plaintiffs except. Exceptions overruled.

Richard W. Nutter, for plaintiffs.

Henry F. Hurlbut and Damon E. Hall, for defendant.

BARKER, J. The story of the accident which caused the injuries for which compensation is sought is not now in dispute. The street railway on which the plaintiffs were passengers was located in March, 1898, and constructed and put in operation in the summer of that year. On December 23, 1900, in the evening, after dark, the car, properly equipped and manned, was running from Providence to Taunton, and it was conceded that the accident was not due to negligence of the persons by whom it was controlled. The tracks were within the bounds of a highway; not in that part used for common travel, but in a cut or depression excavated for them through a ledge. The side of this cut most distant from the part of the way fitted and used for ordinary travel was from 8 to 10 feet high and from 4 to 6 feet from the nearer rail, and was nearly or quite vertical for 5 or 6 feet up, and then sloped back at a slight angle. In it was a cleft beginning $2\frac{1}{2}$ or 3 feet higher than the rail, and running in the shape of a V to the top of the ledge at a point about 8 feet above the rail and about 10 feet back, measured horizontally. In the cleft was earth or soil. After the passage of the next preceding car, which went through about half or three-quarters of an hour before, the earth in the cleft caved, and a stone rolled down out of it, and stopped between the rails. The stone was oval or rounded, and of such size that when the car on which the plaintiffs were came in contact with it the car was derailed, and the plaintiffs were hurt. At the trial they sought to recover under counts which alleged that the defendant so unskillfully and improperly cared for the embankment that the stone was permitted to roll out of it upon the track, in consequence of which the car was derailed, and the injuries complained of sustained. After a ruling, unobjected to, that there was no evidence to warrant a finding that the accident was due to those in control of the car, the cases were sent to the jury, who returned verdicts against the plaintiffs.

The defendant, among other requests, had asked the court to instruct the jury as follows: "(4) The burden is upon the plaintiff in these cases to show that the accident was caused by the negligence of the defendant or its servants and agents, and the mere happening of the accident is no evidence of negligence." "(8) The care which the defendant was bound to exercise with reference to the ledge or embankment was reasonable care, and not the highest degree of care." The court did not give the rulings in the language requested. After the charge the defendant's counsel saved the exceptions because the court declined to give certain rulings which the defendant

Galligan v. Old Colony St. Ry. Co

had requested. Counsel for the plaintiffs then said, "And for the plaintiffs, if your honor will save 4 and 8 of the defendant's requests which were given," to which the court replied, "Well, all right." Aside from the effect of this colloquy no exception was taken by the plaintiffs, and they made no specific objection to any part of the charge. The defendant contends that, as neither of the two requests specified was in fact given in terms, no exception to the charge was saved by the plaintiffs. We think this view too narrow, and that, while the plaintiffs cannot rely upon possible inconsistencies between different sentences of the charge relating to the same subject, not having pointed them out at the time, still it is open to them to question the general correctness of the charge upon the two points treated of in the requests mentioned.

1. We are of opinion that the plaintiffs cannot complain of the instruction that the mere happening of the derailment or the mere happening of the accident was not in and of itself evidence of negligence on the part of the defendant. The plaintiffs showed not only a derailment, but also that it was caused by the presence between the rails of a large stone, which had rolled upon the track from the adjoining bank; and the issue which was treated at the trial as the decisive one to be settled by the jury was whether the stone was upon the track by the fault of the defendant. The plaintiffs, by going as far as they did, had made it impossible for themselves to rely upon the mere derailment as evidence of negligence. *Winship v. Railroad Co.*, 170 Mass. 464, 465, 49 N. E. 647; *Buckland v. Railroad Co. (Mass.)* 62 N. E. 955.

2. The remaining question is whether the rule as to the degree of care to be exercised by the defendant with reference to the ledge or embankment was correct. In one sense, the ledge, being a part of the highway not within the tracks, and more than 18 inches distant from that part of the highway which they occupied, was not within the defendant's care. Still, its right under its location included that of maintaining and operating its road, and carried with it the right so to deal with the ledge or bank that the fall of material from it should not obstruct or endanger the running of cars upon the track. We see no reason why the defendant was not bound, as to its passengers, to exercise the same degree of care to prevent injury to them in consequence of the rolling of stones from the embankment upon the track that it would have been bound to use, if the place had not been part of a highway, and had been part of a location upon the defendants' own land, or of one taken from private owners by the exercise of the right of eminent domain under a grant of power from the legislature. This degree of care is the same as that required with reference to the equipment and management of the cars or the construction of its tracks. *McElroy v. Railroad Corp.*, 4 Cush. 400, 402, 50 Am. Dec. 794. It is the highest degree of care consistent with the nature of the undertaking, which is

Galligan v. Old Colony St. Ry. Co

the management or operation of the road as a common carrier of passengers; or, in other words, the requirement is reasonable care according to the nature of the contract. *Feital v. Railroad Co.*, 109 Mass. 398, 405, 12 Am. Rep. 720; *Dodge v. Steamship Co.*, 148 Mass. 207, 218, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541. We are of opinion that such was the rule intended to be given in the charge, and that so it must have been understood by the jury; and that, if the plaintiffs thought the statement of the rule such that it might have been misunderstood, they should have called the attention of the judge particularly to the point, and requested some specific modification of the language used. The chief issue to the jury was whether the derailment was caused by a pure accident happening without the failure of due care on the part of any one. It was conceded that there was no want of care on the part of the persons in charge of the car, and no want of care was contended for by the plaintiffs, except with reference to the embankment. Upon that point, after stating that, as to the equipment and management of the car, the highest degree of care consistent with the proper management of the road was required, the presiding judge said: "But with reference to the care of the embankment the rule is somewhat different. It is incumbent upon the company to satisfy you that it has used a reasonable degree of care; that is, a care commensurate with the apparent danger there might be to the safety of life and limb of passengers, or to the safety of those who are carried by the railroad company. That is a care which must be considered in connection with the business which is carried on. It is proper for you to consider, in connection with the care which is required, what was necessary, when you are considering that cars are liable to move at the rate of ten or twelve miles an hour in the night, and was there reasonable care used in this case?" The only particular in which the statement is open to criticism is the single sentence in which, after speaking of "the highest degree of care consistent with the proper management of the road" as that which the company is bound to exercise as to the equipment and management of the car, it is said that "with reference to the care of the embankment the rule is somewhat different." But the rule as immediately thereafter stated required of the defendant a degree of care commensurate with the apparent danger there might be to the safety of passengers in connection with the business carried on and with the way it was conducted. It did not allow the jury to find that reasonable care was less than the highest care consistent with the undertaking. In one respect it was too favorable to the plaintiffs, namely, in saying that it was incumbent upon the defendant to satisfy the jury that it had used care commensurate with the danger. If the plaintiffs deemed it important that the jury should be told that reasonable care as to the embankment required the highest degree of care

Mabry v. City Electric Ry. Co

consistent with the nature of the defendant's business, a specific request to that effect should have been made. The colloquy between counsel and the court had no tendency to point out that the particular statement was objected to that the rule with reference to care as to the embankment was somewhat different from that given as to the equipment and management of the car, about which there was no question before the jury.

Exceptions overruled.

MABRY v. CITY ELECTRIC RY. CO.

(Supreme Court of Georgia, Dec. 10, 1902.)

[42 S. E. Rep. 1025.]

Expulsion of Passengers—Damages.*

A railroad company is liable in damages for an injury to the feelings and sensibilities of a passenger, caused by his wrongful expulsion from one of its cars, though such passenger may not have received any physical injury thereby.

(Syllabus by the Court.)

Error from city court of Floyd county; John H. Reece, Judge.

Action by Mrs. Joe Mabry against the City Electric Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Seaborn & Barry Wright, for plaintiff in error.

Denny & Harris, for defendant in error.

CANDLER, J. Mrs. Mabry brought suit for damages against the City Electric Railway Company, a street railroad corporation, of the city of Rome. Her petition alleged that on a named day she boarded a car of the defendant at a point "some 200 yards from the switch where all cars on the line of the defendant company meet, * * * and from which points the cars run to the several destinations of the line." It was her intention to go to her home in North Rome. As she boarded the car, she asked the conductor if she could ride to the switch, and be transferred to an outgoing car, and go to her home, and the conductor replied that she could. She then paid her fare, and when the car reached the switch she "got off of the incoming car for North Rome and boarded the outgoing car to North Rome." Transfers of passengers were made orally by the conductors of the company, and not by written transfer tickets, and she supposed that she had been transferred, as promised by the conductor of the car that she first boarded. After riding a short distance on the outgoing car, the conductor asked for her fare. She told him that she had paid her fare, and explained the agreement made by the conductor of the car which she had first boarded; but in spite

*See note appended to *Louisville & N. R. Co. v. Hine* (Ala.), 14 Am. & Eng. R. Cas., N. S., 382.

Mabry v. City Electric Ry. Co

of her protests the conductor ejected her in the presence of other passengers, and she was compelled to walk to her home, a distance of more than a mile. She sued for \$500 on account of wounded feelings and "great physical distress." The defendant demurred to the petition, the material portions of which are substantially set forth in the foregoing statement, the grounds of demurrer being: (1) That no cause of action was set out, in that no physical injury was alleged to have been sustained by the plaintiff; and (2) that no damages for pain and suffering "or other pathological damages" can be recovered unless there is some physical injury. The court sustained this demurrer, and dismissed the petition, and the plaintiff excepted.

It will be observed that the defendant does not call in question by its demurrer the sufficiency of the allegations of wrong done to the plaintiff by its servants, but asserts that no cause of action is set out, in that no physical injury is alleged to have been sustained by her. So far as appears from the pleadings, the plaintiff was rightfully on the car from which she alleges that she was ejected, and under the alleged agreement made with her by the conductor of the first car she was entitled to ride to her home on the second car. After informing the conductor of the second car of the facts of that agreement, which, if true, entitled her to ride to her destination in pursuance of her original design, it is alleged that he, over her protests, and in the presence of other passengers, ejected her from the car, compelling her to walk to her home, a distance of more than a mile. Her suit is for wounded feelings and physical distress on account of this wrongful treatment. "Wounding a man's feelings is as much actual damage as breaking his limbs. The difference is that one is internal and the other external; one mental, the other physical." *Head v. Railway Co.*, 79 Ga. 360, 7 S. E. 218, 11 Am. St. Rep. 434. The defendant company owed the duty to the plaintiff to carry her safely and properly to her destination, and under this obligation she was entitled to be treated respectfully. If it intrusted this duty to servants, the law holds it responsible for the manner in which these servants executed their trust. The precise question made by the demurrer in the case at bar was before this court in the case of *Cole v. Railroad Co.*, 102 Ga. 474, 31 S. E. 107. In the present case, as in the case cited, the question presented is, does the law afford any redress for wounded feelings unaccompanied by injury to the person or purse? Both cases are clearly distinguishable from the case of *Chapman v. Telegraph Co.*, 88 Pa. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183. In the *Chapman Case* there was no tort independently of the violation of the contract, and in such cases the best decisions of the courts of last resort are to the effect that the damages recoverable are strictly compensatory, and take on the vindictive or exemplary feature only in cases

Morningstar v. Louisville & N. R. Co

where the injury is willful, wanton, or malicious. That case proceeds upon the idea of a negligent omission to perform a contractual obligation, and the judgment might well have been placed upon the character of the suffering alleged and the remoteness of the damages arising therefrom. The case at bar, however, is based upon the wrongful commission of an overt act, which in itself involved the feelings, sensibilities, and in a measure, the reputation, of the plaintiff; an act tending to degrade her in the estimation of other persons present at the time. The injury alleged is, not the failure to carry the plaintiff to her destination, but her expulsion from the car over her protestations of her right to remain thereon. We do not think, therefore, that the Chapman Case is applicable to the case at bar. While the law protects the person of the citizen from physical injury, it also protects his feelings from laceration, and will apply money to such wounds as a salve for their healing.

The court erred in sustaining the demurrer to the petition, and the judgment is therefore reversed. All the justices concurring, except LUMPKIN, P. J., absent.

MORNINGSTAR v. LOUISVILLE & N. R. Co.

(Supreme Court of Alabama, Dec. 16, 1902.)

[33 So. Rep. 156.]

Carriers—Limited Ticket—Construction—Delay of Trains—Effect—Ejection.

Plaintiff purchased a return ticket limited to expire May 20, 1900, and on that day presented himself for return passage at defendant's station in time to take a train scheduled to leave before midnight. The train was delayed, and did not leave until the next day. Plaintiff was accepted as a passenger by the conductor, and when it left the station his ticket was punched to a junction point, where plaintiff was required to change cars. On account of the delay, the connecting train had left the junction when plaintiff arrived, and the conductor of the next train refused to accept plaintiff's ticket, and ejected him, on the ground that the ticket had expired: *held*, that the limit on the ticket fixed the latest time for commencing, and not for completing the return journey, and that, as plaintiff was entitled to rely on defendant's train schedule, defendant was liable for such ejection.

Appeal from circuit court, Mobile county; Wm. S. Anderson, Judge.

Action by Henry Morningstar against the Louisville & Nashville Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

On the trial it was admitted by the defendant that the ticket offered in evidence was a part of the identical ticket purchased by Mr. Morningstar from the agent of the Louisville & Nashville Railroad Company at Mobile, Ala.; that this ticket was honored for Mr. Morningstar's passage from Mobile, Ala., to Pensacola, Fla.; that Mr. Morningstar pre-

Morningstar v. Louisville & N. R. Co

sented himself for passage at the Louisville & Nashville Railroad Depot at Pensacola before 11:20 p. m. on the night of May 20th; that the train bound for Mobile was scheduled to arrive in Pensacola at 11:20 p. m. on the night of May 20th; that it did not arrive in Pensacola until after midnight of May 20th; that the portion of ticket offered in evidence was offered by Mr. Morningstar for passage from Pensacola to Mobile; that the conductor of the Louisville & Nashville Railroad Company in charge of the belated train from Pensacola to Flomaton, the junction point, honored the ticket for passage of plaintiff from Pensacola to Flomaton, and punched same. The plaintiff then further testified that when the train which he boarded at Pensacola arrived at Flomaton the regular train on the defendant's road going to Mobile, with which the train from Pensacola, when on time, made connection, had departed from Flomaton; that he looked around, and could find no passenger train at Flomaton at the hour he arrived there which was going to Mobile; that he made inquiries from the employees of the defendant, and was conducted by one of them to a coach, which was in the defendant's yards at Flomaton, and was told that said coach constituted a part of the train that was going to Mobile; that he boarded this passenger car, and found thereon several other passengers; that the train to which the passenger car was attached left Flomaton going to Mobile a short time before 5 o'clock on the morning of May 21, 1900; that, after said train had gone some distance from Flomaton, and when the conductor of said train came to take up his fare, he offered him the ticket which was introduced in evidence, but that the conductor refused to accept it; that, although the plaintiff explained to the conductor the circumstances attending his trip, the conductor refused to accept the ticket and allow the plaintiff to go on to Mobile on said train, but, putting his hands upon the plaintiff's shoulders, forced him to leave the train.

Fitts, Stoutz & Armbrrecht, for appellant.

Gregory L. Smith and Joel W. Goldsby, for respondent.

SHARPE, J. Apart from the office it may perform in evidencing the contract of carriage, the chief use of a passenger ticket is to identify the holder as a person who has paid his fare, or has otherwise complied with conditions entitling him to carriage, and this use of it is ordinarily made when the holder offers himself to be carried; hence, where nothing is expressed to the contrary, a stipulation purporting to limit the use of a ticket to a specified time is construed as fixing that time as the latest for commencing, and not for completing, the journey. *Auerbach v. Railroad Co.*, 89 N. Y. 281, 42 Am. Rep. 290; *Lundy v. Railroad Co.*, 66 Cal. 191, 4 Pac. 1193, 56 Am. Rep. 100. Accordingly the clause in plaintiff's ticket declaring it "void after May 20, 1900," implied a stipulation merely for plaintiff's commencement of the trip from Pensacola before the expiration of that day. He had a right

Western Maryland R. Co. v. State, to Use of Shirk

to assume, and to rely upon the assumption, that defendant would conform to its schedule for running trains, and was prevented from entering upon his journey on May 20th only by delay until after midnight of the train scheduled to leave Pensacola at the hour of 11:20 p. m. of that day. Defendant was not entitled to treat its own default as defeating its obligation to the plaintiff, nor was that obligation discharged by placing him at Flomaton. Defendant operated the road from Flomaton to Mobile, as well as that from Pensacola to Flomaton, and, having accepted his ticket for passage to the latter place, and having delayed his arrival there until the usually connecting train had gone, it was under the duty to not abandon him, and to afford him opportunity to proceed by another train to Mobile. If, as the evidence tends to show, the plaintiff was duly diligent about attempting to pursue his journey from Flomaton, the conductor of the Mobile train in ejecting him acted not under, but in violation of, the contract of carriage. The ticket did not purport to show on its face, or in connection with the fact that plaintiff was journeying late, that any forfeiture had occurred under the time limitation, for the circumstances controlling his right to so travel were not disclosed by the ticket. The conductor, in denying that right, simply risked the company's responsibility upon the existence vel non of facts avoiding such forfeiture. The evidence offered by plaintiff tended to the establishment of such facts, and should not, as a whole, have been excluded from the jury.

Reversed and remanded.

WESTERN MARYLAND R. CO. v. STATE, to Use of SHIRK *et al.*

(*Court of Appeals of Maryland, Nov. 21, 1902.*)

[53 Atl. Rep. 969.]

Direction of Verdict.

A prayer for the direction of the verdict at the close of plaintiffs' case is waived, so as to preclude a review on appeal, by defendant's introduction of evidence on its own behalf.

Killing of Passenger—Inspection of Foreign Cars.

Where plaintiffs' decedent was killed by the breaking of an axle on a foreign car, the question of the sufficiency of defendant's inspection of the car, alleged as negligence, was for the jury.

Same—Same.*

A train on which plaintiffs' decedent was riding was derailed by the breaking of an axle, and deceased was awakened and told to jump, and in doing so received injuries from which he died: *held*, that, if the breaking of the axle was the result of a defect which could have been discovered by an ordinary inspection, defendant was liable, though the breaking of the axle was not the immediate cause of decedent's death.

Same—Drover on Freight Train—Degree of Care.†

A drover, riding on a pass on a freight train, while a passenger, is

*For monograph on subject of duties of carriers of passengers as to vehicles, see 3 R. R. R. 154, 26 Am. & Eng. R. Cas., N. S., 154; 4 R. R. R. 739, 27 Am. & Eng. R. Cas., N. S., 739.

†See monograph appended to West Chicago St. R. Co. v. Tuerk (Ill.), 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1.

Western Maryland R. Co. v. State, to Use of Shirk

not entitled to the degree of care required of the carrier of passengers on passenger trains, but is only entitled to the exercise of such care on the part of the carrier as is consistent with the operation of freight trains.

Inspection of Foreign Cars.

A carrier, receiving a foreign freight car from another road, is not required to make a scientific inspection of the brakes of such car, to ascertain whether they are safe, but is only required to make a practical inspection, or an inspection consistent with the reasonable dispatch of its business.

Same—Presumption of Negligence.†

Where a drover, riding on a freight train, was killed as the result of a derailment caused by a broken axle, the breaking of the axle raises a presumption of negligence in inspection, and the burden of rebutting such presumption by proof that the company used such care as was required under the circumstances was on defendant.

Same—Killing of Drover Riding on Freight Train—Jumping from Train through Fear—Liability—Instructions.

Where a drover, riding on a freight train, was killed by the breaking of an axle, an instruction, in an action for his death, that if he was riding on the train as authorized by the contract of shipment, and by reason of the insufficiency of an axle of a car in the train he was so injured that he died, and defendant did not use due care in reference to the axle, but intestate did use due care, etc., plaintiffs were entitled to recover, was proper, as modified by an instruction that if the injuries complained of were caused by intestate's acts in jumping from the car through fear or apprehension of danger aroused by the conduct of other persons, and there was no imminent danger to justify an ordinarily prudent person in jumping from the car, and that the danger arose from the breaking of an axle of a foreign car, which had been examined in a careful and thorough manner by defendant's inspectors, and no defect found, and defendant used due care in running and managing the train and in all subsidiary arrangements for the safety of the passenger, plaintiffs could not recover.

Drover Riding on Freight Train—Degree of Care.

In an action to recover for the death of a drover, killed while being transported on a freight train, an instruction that defendant was bound to exercise for decedent's safety the highest degree of care or skill which was consistent with the nature of the undertaking was erroneous, as requiring too high a degree of care.

Same—Presumption of Negligence from Accident.

In an action for the death of a drover, riding on a freight train, an instruction that the fact that the drover was killed while a passenger was prima facie evidence of negligence on defendant's part, etc., was error, since the mere fact that he was killed, without reference to "how" he was killed, raises no presumption of negligence.

Same—Degree of Care.

Where, in an action against a carrier for the death of a drover, the complaint charged only a negligent inspection of the axle, by the breaking of which the train was derailed, an instruction that the utmost care in running and managing the train, and in all the subsidiary arrangements necessary to the safety of the deceased, was required, was erroneous, as requiring care with regard to appliances as to which no negligence was alleged.

Jumping from Train to Avoid Danger—Presumption of Due Care on Part of Deceased.‡

Where plaintiffs' decedent, a drover, died from injuries received in jumping from a moving freight train to avoid injury from the derail-

†See generally, foot-note appended to *Howe v. Northern Pac. Ry. Co.* (Wash.), 5 R. R. R. 624, 28 Am. & Eng. R. Cas., N. S., 624.

‡See foot-note appended to *Dalton v. Chicago, R. I. & P. Ry. Co.* (Iowa), 21 Am. & Eng. R. Cas., N. S., 460.

Western Maryland R. Co. v. State, to Use of Shirk

ment of a train, an instruction, in an action for his death, that the court sitting as a jury is entitled to infer the absence of fault on the part of the deceased from a general and known disposition of men to take care of themselves and keep out of the way of difficulty, was misleading, as not justified by the facts.

Same—Liability.]

Where a drover died from injuries received while being transported on a stock train, an instruction, in an action for his death, that if the court finds that defendant's negligence placed deceased in a state of peril, and he had at that time reasonable grounds for supposing he would be injured by remaining on the train, plaintiffs were entitled to recover, though the fact that deceased jumped from the train increased the peril and caused his death, and he would have probably sustained little or no injury had he remained in the car, was proper.

Damages.

In an action for death, an instruction that the jury is to estimate the reasonable probabilities of deceased's life, if they find for plaintiffs, and give such pecuniary damages, not only for past losses, if any, but for such prospective damages as plaintiffs may have suffered or will suffer as the direct consequences of the death, and that the jury shall apportion the damages among the plaintiffs, was proper, when taken in connection with a further instruction that no recovery could be had in favor of one of the plaintiffs, as to whom no pecuniary injury had been proved.

Appeal from superior court of Baltimore city; George M. Sharp, Judge.

Actions by the state for the use of Susan B. Shirk and another against the Western Maryland Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed.

The various prayers referred to in the opinion were as follows:

Plaintiffs' first prayer: "That if the court shall find as a matter of fact that the defendant was in the month of August, 1894, a corporation leasing and operating a railroad at Cherry Run, in the state of West Virginia, and Potomac Valley Junction, in Washington county, in the state of Maryland, known as the 'Potomac Valley Railroad,' and that one Jacob E. Shirk, now deceased, and one Jacob C. Landis, were on the 21st day of August, 1894, copartners trading as Shirk & Landis, and engaged in the business of buying and selling cattle, and that on the said 21st of August, 1894, certain cattle belonging to said Shirk & Landis were shipped by the said Shirk & Landis over the said railroad so operated by the defendant company, and that the deceased (Shirk) was a passenger traveling in the caboose of the freight train in which said cattle were being transported, and that the transportation of the said Shirk was furnished by the said railroad, under the bills of lading offered in evidence, as part of the con-

[See *Gulf, C. & S. F. Ry. Co. v. Bryant* (Tex.), 1 R. R. R. 952, 24 Am. & Eng. R. Cas., N. S., 952; *St. Louis S. W. Ry. Co. v. Jacobson* (Tex.), 2 R. R. R. 301, 25 Am. & Eng. R. Cas., N. S., 301; *Reed v. Missouri, K. & T. Ry. Co.* (Mo.), 3 R. R. R. 262, 26 Am. & Eng. R. Cas., N. S., 262; *Cameron v. Great Northern Ry. Co.* (N. Dak.), 12 Am. & Eng. R. Cas., N. S., 520; *Dalton v. Chicago, etc., Ry. Co.* (Iowa), 21 Am. & Eng. R. Cas., N. S., 460.

Western Maryland R. Co. v. State, to Use of Shirk

sideration for the freight paid for hauling the said cattle, and that on said 21st day of August, 1894, and while at or near Charlton Station, in Washington county, in the state of Maryland, by reason of the insufficiency of an axle of a car attached to the train upon which said Shirk was traveling, the said Shirk was so injured that he died from the effects of said injuries on September 1, 1894, and that the defendant did not use due care in reference to said axle, but the said Shirk did use due care, and that the said Shirk was the husband of the equitable plaintiff Susan B. Shirk and the son of the equitable plaintiff Obed H. Shirk, and that the life of the said Shirk was of pecuniary benefits to the said equitable plaintiffs, respectively, that then the plaintiffs are entitled to recover in this action." Granted.

Plaintiffs' second prayer: "If the court finds as matter of fact the facts stated in the plaintiffs' first prayer, and that the defendant received and accepted the deceased (Shirk) as a passenger, to be carried as therein stated, then defendant was bound to exercise on said trip for deceased's safety the highest degree of care and skill which was consistent with the nature of its undertaking." Granted.

Plaintiffs' third prayer: "If the court sitting as a jury believes from the evidence that the deceased (Shirk) was killed whilst a passenger on a train on a leased road operated by the defendant, the fact of such injury is prima facie evidence of negligence on the part of the defendant, throwing upon it the burden of rebutting the presumption by showing there was no negligence on its part, or that the accident could have been avoided by the exercise of ordinary care on the part of the deceased." Granted.

Plaintiffs' fourth prayer: "That, in order to rebut the presumption of negligence on its part, the defendant must show that the death of Jacob E. Shirk while traveling as a passenger on its train, if the court sitting as a jury shall find such death, could not have been prevented by the utmost care and diligence in the running and management of the train and the sufficiency of an axle on a car of said train, and in all the subsidiary arrangements necessary to the safety of the deceased." Granted.

Plaintiffs' fifth prayer: "That, in considering the question of negligence, it is competent for the court sitting as a jury, in connection with the other facts and circumstances of the case, to infer the absence of fault on the part of the deceased from the general and known disposition of men to take care of themselves and to keep out of the way of difficulty and danger." Granted.

Plaintiffs' sixth prayer: "If the court shall find as matter of fact that the negligence of the defendant placed the deceased (Shirk) in a state of peril, and he had at that time a reasonable ground for supposing he would be injured by remaining on the train, then the plaintiffs are entitled to recover,

Western Maryland R. Co. v. State, to Use of Shirk

although the court may find as matter of fact that the jumping of the deceased (Shirk) increased the peril or caused his death, and although it may find that he would probably have sustained little or no injury if he remained on the car." Granted.

Plaintiffs' eighth prayer: "If the court sitting as a jury find for the plaintiffs it is to estimate the reasonable probabilities of the life of the deceased, Jacob E. Shirk, and give the equitable plaintiffs such pecuniary damages, not only for past losses, if the court sitting as a jury finds any loss, but for such prospective damages as it may find they have suffered or will suffer as the direct consequence of the death of the said Shirk." Granted.

Plaintiffs' ninth prayer: "If the court sitting as a jury shall find for the plaintiffs, then, in awarding the damages to which the plaintiffs are entitled, it must apportion them among the equitable plaintiffs in such shares as it shall find and direct." Granted.

Defendant's second prayed: "The defendant prays the court to rule as a matter of law that it is the duty of the defendant to receive and forward loaded freight cars belonging to other common carriers, offered to it for transportation over its road, with diligence and dispatch, and that the defendant has a right to assume that such foreign cars were carefully and properly constructed, and is not liable for accidents resulting from any defects in such foreign cars while being forwarded over its road, provided that the defendant maintains a sufficient number of competent and skillful inspectors, and subjects such cars to such careful inspection as the exigencies of traffic will permit, before permitting such cars to be forwarded over its road, and provided, further, that no defects or dangers are revealed or disclosed by said inspection, and the defendant exercises all due care and caution in the running and management and operation of (such cars), the train, and in all the subsidiary arrangement necessary to the safety of the passenger while being transported over its road." Granted as amended.

Defendant's third prayer: "The defendant prays the court to rule that if the court as jury shall find that the accident complained of in this case was caused solely by a defect in the axle of a loaded freight car belonging to the Baltimore & Ohio Railroad Company, and that said loaded car was received by the defendant from the Baltimore & Ohio Railroad Company at Cherry Run, West Virginia, for transportation over its line, and that the defendant maintained and employed at Cherry Run a force of competent and skillful inspectors, and that after said loaded car was received by the defendant it was examined and inspected by its said agents in as careful and thorough a manner as the necessary exigencies of the traffic at said point permitted, and that no defects were found in said car, and that the defendant forwarded said car on

Western Maryland R. Co. v. State, to Use of Shirk

its lines, and that the defendant, its servants, and agents, used due care in the (operation), running and management of the train of which said car was a part, and in all the subsidiary arrangements necessary to the safety of the passenger, then the defendant was not guilty of negligence, and the verdict must be for the defendant, even though the court as jury shall find that the axle of said car broke and caused the accident complained of." Granted as amended.

Defendant's fourth prayer: "The defendant prays the court to rule that if the court as jury shall find the facts set out in the defendant's third prayer, and shall further find that the defendant, its servants, and agents subjected said car to the ordinary and usual tests employed by railroads generally to ascertain the fitness and safety of the loaded freight cars of other roads received for transportation over their lines, and that such tests disclosed no defects in said car, then the defendant was not guilty of negligence, and the verdict must be for the defendant, even though the court as jury shall find that the axle of said car broke by reason of some defect and caused the accident complained of." Refused.

Defendant's fifth prayer: "The defendant prays the court to rule that if the court as jury shall find that the said Jacob E. Shirk became a passenger on a freight train of the defendant company, and that said freight train was made up partly of loaded freight cars belonging to other companies and received by said defendant to be forwarded over its line, then the said Shirk assumed the risks of all dangers arising from defects in such foreign cars which could not be detected by the defendant by careful inspection of said cars, made with due regard to the exigencies of traffic, provided the defendant used all due care (in the operation of said train), in the running and management of said train, and in all the subsidiary arrangements necessary to the safety of the passenger." Granted as amended.

Defendant's sixth prayer: "The defendant prays the court to rule that if the court as jury shall find the facts set out in the defendant's fifth prayer, and shall further find that the said Shirk received injuries resulting in his death by the breaking of an axle on a loaded freight car of said train belonging to another road and being transported over the line of the defendant's road, and shall further find that said foreign car was inspected by competent and skillful agents of the defendant before being transported on the line of the defendant's road in as careful a manner as the exigencies of travel permitted, and that no defect in said car was discovered or disclosed by said inspection, then the accident was one of the risks incident to such mode of travel, and the verdict must be for the defendant, unless the court as jury shall further find that said accident was caused by the negligence of the defendant in the (operation), running, or management of the train of which said car formed a part, or in some of

Western Maryland R. Co. *v.* State, to Use of Shirk

the subsidiary arrangements necessary to the safety of the passenger." Granted as amended.

Defendant's seventh prayer: "The defendant prays the court to rule that there is no evidence in this case that the said Shirk, the equitable plaintiffs' decedent, was induced to jump from said car by the act or conduct of any of the employees, servants, or agents of the defendant company, counseling or directing him so to jump." Refused.

Defendant's ninth prayer: "The defendant prays the court to rule that if the court as jury shall find that the injuries complained of were caused by the act of the said Shirk in jumping from said car, and that said Shirk was induced to so jump from fear or apprehension of danger, and that said fear or apprehension was aroused by the act or conduct of some person or persons in said car, counseling or directing him to jump from said car, if the court as jury shall so find, and shall further find from the evidence that such real and imminent danger existed as would justify an ordinarily prudent and cautious person in jumping from said car and in counseling and directing others to so jump, and shall further find that such danger arose from the breaking of an axle under a loaded freight car, one of the cars of the said train, and that said loaded freight car belonged to the Baltimore & Ohio Railroad Company, and was received by the defendant from the Baltimore & Ohio Railroad Company at Cherry Run, West Virginia, to be forwarded over its lines, and that the defendant maintained and employed at Cherry Run a force of competent and skillful inspectors, and that after said loaded freight car was received by the defendant it was examined and inspected by its said agents in as careful and thorough a manner as the necessary exigencies of the traffic at said point permitted, and that no defect was found in said car, and that the defendant forwarded said car on its line, and that the defendant, its servants and agents, under due care in the (operation), running and management of the train of which said car was a part, and in all the subsidiary arrangements necessary to the safety of the passengers, then the defendant was not guilty of negligence, and the verdict must be for the defendant, even though the court as jury shall further find that the person or persons so counseling or directing the said Shirk to jump were servants or employees of the defendant." Granted as amended.

Defendant's tenth prayer: "The defendant prays the court to rule as a matter of law that under the pleadings and evidence in this case there is no evidence legally sufficient to show that the equitable plaintiff in this case Obed H. Shirk suffered any pecuniary damage by the death of Jacob E. Shirk, and therefore the court's verdict must be for the defendant in so far as the defendant is alleged to be liable to the said Obed H. Shirk." Granted.

Argued before McSHERRY, C. J., and FOWLER,

Western Maryland R. Co. *v.* State, to Use of Shirk

BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Charles Marshall, R. E. Lee Marshall, and J. Hanson Thomas, for appellant.

Hinkley & Morris, for appellees.

McSHERRY, C. J. This suit was brought in the name of the state of Maryland, for the use of the widow and the father of Jacob E. Shirk, deceased, against the Western Maryland Railroad Company to recover damages for the injuries sustained by the equitable plaintiffs as a consequence of the death of Shirk. The death of Shirk is alleged to have been caused by the negligence of the railroad company. The questions that are open for consideration are all brought up by an exception to the court's rulings on the prayers presented at the close of the case. The prayer offered at the conclusion of the plaintiffs' case was too general (*Robey v. State*, 94 Md. 67, 50 Atl. 411), and was, therefore, properly rejected. But, even if there had been error in refusing to grant that prayer, the right to have the ruling reviewed was waived by the defendant when it preceded thereafter to introduce evidence on its own behalf. *Barabasz v. Kabat*, 91 Md. 53, 46 Atl. 337.

The facts which must be stated, so that the legal principles involved may be understood, are as follows: In the latter part of August, 1894, Jacob E. Shirk and his co-partner, Jacob C. Landis, shipped, under a through bill of lading, from Somerset county, Pa., to Ephrata, in Lancaster county, two car loads of cattle, by way of the Baltimore & Ohio, the Western Maryland, the Cumberland Valley and the Philadelphia & Reading Railroads. The cars were delivered by the Baltimore & Ohio Railroad to the Western Maryland Railroad, at Cherry Run, on August 21st, and subsequently on the same day with other freight cars were made up into a train to be hauled to Hagerstown for transfer to the Cumberland Valley Railroad. Both Shirk and Landis were entitled to ride free on the freight train which carried the cattle. The train consisted of nine loaded cars, two empty ones, and a caboose; the latter being at the end of the train. Next behind the two cattle cars was a Baltimore & Ohio gondola car loaded with steel billets, and following that were two or three other cars, and then came the caboose. The train left Cherry Run in the afternoon. Shirk and Landis were in the caboose, and both were asleep. When the train had reached a point about 10 miles from Hagerstown, and while running at a speed of 12 miles an hour, the front axle of the Baltimore & Ohio gondola car broke about 9 inches from the wheel, and the axle fell upon the ties, derailing some of the cars behind it, including the caboose. Besides Shirk and Landis, there were two other men in the caboose. When the caboose left the rails, some one awoke Shirk and Landis, and called to them to jump. Whether the person who gave the warning

Western Maryland R. Co. v. State, to Use of Shirk

was one of the crew of the train, or not, is a disputed matter. Shirk ran out of the rear door of the caboose and leaped from the end of the platform, with his back to the train, while the train was still in motion, and fell upon his head, receiving a severe injury, which caused his death on September 1st. Landis jumped from the side of the platform, and fell on his side. He was not badly hurt, but claims that since then he has been suffering from sciatic rheumatism resulting from the fall. Before the train left Cherry Run the cars were inspected by the car inspectors of the defendant, but it is asserted that the inspection was insufficient. This is one of the controverted questions of fact, and it is a question to be determined by the jury, or by the judge sitting as a jury, under appropriate instructions. *Palmer v. Canal Co.*, 120 N. Y. 170, 24 N. E. 302, 17 Am. St. Rep. 629.

The declaration alleges that Shirk was injured and killed "by reason of the insufficiency of an axle of a car attached to" the freight train upon which he was riding. The undisputed evidence shows that the injury which caused the death was inflicted, not by the broken axle, but by Shirk's falling on his head when he jumped from the moving train. It is clear that the broken axle caused the derailment of the caboose, and that the derailment induced one of the occupants of that car to awaken Shirk and to suggest to him to jump in order to save himself from injury. It is altogether probable that had he not jumped he would not have been hurt; and it is certain that he would not have jumped if the axle had not broken. If the breaking of the axle was due to the negligence of the defendant company in not properly inspecting the gondola car before sending it out in the train, and was not the result of a hidden and undiscoverable defect, and if the deceased jumped, in the circumstances stated, because directed by an employee of the company to do so, then the equitable plaintiff—the widow—would be entitled to recover, because, while the breaking of the axle was not the immediate cause of the death, it was the efficient cause, or the cause but for which the death would not have happened. It was for the jury, or the judge sitting as a jury, to say, in view of all the evidence, whether negligence had been satisfactorily shown and whether the deceased had exercised proper care in jumping from the moving train. The prudence of a passenger's leaving a moving train to escape an apparent danger must be judged by the circumstances as they appeared to him at the time, and not by the result. *Railroad Co. v. Murray*, 55 Ark. 248, 18 S. W. 50, 16 L. R. A. 787, 29 Am. St. Rep. 32. The court could not rule as matter of law that there was no evidence of negligence. The deceased was a passenger. 5 Am. & Eng. Enc. Law (2d Ed.) 508, and note 5. He was not, however, entitled to the same absolute and extraordinary degree of care as to his safety which a common carrier is bound to exercise toward a traveler on a regular passenger train. "Where a drover is

Western Maryland R. Co. v. State, to Use of Shirk

riding on a pass on a freight train, the carrier is not bound to the same absolute or extraordinary degree of care as to his safety as it is to a passenger for hire riding pursuant to a ticket on regular passenger trains; for it is impossible for the company to care as well for a person riding on an ordinary freight train as it is for one riding on a regular passenger train." 4 Elliott, R. R. § 1606. This proposition is self-evident. The risks and dangers are much greater and more numerous upon a freight than upon a passenger train, and the same precautions in the way of running the former and in constructing the cars used therein that are necessary in respect to the latter cannot, in the very nature of things, be observed. This is a condition which every one who rides upon a freight train must be held to appreciate and understand. *Railroad Co. v. Arnol*, 144 Ill. 270, 272, 33 N. E. 204, 19 L. R. A. 313. In section 1629, 4 Elliott, R. R., the author, after speaking of the degree of care which a carrier owes its passenger, proceeds: "But we do not mean that its duties and the precautions it must take are absolutely the same with respect to the operation of [freight] trains as with respect to regular passenger trains. As to its roadbed, bridges, and the like, it would seem that the duty is absolutely the same; but it is obvious that the risk is greater in riding upon freight trains, that the same appliances cannot be used, and that the same speed and comparative freedom from sudden jerks and the like cannot be attained. The duty of the company is therefore modified by the necessary difference between freight and passenger trains and the manner in which they must be operated, and, while the general rule that the highest practicable degree of care must be exercised holds good, the nature of the train and the necessary difference in its mode of operation must be considered, and the company is bound to exercise only the highest degree of care that is usually and practically exercised and consistent with the operation of trains of that nature." "In the operation of freight trains, the primary object is the carriage of freight, and the appliances used are, and are known by the passengers to be, adapted to the business, and the carrier is not, when transporting passengers thereon, held to a degree of care in its operation that would destroy the use of the train for its primary purpose." *Railroad Co. v. Arnol*, supra. Shirk having been a passenger, but a passenger on a freight train, the usual presumption of negligence obtaining when a passenger is injured by some defect in the roadbed, or in the means or instrumentalities of transportation, would apply in a modified way, and the modification would be due to the difference in the makeup of a freight train and to the difference in the method and circumstances of its operation. The presumption of negligence, above alluded to, is a rebuttable presumption; and unless the plaintiffs' evidence itself destroys the presumption or furnishes no basis for it to rest on, it must be overcome by the defend-

Western Maryland R. Co. v. State, to Use of Shirk

ant, and the credibility of the testimony adduced by the latter is for the jury, or the judge sitting without a jury, to determine.

As it is the duty of the carrier to use safe appliances, so it is a further duty to ascertain whether foreign freight cars delivered to it for movement over its line are safe and free from defects before suffering them to go over its road. This duty can only be discharged by properly inspecting such cars. The extent and thoroughness of the inspection must, of necessity, depend upon circumstances. The same minuteness is not possible in every instance. It must be as thorough as possible, regard being had to the nature of the business and the hazards involved. It need not be scientific. It must be practical. The question is not whether, according to evidence of a scientific or speculative nature, a defect might have been detected, but whether practically and by the use of ordinary and reasonable care it ought to have been observed. *Stokes v. Railway Co.*, 2 Fost. & F. 691. The rigid rule laid down in *Sharp v. Grey*, 9 Bing. 457, to the effect that the carrier is bound to furnish a roadworthy conveyance, and, if the event proves that it was not so, the carrier must suffer the consequence, though as diligent in making an inspection of the coach as was possible without taking it apart, was distinctly repudiated in England. *Readhead v. Railway Co.*, L. R. 4 Q. B. 379. This same rule, though at first followed in New York (*Alden v. Railroad Co.*, 26 N. Y. 102, 82 Am. Dec. 401), was subsequently rejected in *McFadden v. Railroad Co.*, 44 N. Y. 478, 4 Am. Rep. 705. It is now well settled that a carrier of persons is not liable for latent defects in its appliances which could not be discovered, either in the process of manufacture or subsequently, by the application of that skill and care which is required of such carriers. 5 Am. & Eng. Enc. Law, 528, and cases in note 4. Thus, in *Richardson v. Railway Co.*, 1 C. P. Div. 342, it appeared that the plaintiff, who was a passenger on a passenger train of the defendant, was injured in a collision between the train upon which he was riding and another train, and that the collision was caused by the breaking of an axle under a foreign freight car attached to the train which collided with the passenger train. The foreign freight car had been inspected, and the tests usually employed by railroads were applied, before it was sent out, and the defect was not revealed. In the course of the judgment delivered on appeal it was said by Jessell, M. R.: "The railroad company are bound to take reasonable care to ascertain that trucks belonging to other companies and persons so coming on their line are in such a state to travel safely. They must therefore use due diligence in the examination of such trucks. * * * The company cannot stop all foreign trucks and empty them for the purpose of a minute examination. * * * It cannot be said that it is obligatory upon the company so to treat foreign trucks as to destroy the very objects for which they were sent on the line, viz., for

Western Maryland R. Co. v. State, to Use of Shirk

the purpose of through traffic. There must be some reasonable limit to the amount of examination required." The evidence in this record furnishes an illustration of the wisdom of the above observations. It was shown that during the month of August, 1894,—the month that Shirk was injured,—the defendant company received from and delivered to the Baltimore & Ohio Railroad Company, at Cherry Run, 5,933 freight cars, or an average of 191 each 24 hours. The inspection of 191 cars in 24 hours would require that 8 be inspected each hour and that would allow something less than 8 minutes for a car. If through cars were delayed for a more minute inspection, the very purpose had in view in forwarding them would in a great measure be frustrated, and rapid through shipments would have to be abandoned. If the measure of the carrier's duty with respect to foreign freight cars be the one cited above from 5 Am. & Eng. Enc. Law, and illustrated by the case of *Richardson v. Railway Co.*, supra,—and there is no doubt that it is,—then one who travels on a freight train made up in whole or in part of foreign cars cannot reasonably insist that a higher degree of care must be exercised in regard to the inspection of such cars than would be requisite if he were not a passenger thereon. In other words, he cannot claim that, because he is a passenger on a freight train, more care must be taken in inspecting the cars than would be necessary if he were not a passenger. With these preliminary principles settled, we may now turn to the instructions given and the prayers refused by the trial court.

From what has been said it is obvious that the court was right in refusing to grant the appellant's first prayer, offered at the conclusion of the case, inasmuch as by that prayer the case was sought to be withdrawn from the consideration of the court sitting as a jury, on the ground that there was no legally sufficient evidence to prove negligence on the part of the railroad company. There was the presumption arising from the breaking of the axle. The standard of care required in regard to its inspection being as above declared, and the burden of proving that care being on the defendant, it was for the court sitting as a jury to say whether the railroad company's evidence measured up to that standard; and consequently the court could not grant the prayer and thus deny to the judge sitting as a jury the right to pass on the credibility of that evidence.

The first instruction given at the instance of the appellee, as qualified by the appellant's tenth instruction, fairly put the theory of the plaintiffs, and there was no error in granting it.

The appellees' second instruction should not have been granted. It required the railroad company to exercise "the highest degree of care and skill which was consistent with the nature of its undertaking" in transporting Shirk as a passenger. The degree of care thus described is the degree of

Western Maryland R. Co. v. State, to Use of Shirk

care imposed upon a carrier of persons on a passenger train, and not the degree of care required of it in transporting a passenger on a freight train. The instruction should have been more definite. It is possible, upon very close reasoning, to say that by reference to the first instruction the attention of the court sitting as a jury was called to the fact that Shirk was a passenger on a freight train, and that the qualification limiting the care and skill to that which was consistent with the nature of the undertaking restricted the railroad's obligation to that measure of care and skill which it was bound to exercise toward a passenger on a freight train, because the undertaking was to carry him on a freight train. But there is no suggestion in either the first or the second instruction that any different measure of care and skill is applicable to the two conditions, and thus a jury would have been left free to adopt in this case the more rigid rule respecting a passenger on a passenger train. The instructions did not say that there was a difference in the degree of care and skill in the two instances, nor did they define or point out wherein the difference consisted. The instruction was, therefore, misleading.

In the third instruction it was ruled that the fact that Shirk was killed while a passenger was *prima facie* evidence of negligence on the part of the defendant, which threw upon it the burden of rebutting the presumption by showing that there had been no negligence on its part. This was erroneous. The mere fact that he was killed while a passenger, without any reference as to how he was killed, furnished no ground for a presumption of negligence. The fact that he was a passenger, and the fact that he was killed while a passenger, justified no inference of any kind as to what caused his death, and therefore did not warrant the conclusion that his death had been due to the defendant's negligence. This is illustrated in *Railroad Co. v. MacKinney*, 124 Pa. 462, 17 Atl. 14, 2 L. R. A. 820, 10 Am. St. Rep. 601, where it is said: "A passenger's leg is broken while on his passage in a railroad car. This mere fact is no evidence of negligence on the part of the carrier until something further be shown. If the witness who swears to the injury testifies, also, that it was caused by a crash in a collision with another train of cars belonging to the same carrier, the presumption of negligence immediately arises,—not, however, from the fact that the leg was broken, but from the circumstances attending the fact." *Benedick v. Potts*, 88 Md. 56, 57, 40 Atl. 1067, 41 L. R. A. 478.

The fourth instruction granted at the instance of the appellees was also erroneous. While it is true that a presumption of negligence may arise from the circumstances of a case, and that it is incumbent on the defendant to rebut that presumption when it does arise, it is not true that the defendant must show, in order to rebut the presumption in a case like this, "the utmost care and diligence in the running and manage-

Western Maryland R. Co. v. State, to Use of Shirk

ment of the train, * * * and in all the subsidiary arrangements necessary to the safety of the deceased," especially as the declaration alleges the insufficiency of the car axle as the sole ground of negligence. When the cause of the injury is charged in the narr. to be the insufficiency of an axle, it is error to require the carrier to show, not only due and proper care with respect to that axle, but, in addition, the sufficiency of all the subsidiary arrangements necessary to the safety of the deceased, though it is not pretended that any of those subsidiary arrangements (whatever they were) had anything at all to do with the injury. Under this instruction the defendant company would have been liable, though there had been no negligence in respect to the axle, the things which did cause the injury, if there had been negligence in regard to some subsidiary appliance which did not cause the injury, because the thing which did and the things which did not cause the death of Shirk are conjunctively put in the instruction, and the company was required, in order to rebut the asserted presumption of negligence, to show the utmost care and diligence with respect to all of them.

The fifth instruction was misleading. It was not applicable to the facts of this case. It has been held proper in some cases. *Baltimore & O. R. Co. v. State*, 60 Md. 449. But it is not universally applicable. The absence of fault on the part of the deceased can only be inferred from the general and known disposition of men to take care of themselves, and to keep out of the way of difficulty and danger, when there is no reliable proof to negative the inference, or when there is rational doubt, upon the evidence, as to the acts and conduct of the parties. *Railroad Co. v. Stebbing*, 62 Md. 518. There is no room for a rational doubt, upon the evidence, as to the acts or the conduct of the deceased. There was no basis for the presumption in this case, and it was misleading to inject it.

The sixth instruction is free from error, and the seventh prayer was refused.

The eighth and ninth instructions relate to measure of damages. Taken in connection with the appellant's tenth, they are unobjectionable.

There was injurious error in modifying the appellant's second, third, fifth, sixth, and ninth prayers. The modification which was added by the trial court to each of these prayers required the railroad company to show that it had used due care "in all the subsidiary arrangements necessary to the safety of the passenger while being transported over the road," notwithstanding the fact that it was not contended, or even suggested, by the plaintiff, that the absence of due care in any of the subsidiary arrangements was the cause of the injury. The declaration, as has been pointed out, counted on negligence in respect to the car axle, and in respect to nothing else; and the issue thus made should not have been

Burns v. Boston El. Ry. Co

amplified or enlarged by the modification annexed to those prayers. *Railway Co. v. Nugent*, 86 Md. 360, 38 Atl. 779. The second, third, sixth, and ninth prayers, as presented before being modified by the trial court, were designed to define the degree of care imposed by the law upon the railroad company as to the inspection of freight cars of other roads delivered to it for movement over its own road, and in the light of what we have said on this subject they ought to have been granted without modification.

The fifth prayer as presented definitely ruled that the deceased assumed the risks of all dangers arising from defects in foreign freight cars, when the defects could not be detected or discovered by careful inspection. As such an inspection is the measure of duty which the company was bound to perform with respect to such cars, it owed no higher duty to the deceased, who was a passenger on the freight train; and when that duty was done, if done, the hazards incident to hidden or latent imperfections were, of course, assumed by the passenger on such a train.

The appellant's fourth prayer stated the same principle in a slightly different form, and, for the reasons already given, should have been granted.

The seventh prayer was properly refused. There was some evidence from which the judge sitting as a jury might have found that Shirk was induced to jump from the caboose by the act or advice of an employee of the railroad.

The appellant's eighth and tenth prayers were granted.

Because of the errors indicated, the judgment in favor of the plaintiffs must be reversed, and a new trial will be awarded.

Judgment reversed, with costs above and below, and new trial awarded.

BURNS v. BOSTON EL. RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, Feb. 27, 1903.)

[66 N. E. Rep. 418.]

Injury to Passenger—Jerks and Jolts.*

Plaintiff boarded the front platform of a crowded street car, on which six or seven other passengers were standing, and was injured by being thrown from the platform by a sharp jerk of the car as it rounded a curve. There was a sign on the car, of which plaintiff was aware, that "Passengers riding on the front platform do so at their own risk": *held*, that such rule was reasonable, and precluded a recovery for plaintiff's injuries.

Same—Same—Crowded Street Car.

It was not negligence for a street car company to take plaintiff on as a passenger, because the car was crowded.

Same—Same—Crowded Car—Riding on Platform.

The fact that there were passengers on the platform of a street car when plaintiff entered thereon did not show that the rule that passengers riding there assumed the risk of any injury had been waived by the street car company or was not in force.

*See monograph appended to *Chicago City Ry. Co. v. Morse* (Ill.), 4 R. R. R. 215, 27 Am. & Eng. R. Cas., N. S., 215.

Burns v. Boston El. Ry. Co

Exceptions from superior court, Suffolk county; Henry N. Sheldon, Judge.

Action by one Burns against the Boston Elevated Railway Company. From a judgment in favor of defendant, plaintiff brings exceptions. Exceptions overruled.

Danl. H. & Timothy W. Coakley, for plaintiff.

E. P. Satonstall, for defendant.

MORTON, J. This is an action of tort for personal injuries. The plaintiff was riding on the front platform of a car belonging to the defendant and as it rounded a sharp curve at the corner of Lowell and Brighton streets, in Boston, was thrown off by a sharp jerk, and received the injuries complained of. There was testimony tending to show that the speed was unusual and excessive, that the car was crowded, and that there were six or seven others on the platform. The plaintiff testified on cross-examination that he knew that there was a sign on the car that "Passengers riding on the front platform do so at their own risk," and finally said (though he denied it at first) that he knew that, according to the sign, when he rode on the front platform, if he had an accident such as happened, he took the risk. At the close of the plaintiff's evidence the court directed a verdict for the defendant, and the case is here on exceptions by the plaintiff to that ruling.

We think that the ruling was right. The rule in respect to passengers riding on the front platform must be regarded, it seems to us, as a reasonable rule, and such a rule as the defendant had a right to adopt. *Sweetland v. Lynn & Boston R. R.*, 177 Mass. 574, 579, 59 N. E. 443, 51 L. R. A. 783, and cases cited. It would have had the right to prohibit absolutely passengers from riding on the front platform, and a passenger who, without sufficient excuse, knowingly violated the rule, and was injured in consequence thereof, would have been guilty of contributory negligence, and would not have been entitled to recover, even though the defendant had also been negligent. *Wills v. Lynn & Boston R. R.*, 129 Mass. 351. We do not think that the only alternatives open to the defendant were those of absolute prohibition or unqualified permission. The notice contained a fair warning that the front platform was regarded by the company as a place of exposure to danger, and that it was unwilling that passengers should ride there, unless they were content to take the risks of doing so; and it is not unreasonable, it seems to us, to say that a passenger who knew the rule, as the plaintiff did, and rode upon the front platform, accepted the risk, in the absence of anything to show that the rule had been waived by the company, or that it was not in force. The rule is to be regarded, we think, as designed to promote the safety of passengers, by warning them that the front platform was or might be a place of danger, and that they rode there at their own risk, rather than as designed to protect the defendant from the results of

Rolfs v. Atchison, etc., Ry. Co

its own negligence, or that of its servants or agents. And we think that, upon the undisputed testimony, the plaintiff must be held to have accepted the risk.

The fact that the car was crowded is immaterial. The plaintiff was not obliged to get onto a crowded car, and it was not negligence on the part of the defendant to take him on as a passenger, because the car was crowded. *Jacobs v. West End St. Ry.*, 178 Mass. 116, 59 N. E. 639. The fact that there were other passengers on the platform did not show that the rule had been waived by the defendant or was not in force. Their presence there was as consistent with the fact that the rule was still in force as that it was not. The case is very different from that of *Sweetland v. Lynn & Boston R. R.*, supra, on which the plaintiff relies. There was abundant evidence in that case of a custom to use the front platform, and that the rule notifying passengers not to stand on the front platform was not in force.

Exceptions overruled.

ROLFS v. ATCHISON, T. & S. F. Ry. Co.

(*Supreme Court of Kansas, Feb. 7, 1903.*)

[71 Pac. Rep. 526.]

Expiration of Passenger's Ticket—Authority of Conductor.*

A railroad ticket containing a full and unambiguous printed contract, signed in ink by the purchaser, that it should expire on a date shown by punch marks on its margin, is conclusive evidence to the train conductor of the contract between the passenger and the carrier as to the time the ticket continues in force.

Same—Parol Evidence—Expulsion of Passenger.†

In an action of tort for his expulsion from the train, brought by the purchaser of a ticket of the character mentioned in paragraph 1 above, who attempted to use it after the date of expiration shown by the marginal punch marks, parol evidence of statements made by the ticket agent at the time of sale, contradictory of the contract contained in the ticket, is inadmissible.

(Syllabus by the Court.)

In banc. Error from district court, Leavenworth county; J. H. Gillpatrick, Judge.

Action by F. A. Rolfs against the Atchison, Topeka & Santa Fe Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Dawes & Wulfekuhler and Fenlon & Fenlon, for plaintiff in error.

A. A. Hurd, for defendant in error.

*See foot-note appended to *McGhee v. Reynolds* (Ala.), 10 Am. & Eng. R. Cas., N. S., 49; foot-note appended to *Southern Ry. Co. v. Howard* (Ga.), 18 Am. & Eng. R. Cas., N. S., 758.

†See note appended to *Lexington & E. Ry. Co. v. Lyons* (Ky.), 11 Am. & Eng. R. Cas., N. S., 212.

As to the validity of a stipulation fixing time for expiration of ticket, see extensive note appended to *Walker v. Price* (Kan.), 20 Am. & Eng. R. Cas., N. S., 432.

Rolfs v. Atchison, etc., Ry. Co

BURCH, J. F. A. Rolfs commenced an action in the district court of Leavenworth county against the Atchison, Topeka & Santa Fe Railway Company to recover damages consequent upon his expulsion from one of the defendant's passenger trains on June 12, 1896. Concerning his right to be transported, he alleged as follows: "That on the 12th day of May, 1896, said plaintiff purchased from the defendant, through its agent at Norman, Indian Territory, a book of mileage containing tickets for one thousand miles' transportation over the lines of the said Atchison, Topeka & Santa Fe Railway Company's road, and lines of road operated by it, by virtue of which purchase, said defendant agreed and promised to convey and carry said plaintiff over said defendant's roads, and roads operated by it, to the extent of one thousand miles, within one year from date of said ticket." The substance of the plaintiff's evidence relating to his right to be transported appears in the following questions and answers: "Q. Mr. Rolfs, did you purchase a ticket of the agent of the Santa Fe Company, at Norman, Indian Territory, on the 12th of May, '96? A. I purchased a ticket from an agent there in Norman, Oklahoma. Q. That day? A. Yes; a little before four o'clock in the morning. Q. Will you look at this ticket or book I now hand you, and state whether or not that is the ticket or book of mileage that you purchased from the agent of the Santa Fe Company at Norman station on the 12th of May, 1896? (Book marked 'Exhibit No. 1.')

A. Yes, sir; that is the ticket,—No. 441. Q. Is this your signature? (Showing witness ticket.) A. Yes, sir. Q. You wrote that? A. Yes, sir. Q. Is this the book of mileage that you tendered to the conductor upon the occasion when he refused to accept it? A. Yes, sir. Q. Mr. Rolfs, when you presented the ticket to the conductor, was it accepted? A. No, sir; he didn't accept it. He said it was expired. Q. What was stated, Mr. Rolfs, when the conductor asked you for your fare,—by you to him? A. I told him the ticket was legal tender; it was only one month old, and it was good for a year. Q. Now, Mr. Rolfs, did you hand him the ticket at that time? A. Yes, sir. Q. What did he say? A. He said it was 13 months old. Q. Did he accept the ticket from you? A. No. Q. Did he demand your fare? A. He demanded the fare; yes. Q. Did you pay it? A. No; I didn't pay it. Q. Now, Mr. Rolfs, please state to the court and jury, just what took place between you and the conductor of the Santa Fe train at the depot or station at Diamond Springs when you reached there? A. I told him if he didn't believe me he could telegraph. He said he couldn't get an answer. I told him, 'Yes,' he could; there was an operator there at Norman; I bought a ticket at 4 o'clock in the morning, and he could get an answer there if he didn't believe me. Q. If he didn't believe you about what? A. My statement that it was only a month old; he could telegraph and find out about it

Rolfs v. Atchison, etc., Ry. Co

if he didn't believe me. Q. Did you, or not, call the attention of the conductor to the fact that you yourself had purchased that ticket, and that it had not yet expired? A. Yes; I stated that fact. Q. What did he say in response to your statement that you yourself had purchased the ticket, and that it had not yet expired? A. He said it was 13 months old, and he couldn't get no answer from the operator. Q. And he didn't accept the ticket? A. No; he didn't." Some other questions were propounded and answers returned upon the same subject, but no additional facts were adduced. Sufficient evidence to show plaintiff's removal from the train and to establish damages was introduced. The ticket itself was not offered in evidence. A demurrer to the evidence was interposed, and, pending its consideration, plaintiff further offered to show "that the agent from whom the ticket was purchased stated to the plaintiff at the time he purchased it that it was good for one year from the date of purchase, and also to prove by Mr. Saunders, the conductor of the train, that such tickets at that time were sold, good for one year from date of purchase." This offer was rejected. The demurrer to the evidence was sustained, and judgment was rendered against the plaintiff for costs. Of this judgment he complains here.

Apparently, under the plaintiff's own view of the case, his right to passage upon the train depended upon his ticket, and it is somewhat difficult to perceive how he could recover for a violation of right originating in a contract which he withheld from the court. Since the ticket was suppressed from the evidence, the court was left unadvised as to its contents, terms, and conditions, and the demurrer was rightfully sustained. The original ticket, however, is attached to the case made, and it may have been treated by all parties as if in evidence. If so, it destroyed the plaintiff's case. The ticket is an ordinary mileage book. On the front cover appears the following notice: "Void for passage after date canceled by punch." On the back cover appears the notice following, and a contract, the essential portions of which also follow; the signature at the end of the contract being in ink:

"This Ticket Expires on Date Punched in Margin.

"Local Form 66. Series 3. No. 441. Sold under this contract: * * *

"(7) This contract must be signed in ink by the person to whom the ticket is issued, before being presented for passage, and the holder must identify himself by his signature whenever so required by authorized employees of this company. * * *

"(10) This ticket expires on the date canceled by punch in margin, after which it will be of no value for passage, but will be redeemable, at the company's option, if presented by the original purchaser (within its limit), on basis of charging tariff rate for mileage used, refunding difference.

Rolfs v. Atchison, etc., Ry. Co

“(11) One hundred and fifty pounds of baggage will be checked free hereon.

“I agree to use this ticket in conformity with the conditions and notices hereon governing its use. Signature of person who is alone authorized to use this ticket. F. A. Rolfs, Purchaser. (Sign in ink.)”

On the inside of the first cover is the official stamp of the company. The month and day of the stamp are May 12th. The last figure of the number, indicating the year, is sufficiently obscure to raise a question as to whether it is 1895. The date of expiration punched in the margin is May 12, 1896. It will be observed that the ticket says nothing of the date of purchase or date of official stamp, and, so far as its express provisions are concerned, the date of stamp or of sale has no effect. There are, however, two notices on the ticket,—one on the front and one on the back,—stating that the punched date in the margin fixes absolutely the limit of the ticket. There is a contract, signed in ink, that the ticket will be used according to these notices. And paragraph 10 of the signed contract is given up to a stipulation relating to expiration on the day punched in the margin, and the rights of the holder to redemption after that date. When this ticket was presented to the conductor, it was with plaintiff's unambiguous written declaration that it was invalid. This declaration the conductor accepted, and demanded payment of fare. Then plaintiff sought to impeach the written statement by a verbal one. Was the conductor bound to accept the oral contradiction? May each passenger on a train require the conductor to hear and weigh and verify a story relating to his right to ride, in direct opposition to the language of his ticket? The answer to this question has already been indicated by the approval of *Frederick v. M. H. & O. R. R. Co.*, 37 Mich. 346, 26 Am. Rep. 531, in *A. T. & S. F. Rld. Co. v. Long*, 46 Kan. 260, 26 Pac. 682. In *Frederick v. M. H. & O. R. R. Co.*, supra, it is said: “How, then, is the conductor to ascertain the contract entered into between the passenger and the railroad company, where a ticket is purchased and presented to him? Practically, there are but two ways,—one, the evidence afforded by the ticket; the other, the statements of the passenger, contradicted by the ticket. Which should govern? In judicial investigations we appreciate the necessity of an obligation of some kind, and the benefit of a cross-examination. At common law, parties interested were not competent witnesses; and, even under our statute, the witness is not permitted, in certain cases, to testify as to facts which, if true, were equally within the knowledge of the opposite party, and he cannot be procured. Yet here would be an investigation as to the terms of a contract, where no such safeguards could be thrown around it, and where the conductor, at his peril, would have to accept of the mere statement of the interested party. I seriously doubt the practical workings of such a method, ex-

Rolfs v. Atchison, etc., Ry. Co

cept for the purpose of encouraging and developing fraud and falsehood, and I doubt if any system could be devised that would so much tend to the disturbance and annoyance of the traveling public generally. * * * As between conductor and passenger, and the right of the latter to travel, the ticket produced must be conclusive evidence, and he must produce it when called upon, as the evidence of his right to the seat he claims." In *Hufford v. Grand Rapids & Ind. Ry. Co.*, 53 Mich. 118, 18 N. W. 580, it is said: "In *Frederick v. Marquette, etc., R. R. Co.*, 37 Mich. 342, s. c. 26 Am. Rep. 531, it was decided that, as between the conductor and the passenger, the ticket must be the conclusive evidence of the extent of the passenger's right to travel. No other rule can protect the conductor in the performance of his duties, or enable him to determine what he may or may not lawfully do in managing the train and collecting the fares. If, when a passenger makes an assertion that he has paid fare through, he can produce no evidence of it, the conductor must, at his peril, concede what the passenger claims, or take all the responsibilities of a trespasser if he refuses, it is easy to see that his position is one in which any lawless person, with sufficient impudence and recklessness, may have him at disadvantage, and where he can never be certain, if he performs his apparent duty to his employer, that he may not be subjected to severe pecuniary responsibility. Such a state of things is not desirable, either for railroad companies or for the public. The public is interested in having the rules whereby conductors are to govern their action certain and definite, so that they may be enforced without confusion and without stoppage of trains; and if the enforcement causes a temporary inconvenience to a passenger, who by accident or mistake is without the proper evidence of his right to a passage, though he has paid for it, it is better that he submit to the temporary inconvenience, than that the business of the road be interrupted to the general annoyance of all who are upon the train. The conductor's duty, when the passenger is without the evidence of having paid his fare, is plain and imperative, and it can serve no good purpose and settle no rights to have a controversy with him. The passenger gains nothing by being put off the car, and loses nothing by paying what is demanded and staying on." This opinion has the authority of Chief Justice Cooley's great name, and its doctrine is preferred to certain statements in a later decision by the supreme court of the same state upon the same subject. Such being the law, the plaintiff was negligent in attempting to use the ticket. The language of the ticket was plain and unequivocal. The notices were ample and conspicuous. It cannot be contended they had not been brought to plaintiff's attention, or that he had not had time to familiarize himself with them, or that they were not understood. He testified he went out on the road for his own house, and hence had

Rolfs v. Atchison, etc., Ry. Co

some experience in travel, and the ticket itself was not of the kind used by the traveling public generally. If the agent made a mistake, he subscribed to it, and could not be free from fault in attempting to use a ticket to the invalidity of which he certified.

The offer of the plaintiff to show the statement of the agent that the ticket was good for a year from date of sale was properly rejected for the reason that the part of the contract relating to the time of the expiration of the ticket was in writing, and, so far as the parties committed their agreement to writing, the instrument, and not verbal statements, must control. In 4 Elliott on Railroads, § 1593, it is said: "A ticket is evidence of a contract to carry and the right to passage, but the contract itself is implied by law except in so far as it expressed in the ticket. Upon the theory that it is not itself the written contract, parol evidence has been held admissible to prove the terms of the contract in fact entered into between the company and the passenger, or the representation made by the agent, at the time the ticket was purchased, as to stop-over privileges or the like. But the terms of the contract, or certain conditions and limitations which enter into and form part of the contract, are frequently written or printed on the face of the ticket, and where such is the case we think the better rule is that a passenger has no right to rely upon the representation of an agent or conductor which are contrary to its express limitations and conditions." This doctrine is approved in *Railroad Co. v. Price*, 62 Kan. 327, 62 Pac. 1001, where it is also said: "It follows logically, when it is decided that the acceptance and use of such a ticket as that held by the defendant in error constituted a contract between her and the carrier, that its positive terms, being expressed in writing, cannot be contradicted or varied by parol evidence. Nor can oral agreements relating to the subject expressed in the written ticket, made before or at the time it was issued, be received in evidence in contradiction of its stipulations. This is but the application of an old and well-settled rule of evidence. *Rogers v. Perrault*, 41 Kan. 385, 21 Pac. 287; *Willard v. Ostrander*, 46 Kan. 591, 26 Pac. 1017, and cases cited. There is no ambiguity appearing in this contract of carriage, or the use of words having a doubtful meaning." A special rule of evidence cannot be adopted for a contract of this character.

Certain cases cited by plaintiff in error as decisive of this one are not so, and serve to illustrate the rule. Thus in *Erie Railroad Co. v. Winter's Adm'r*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71, a passenger bought a ticket, and asked for a stop-over privilege. He was told by the agent that he must arrange the stop-over with the conductor. The conductor punched his ticket, and told him that was sufficient to entitle him to the privilege. In taking a train after making the stop, the punched ticket was declined, and on nonpayment of

Rolfs v. Atchison, etc., Ry. Co

fare he was put off. The syllabus reads: "Parol evidence of what is said between a passenger on a railroad and the ticket seller of the company, at the time of the purchase by the passenger of his ticket, is admissible as going to make up the contract of carriage, and forming part of it." But it will be observed the stop-over portion of the contract was independent of and additional to the ticket, and therefore provable by evidence independent of and additional to the ticket. The terms of the ticket were not contradicted. If the ticket had contained an express contract that it would be used without stop-over, which contract the traveler had signed, a different principle would have been applied. In *Murdock v. Boston & Albany Railroad*, 137 Mass. 923, 50 Am. Rep. 307, the syllabus reads: "If the ticket seller of a railroad corporation delivers to a passenger a ticket with a hole punched in it, and assures him that the ticket entitled him to be carried to his place of destination, when in fact, by the rules of the corporation, it does not, and the passenger is expelled by the conductor from the train of cars, for refusing to pay additional fare, he may maintain an action therefor against the corporation." But the opinion states: "There was nothing on their face to show the contrary to the plaintiff, and he took and paid for them on the strength of these explanations and assurances of the ticket seller. * * * The ticket seller assumed to know, and gave assurances which the plaintiff had a right to rely on, and which he did rely on. If, when the conductor refused to accept the punched ticket, it had appeared on an inspection of it that there had been a mistake, and that it did not, on its face, purport to be good for a passage over that part of the defendant's road, and that the ticket seller had delivered to the plaintiff a good ticket upon some other railroad, or to some place which had already been passed when the mistake was discovered, and it was found that the plaintiff had, through inadvertence, accepted a ticket which, on its face, was plainly insufficient, then this case would have fallen within the doctrine of the recent decision in *Bradshaw v. South Boston Railroad*, 135 Mass. 407, 46 Am. Rep. 481, and it would have been the duty of the plaintiff to yield for the time being, and pay his fare anew, or withdraw from the car." In *Ellsworth v. Chicago, B. & Q. Ry. Co.* (Iowa) 63 N. W. 584, 29 L. R. A. 173, a passenger bought a ticket, which, by a mistake of the agent in stamping it, bore a date prior to that of the purchase. The ticket, however, contained the provision, "Continuous passage within one day of date of sale." No reference was made to the date of stamp. The face of the ticket, so far as the passenger was concerned, made the date of the stamp immaterial. He could rely upon its express provisions, and was therefore not negligent in attempting to use it. Most of the cases cited by plaintiff in error are distinguishable from the one under review. Some of them, however, are irreconcilable with the views herein

Powelson v. United Traction Co

expressed, and, so far as they may be so, cannot be approved. Whatever remedy the plaintiff may have, if the ticket was wrongfully limited by the agent selling it, it is not for a tortious removal from the defendant's train.

The judgment of the district court is affirmed. All the justices concurring.

POWELSON v. UNITED TRACTION CO.

(*Supreme Court of Pennsylvania, Jan. 5, 1903.*)

[54 Atl. Rep. 282.]

Street Railroads—Injuries to Passenger.*

The evidence for plaintiff showed that he attempted to board a summer car, and waved his hand when he saw it coming about 100 feet distant; that when it reached plaintiff it had almost stopped, and he stepped on the running board, and was about to go into the car, when the conductor rang the bell, and the car started, and threw him off: *held*, that the negligence of defendant was for the jury.

Appeal from Court of Common Pleas, Allegheny County.

Action by James Powelson against the United Traction Company. Judgment for defendant, and plaintiff appeals. Reversed.

Argued before MITCHELL, DEAN, FELL, BROWN, MESTREZAT, and POTTER, JJ.

Rody P. Marshall and John C. Haymaker, for appellant.

William A. Challener, Clarence Burleigh, and James C. Gray, for appellee.

DEAN, J. The plaintiff is 58 years of age. On June 25, 1900, he boarded a summer car in Allegheny City. When he saw the car coming about 100 feet distant, he waved his hand to the motorman to stop, who at once put on the brakes, so that when it reached plaintiff it had almost stopped, and he stepped upon the running board, and was about to go into the body of the car, when the conductor rang the bell for the car to start. It was instantly started with a jerk, which threw the plaintiff off, ran over his leg, so crushing it that amputation followed. We do not find these to be the undisputed facts, but only that there was some evidence tending to establish them. The learned judge of the court below, being of opinion that there was no sufficient evidence of negligence on the part of defendant, and that there clearly was contributory negligence on the part of the plaintiff, peremptorily instructed the jury to find for the defendant. We now have this appeal by plaintiff, who alleged error in the instruction, arguing that the case was for the jury on both questions.

To step on or off a moving car, whether the power which

*As to the care required in taking on and letting off passengers, see monograph appended to *Phillips v. St. Charles St. R. Co. (La.)*, 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

Powelson v. United Traction Co

propels the car be steam or electricity, is per se negligence, and, if injury results to the passenger, he cannot recover damages. To this rule, as in all rules, there are some rare exceptions. As to steam cars—such as *Johnson v. West Chester, etc., R. R. Co.*, 70 Pa. 357, where plaintiff had a ticket, and, while incumbered with bundles and a coil of pipe, attempted to get on a car just beginning to move, although the motion was just perceptible, fell, and had his arm crushed under the wheels—this court, speaking by Agnew, J., says: “There cannot be an inexorable rule so unbending that no circumstances begotten by the railroad company can change it. Even when a train is distinctly under way, there are cases (and this was one) where it must be left to the jury to say whether the danger of going aboard was so apparent that it would be culpable negligence in the passenger.” This was the case of a passenger getting on a moving train under peculiar circumstances. *Penna. R. R. Co. v. Peters*, 116 Pa. 206, 9 Atl. 317, is a case of a passenger getting off a moving train under peculiar circumstances; and so there are a very few other cases reported as exceptions to the general rule.

The exceptional cases as to electrical cars, on one ground and another, are perhaps more numerous on account of the entirely different use made of them. They carry passengers, it is true, but generally only for short distances. Instead of fixed stations at comparatively long distances, they stop at every street corner, and often, when signaled, between. They accommodate their traveling public only, because they stop often. To see that they stop at the proper place for passengers to get off and on, and then start at the right time, is the principal duty of the employees in charge of the car. It necessarily follows that accidents to passengers in getting on and off are more numerous than on steam cars; and, while the same rule is applicable to both steam and electric cars, the exceptional cases are more in number in the latter than in the former. But the case cited and relied on by appellant. *Walters v. Phila. Traction Co.*, 161 Pa. 36, 28 Atl. 941, is not an exception to the general rule. In that case this language of the court below was held not to be error: “If you should arrive at the conclusion that the car was in motion, and was not in that condition of motion which would induce any reasonable man to get on, then the plaintiff cannot recover. If, however, you should come to the conclusion that it had stopped, or was in the act of stopping, or was in such a condition of running or stopping as induced the plaintiff to think it was about to stop, then he had a right to get on, and, if the car started before he was safely seated in the car, and an injury resulted therefrom, then your verdict should be for the plaintiff.” In this case plaintiff testified the car had actually stopped when he attempted to get on, and after he was safely on the platform the car started, as here, by a sudden jerk, and he was thrown off. There was evidence for the defendant

Powelson v. United Traction Co

that the car was actually moving—that is, had not stopped—when he was thrown off. The charge must be taken in its application to the peculiar facts as averred in plaintiff's testimony. If the car had not come to a full stop, and plaintiff negligently got on, yet, when safely on, by the negligent jerk of the motorman he was thrown from the platform, it cannot be said that plaintiff's negligence contributed to the accident. It was not his negligence in getting on a moving car that brought about the result, for he, by good fortune, although not by the exercise of care, escaped any injury. But, being on safely, at once commenced the duty of defendant to carry him safely. In this, according to plaintiff's testimony, defendant failed. There was no relaxation of the rule, in the case cited, that to get on a moving car is negligence. The language quoted was affirmed in a per curiam opinion. It was not intended by this court to say that in that case, under the circumstances, it was not negligence in defendant to get on a moving car; but that, even if plaintiff got on a moving car, if it was moving, and then he was jerked off by the negligence of the motorman, the charge of the court did not harm defendant's case. None of the other cases cited by appellant are in point on the facts before us.

It is argued that slowing up on plaintiff's signal was an invitation to him to get on while in that condition of motion. This is a mistake. It at most was an invitation to get on when the car stopped, not sooner. But it still remains to say whether, on this evidence, there was a question for the jury. The plaintiff testifies: "When I put up my hand, the motorman saw me, and he turned the brake.

* * * When I held up my hand, the car slowed up. When it got to me it was about stopping, and I got on the car, and just as I got on the car the conductor rang the bell. I was about to take my seat, as the car gave a jerk. And the conductor was on the board at the time. He tried to hold me on, and I fell over, and had my foot taken off. * * *

Q. What do you mean by saying that you were going to take your seat? A. Why, step up on the other. You know the footboard is down below, and then you have to step to get on to the seat, and I was just about in the act of doing that when he rang the bell, and it started, and knocked me off. I had stepped on the footboard." The evidence of defendant tends to contradict this statement but the credibility of the witnesses was for the jury. If they had believed defendant's witnesses, then plaintiff had got on a moving car; but, if they also believed plaintiff, then his negligence was not followed by the penalty of injury. He had escaped that, and was safe. Being on, it was the duty of the company to exercise care in carrying him. If it negligently started up the car with a jerk, that negligence was not excused by his, and the company would be answerable. There was conflicting evidence as to his negligence and that of the company. He

Paginini v. North Jersey St. Ry. Co

says, "It was not my carelessness in getting on the car when moving that threw me off, but yours in suddenly starting up before I had reasonable time to be seated." We think the court erred in not leaving the truth of the matter to be determined by a jury.

The judgment is reversed, and a. v. f. d. n. awarded.

PAGININI v. NORTH JERSEY ST. RY. CO

(*Supreme Court of New Jersey, Feb. 24, 1903.*)

[54 Atl. Rep. 218.]

Carriers—Injury to Passengers—Negligence.*

It is not negligence per se for a motorman to open the gate on the front platform of a trolley car before the car has come to a full stop.

(Syllabus by the Court.)

Error to circuit court, Hudson county.

Action by Michael Paginini against the North Jersey Street Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Argued November term, 1902, before the CHIEF JUSTICE and VAN SYCKEL, FORT, and PITNEY, JJ.

Vredenburgh, Wall & Van Winkle, for plaintiff in error.

Hudspeth & Puster, for defendant in error.

FORT, J. The defendant in error had a verdict in the Hudson circuit for alleged injuries resulting from his being thrown from the front step of a car of the plaintiff in error. The injuries resulted while he was alighting from a moving car. His claim was that the car upon which he was had passed the street at which he was expecting to be discharged; that he went forward, because of the crowded condition of the car, to the motorman, and asked why he had not stopped; that the motorman made no reply, but proceeded to bring the car to a stop, and opened the gate for him to alight; that he then rested one foot upon the step and the other upon the platform, holding the gate with one hand and his violin case with the other; that, thereupon, the motorman, instead of stopping, suddenly put on the power, and he was thrown from the car and injured. This was his testimony. There was a motion to nonsuit, but this, we think, was rightly refused. Another error is assigned upon an exception taken to the refusal of the court to charge the following request of the defendant, as well as to what the court did charge, viz.: "That it was negligence on the part of the plaintiff to step on the front step of this car before it had stopped, and, if that

*As to the care required in taking on and letting off passengers, see monograph appended to *Phillips v. St. Charles St. R. Co.* (La.), 1 R. R. R. 902, 24 Am. & Eng. R. Cas., N. S., 902.

Paginini v. North Jersey St. Ry. Co

contributed to the accident, he cannot recover." This is what the court said in charging the jury on this request: "That is true, gentlemen. He could not step upon the front step of the car until after it had stopped, unless somebody opened the gate. He certainly knew whether the motorman opened the gate. If the motorman opened the gate, or any one in authority upon that car opened the gate, and he stepped down, why, it would be a negligent act upon the part of the company—if the motorman opened the gate, it would be a negligent act."

It seems impossible to sustain this charge and uphold the verdict. It cannot be but that the jury received the impression from this language that, from the mere fact that the motorman opened the gate, there was a negligent act on the part of the defendant company. This conclusion is irresistible, when taken in connection with some of the statements previously uttered by the judge in the charge. He had already said: "(a) If that is true, gentlemen—if the motorman before that car came to a stop opened the gate—then, by his evidence, he violated one of the rules of the company, and he was negligent in opening the gate and allowing the man to get off before the car stopped." "(b) Did the motorman open that gate and thereby invite the passenger to alight while this car was in motion, or did some one else?"

Taking all these statements of the court together, it must appear that what the court told the jury was that it was negligence for the motorman to open the gate—that it amounted to an invitation for the plaintiff to get off while the car was in motion—and that such negligence was imputable to the defendant company, and that, as a matter of law, the plaintiff, being, of course, free from negligence, could recover. We are unable to give assent to this view of the law. It cannot be said, as a matter of law, that it was negligence per se for the motorman to open the gate before the car came to a full stop; nor can it be said that the opening of a gate by a motorman while the car is moving is an invitation to a passenger to alight from a moving car. This would no more be true than would the act of a conductor in opening the rear door of the car, as it was about to come to a street and stop, be an invitation for a passenger to get up and step off the car by the rear platform while the car was still in motion. Passengers take obvious risks. *Coleman v. Second Avenue R. R. Co.*, 114 N. Y. 609, 21 N. E. 1064. Because a motorman opens a gate before a car comes to a stop, that will not excuse a person in jumping off a car before it comes to a stop. The mere opening of the gate will not raise a presumption of actionable negligence against the defendant company.

For these errors of the trial court, the judgment is reversed, and a venire de novo awarded.

WEBER v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, March 24, 1902.)

[43 S. E. Rep. 888.]

Ejection of Passenger—Evidence—Refusal to Accept Plaintiff's Fare from Another Passenger—Profanity of Conductor.

In an action against a railroad company for ejecting a passenger, evidence is admissible that a third party offered to pay plaintiff's fare, where the complaint alleged that, on a friend offering to pay plaintiff's fare, the conductor cursed violently and said he should not ride.

Failure to Buy Ticket—Excess Rates and Rebates—Reasonable Regulations.

Whether the regulations of a railroad company as to excess rates and rebate checks is reasonable is a question of law for the court.

Same—Same.*

Where a passenger does not buy a ticket when opportunity is given, a railroad company has no right to charge excess fare and give rebate checks therefor between points within the state.

New Trial.

The Supreme Court has no power to grant new trials because of excessive damages.

Appeal from Common Pleas Circuit Court of Union County; Watts, Judge.

Action by B. F. Weber against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

C. P. Sanders, for appellant.

V. E. De Pass and Stanyarne Wilson, for respondent.

POPE, C. J. This action came on for trial before the Honorable R. C. Watts, as circuit judge presiding, and a jury. The object of the action was to recover in the aggregate the sum of \$1,995, which the plaintiff alleged was the damages sustained by him under the two causes of action set up in his complaint. The circuit judge, in his charge to the jury, described the allegations of the complaint as follows:

"He alleges in his complaint that he boarded a train of defendant company in 1901; that he got on the train at Union, S. C. He says his wife and six children were anxiously awaiting his return with some medicine which he came to Union to get; that he got the medicine and got on the car, and when the train got a short distance from Union the conductor, who represented the defendant, came to plaintiff and called for his fare. He told the conductor that he hadn't had time (that is, plaintiff hadn't had time) to purchase a ticket before boarding the train, and tendered the conductor the regular fare from Union to Jonesville, which was thirty cents (that amount being included in the coins which he gave him), and that he had no more money. He said the conductor told him he would have to pay twenty cents more. After he told the conductor he didn't have it, then the conductor told

*As to whether extra fare may be charged because of failure to procure ticket, see note appended to *Coyle v. Southern Ry. Co. (Ga.)*, 20 Am. & Eng. R. Cas., N. S., 529.

Weber v. Southern Ry. Co

him he would have to borrow it or get off the train. He said he asked a friend to lend him that amount, and the friend told him he did not have it; that he then asked the conductor to lend it to him until he got to Jonesville, and the conductor refused and called him a fool, and went into another car, taking the money with him. He says in a short time the conductor came back to plaintiff and dropped the money in his hands. Plaintiff thought it was five cents change due, but, upon finding it to be thirty-five cents, he refused to accept it, and placed thirty cents of it down where the conductor could get it, telling him at the time that he had paid the fare. He said when the train reached Bonham, a station between Union and Jonesville, the conductor, accompanied by three trainmen, took hold of plaintiff, took up the thirty cents, and, with force and violence, and with intent to degrade, humiliate, mortify, and wound plaintiff in his person and feelings, wantonly, unlawfully, maliciously, and without regard to his rights, dragged him out of the car and jerked him off to the ground. He says, by reason of the unlawful and oppressive conduct and violence of the defendant towards him, the inexcusable cursing to which he was subjected by it, and the outrageous invasion and disregard of his rights as a passenger on the train, he was damaged in the sum of \$495.

“In the second cause of action he alléges that on the same day he was at a station called ‘Bonham station,’ on defendants road, desiring to go home, where his wife and sick children were anxiously awaiting him, and needing the medicine which he got for them that day, and with which he was returning on said car, or at least hoping to return, and having at hand the means, and being fully prepared and intending in good faith, to pay any amount of fare which defendant might require or demand of him to carry him on said train to Jonesville, so soon as he should have the opportunity to do so, having first tendered the amount of the fare to the conductor, twenty-five cents, in addition to thirty cents which he had already handed him, which was more than the fare, stepped upon the second step of the platform of the passenger car of defendant, intending to ride as a passenger on said car, and thereby became and was a passenger thereupon. He says, immediately before he could enter the car, said conductor, with force and violence, and with intent to degrade, humiliate, mortify, and wound plaintiff in his person and feelings, wantonly, unlawfully, maliciously, and in utter disregard of his rights, jerked him therefrom into the ditch. He says, upon remonstrating with him, and pleading the cause of his sick children at home, and telling him of the medicine he had for them, said conductor refused to let him enter the car. He says a friend of his was present, offering to pay said conductor any amount he might demand, if he would permit plaintiff to ride to Jonesville; that he cursed violently, and said plaintiff should not ride for any amount, and flagged the

Weber v. Southern Ry. Co

engineer to move on. Plaintiff was again getting on the car, which was then in motion, when he was kicked off. He then ran up to the front end of the car, and was a passenger going into the car, when the conductor, who had run through the car, and who was a large and strong man, caught hold of him and jerked him out of the car, and motioned the engine to move faster. He says he caught the back rail, and was endeavoring to swing around the step, when the conductor cursed him and kicked him in the side and on the hand, tearing the skin off his fingers, and finally kicking him on the elbow and knocking him to the ground, to his great and permanent injury and suffering. He said thereby he was forced to get home the best way he could, suffering much bodily pain and great mental anguish. He says, by reason of the unlawful and oppressive conduct and violence of the defendant towards him, the outrageous cursing and abuse to which he was subjected by it, and its brutal invasion and disregard of his rights, he was damaged \$1,500. He therefore asks for damages in both causes of action \$1,995."

Except as to its corporate character, and that the plaintiff entered its passenger coach at Union, S. C., and was ejected at the station named "Bonham," the Southern Railway Company denies the allegations of the complaint. Both sides introduced testimony as to the issues made by the pleadings. There was objection as to the competency of the testimony of one of the plaintiff's witnesses (that of Mr. Whitlock), but the circuit judge overruled the objection. Both sides offered requests to the circuit judge to be passed upon in his charge to the jury; but the circuit judge read the requests to charge in the presence of the jury, and in his general charge passed upon the same. The jury returned a verdict in favor of the plaintiff in the sum of \$1,500. A motion was then made for a new trial, based in part upon the charge of the judge, and also because the finding of damages was excessive in amount. This motion was overruled. Thereupon the defendant appealed to this court upon nine grounds, as follows:

"(1) That his honor erred in allowing the witness Littlejohn to testify as follows: 'I told the captain to let the man go. I said, "I will pay his way;"' and in ruling and holding that this was a part of the *res gestæ*, and also in ruling and holding that, even if a man is lawfully ejected from a train, if this ejection is at a regular station, then that he could, by either buying a ticket or offering to pay his way, re-enter this train and continue his journey. The error being, as it is respectfully submitted, that, where a man violates the reasonable and lawful rules of the company or breaks his contract, he forfeits his right to ride on that train, and if he is then lawfully ejected, even though it be at a station, that he could not, by offering to pay his fare from that station, or even from the commencement of his journey, regain his right to re-enter the same train, and force the railroad company to carry out a

Weber v. Southern Ry. Co

contract which he himself had broken. It also being respectfully submitted that, Mr. Littlejohn being a mere volunteer, the conductor was not bound to receive any money from him, and hence his statement or what he said to the conductor is incompetent, and his honor should have so held.

“(2) That his honor erred in charging the plaintiff’s eleventh request, to wit: ‘There is no law to justify a railroad company in refusing to permit a passenger to take passage on one of its trains at a station, who shows himself prepared and willing to pay the fare, even if he has been ejected at such station because of the noncompliance with the rules of the company;’ and also in charging: ‘I charge you further, as matter of law, that if this plaintiff here refused to pay his fare, if he did not have a ticket and refused to pay his fare, or refused to pay excess, and if the conductor stopped that train at a station where people were accustomed to get on and off, if he ejected this plaintiff from the train at a station on the defendant’s road where parties were accustomed to get on and off, and then plaintiff attempted to board that train again, with an honest intention and with ability to pay, an honest intention to pay his fare, having the ability to pay, and he attempted to board that train in a peaceable manner, and not in a disorderly, rude, and violent or angry manner, not with the intent to try to beat a ride, but with the honest intention to pay, and with the ability to pay, his fare, then it was the duty of the conductor to receive him, and he could not eject him at that station. Now, if he stopped at a place other than a station and ejects a passenger, the passenger has no right to go back on; but if the conductor stops at a station where passengers are accustomed to get on and off, and ejects a passenger at that point who refuses to pay his fare, the passenger then has a right to go to the ticket office and get a ticket, if the ticket office is open, or he has got a right to get back on that train in a peaceable, quiet manner; and if he gets on the train with the intention of behaving himself, and with the intention to pay his fare, and he has the money and the ability to do it, then it is the duty of the railroad to receive him. If they eject him, it is unlawful. If they eject him then, then I charge you, as a matter of law, he has a right to get on that train and ride and offer himself as a passenger under such circumstances as that.’ The error being, as it is respectfully submitted: (a) That his honor failed to recognize the rule of law that, where one party to a contract breaks the contract, then that such person cannot after this, by offering to comply, regain any rights under the contract which he has broken, and force the other party to this contract to carry it out. (b) That by his honor’s charge, he instructed the jury, in terms, that a person who had violated the rules of the company, and been lawfully ejected, if this ejection took place at a regular station, that such person could,

Weber v. Southern Ry. Co

by paying his fare from that point, regain the right which he had forfeited to re-enter the same train, whereas his honor should at least have instructed the jury that before he could re-enter such train he must pay the fare and excess from the point where his journey commenced.

“(3) That his honor erred in not refusing the plaintiff's thirteenth request, to wit: ‘Where a railroad company has a rule or regulation concerning the collection of excess rates and the issue of rebate tickets, it is a question for the jury whether such rule or regulation is reasonable, and it should not be enforced if unreasonable.’ It being respectfully submitted that the question of whether a rule or regulation concerning excess rates and the issuing of rebate tickets, and whether the same is reasonable or unreasonable, is a question of law for the court, and not a question of fact for the jury.

“(4) In refusing to charge the defendant's second request, to wit: ‘Where one refuses to pay the amount which the railroad company has the right to charge and collect, such person becomes a trespasser, and, if the conductor puts him off, he loses his right to be carried as a passenger on such train, and cannot, by offering to pay the amount after he has been ejected, regain or restore his right to be carried on this particular train.’ And in modifying this request so as to instruct the jury that if a passenger, under such circumstances, is ejected at a regular station, then that such passenger could, by purchasing a ticket, or offering to pay his way from that point, regain his right to re-enter such train and be carried on his journey. The error being, as it is respectfully submitted, that his honor failed to recognize the rule of law to the effect that where one person breaks a contract, or where a passenger is rightfully ejected, then that such person or passenger could not thereafter restore his rights by offering to comply with the contract which he had broken, or by making a new contract to take the place of the old.

“(5) That his honor erred in modifying the defendant's fourth and fifth requests to charge, and in instructing the jury that while a passenger is bound to obey the reasonable rules and regulations of the company, and that while a railroad company has a right to charge an excess fare of twenty-five cents where a passenger does not purchase a ticket, if the ticket office be open for thirty minutes before the departure of the train, that the railroad company could lawfully eject such person upon refusing to pay such excess, provided it offered the passenger a rebate ticket, yet that, if such ejection took place at a regular station, then that such passenger could, by purchasing a ticket, or offering to pay his fare from that point, re-enter such train and regain his right to be carried thereon, and that if the railroad company prevented him from so doing, or expelled him therefrom, it would be liable to him in damages; the error being, it is respectfully

Weber v. Southern Ry. Co

submitted, that his honor failed to recognize the rule of law which holds that where one person has broken his contract, or forfeited his rights thereunder, then that such person could not thereafter regain his rights by offering to comply therewith, nor could he compel the party to the contract to enter into a new one with him.

“(6) Because the law of this case, under his honor’s charge, being that the railroad company had the right to charge an excess fare of twenty-five cents where a passenger had failed to procure his ticket, where full opportunity had been offered to him to do so, and to eject such passenger upon his refusing to pay such excess, provided it offered him a rebate ticket, that it was error for his honor to instruct the jury that, if such ejectment took place at a regular station, then that such passenger could re-enter the train and regain his rights to be carried thereon by purchasing a ticket at such station, or by tendering his fare therefrom; the error being that when one person forfeits or waives his rights under a contract, either express or implied, and refuses to comply with the terms of his contract, then that such person has no rights under such contract, and cannot thereafter, without the consent of the other party, regain any rights thereunder by offering to comply therewith.

“(7) Because, after instructing the jury as follows: ‘I charge you, as matter of law, that if the railroad commissioners allowed the train to fix rules requiring persons to purchase a ticket at the depot of the company if the office is opened thirty minutes before the train leaves, and the passenger fails to get a ticket, allowed the railroad company to charge an excess of twenty-five cents by giving a rebate ticket, then that is a reasonable rule, and they have a right to adopt such a rule as that. Now, if the railroad commissioners permitted the Southern Railway Company, the defendant here, to require the plaintiff, who got on the train without a ticket, if the ticket office was opened a half an hour before the train left the station, to pay twenty-five cents in excess of the regular fare—three cents a mile—that was a reasonable rule, and it would be the duty of a passenger to pay it, provided they gave him a rebate ticket; that is, giving you a slip which will enable you to have that money refunded at any station he got off at which the company had a station master. Now, if the plaintiff here boarded this train, going from here to Jonesville, and didn’t get a ticket, and if the ticket office was opened thirty minutes before he left, then I charge you, as a matter of law, that the conductor had the right to exact from him twenty-five cents in excess of three cents a mile, provided he gave him a rebate ticket; that it was the duty of the passenger to pay that, and if he didn’t pay it, and refused to pay it, then the conductor had a right to eject him, and in ejecting him he had a right to use requisite amount of force, but he had no right to use unnecessary force in ejecting him. His

Weber v. Southern Ry. Co

honor erred in instructing the jury, in substance, that, if the ejectment took place at a point where there was no station, that such passenger could not, by offering to pay his fare, re-enter the train and continue his journey, but that, if such ejectment took place at a station, that he could, by purchasing a ticket or offering to pay his fare, re-enter such train and continue his journey, and that the railroad company would have no right to prevent such passenger from riding thereon, and if the company did prevent him from doing so, or if it did eject him thereafter from the train, that such conduct on the part of the railroad company would be unlawful, and that such passenger could recover damages therefor. The error being, as it is respectfully submitted, in leading the jury to believe that the rights of a passenger who has been lawfully ejected at a station are different from those of one who has been lawfully ejected at a point where there is no station; and in instructing the jury, in effect, that where a passenger forfeits or waives his contract with the railroad company, and is lawfully ejected by failure to comply with the lawful and reasonable rules of the company, then that such passenger, if he is ejected at a regular station, could re-enter such train, and regain his rights to ride thereon, notwithstanding he had broken his contract with the company.

“(8) Because his honor erred in charging: ‘If he [meaning the conductor] ejected this plaintiff from the train at a station on defendant’s road where parties were accustomed to get on and off, and then the plaintiff attempted to board that train again with the honest intention and with ability to pay his fare, in a peaceable manner, and not in a disorderly, rude, and violent or angry manner, and not with intent to try to beat a ride, then it was the duty of the conductor to receive him, and he could not eject him at that station.’ And also in charging: ‘Now, if this plaintiff here fractiously refused to pay his fare, the jury can take that into consideration; but if he was within the law, if he was behaving himself in a peaceable manner, wanted just his ride, and was not boisterous or violent or discourteous—anything of that sort—all the circumstances in that case can be considered by the jury.’ And also in charging: ‘Now, I charge you that if this man had a right, under the law as I have defined it to you, to ride to Jonesville, if this conductor unlawfully ejected him, then you will find a verdict for the plaintiff for such damages as you think he has sustained; and if you think that it was a willful, high-handed, outrageous invasion of his rights, in addition to such actual damages as he has sustained you can give such damages as you see proper under the testimony in this case.’ And also in charging: ‘If you think this man was on that train, and he had a right to be there under the law as I have defined it to you, and that his rights were invaded by the defendant company, then you award him such damages as you think he has sustained.’ And also in charging:

Weber v. Southern Ry. Co

'If you think there was a willful, wanton, high-handed, and oppressive, outrageous invasion of his rights by the defendant company, and he was mortified, humiliated, then, if you believe that (and that is for you to determine), then you can give, in addition to such actual damages as he has sustained (as in your opinion he has sustained), such damages in the way of punishment (punitive damages, smart money) that you wish to award, not exceeding, however, the amount asked for, because you cannot give any more than that.' The error being, it is respectfully submitted: (a) That this was a charge upon the facts involved in the case. (b) That this was a statement of facts, which was exclusively for the jury. (c) That his honor in so charging went beyond the limits of the circuit judge, as defined and limited by article 5, § 26, of the Constitution of this state, and charged and stated facts which were for the jury. (d) That his honor in so charging went beyond the province of the judge, and invaded the province of the jury.

"(9) In not granting the defendant a new trial on the grounds: First, on account of errors in his honor's charge, as shown by the exceptions 1, 2, 4, 5, 7, and 8 herein; second, because the verdict herein is excessive, and shows that the jury was influenced by passion and prejudice."

We will now endeavor to pass upon these questions which we think fairly arise from the record.

1. Did the circuit judge err in allowing the witness Littlejohn to testify as is set out in the first ground of appeal? We think not, for the defendant went to trial with an allegation in the complaint, "Upon friends of plaintiff offering to pay said conductor any amount he might demand if he would permit the plaintiff to ride to Jonesville, he [the conductor] cursed violently and said, '[plaintiff] shall not ride for any amount.'" In its answer the defendant traversed these facts. Now, therefore, when the witness Littlejohn proposed to testify thereto, the defendant objected. The circuit judge admitted the testimony, in which ruling we think he was correct. This exception is overruled.

2. Was it error in the circuit judge in not formally telling the jury that he intended to overrule the thirteenth request to charge, as presented in these words: "(13) Where a railroad company has a rule or regulation concerning the collection of excess rates and the issue of rebate tickets, it is a question for the jury whether such rule or regulation is reasonable, and it should not be enforced if unreasonable." The circuit judge was most careful to inform the jury by his instructions to them that, whenever his general charge was not in accord with the plaintiff's requests to charge, such requests were refused. It is true, he did not formally say to the jury, "I overrule the plaintiff's thirteenth request to charge," but he did, time and time again, in his general charge to the jury, instruct them that it was a matter of law that railroad com-

panies could issue a regulation by which, if a man refuse to pay his fare, or also refuse to pay his fare and 25 cents additional as an excess rate, it was lawful for the conductor not only to eject him, but, if such passenger refused to leave the train on the demand of the conductor, the latter could lawfully use force sufficient to put him off, provided the expulsion was not made on a trestle, bridge, or in a swamp. This exception is overruled.

3. Did the circuit judge err when he instructed the jury in his charge that railroad companies had the power in this state to charge and exact of any passenger on their trains, who took passage thereon at a station where the ticket office was kept open for 30 minutes before the arrival of such train at such station, the sum of 25 cents in addition to and in excess of the regular fare? This is an important question. It has been before the court before. The importance of this question is fully appreciated by the appellant in the case at bar, for an inspection of the grounds of appeal will show that it enters, in some form or other, into all but two grounds of appeal. We might say that this question might have been avoided in this appeal. The plaintiff, who is the respondent here, did not appeal from the judge's charge, but the defendant has by his appeal raised it—not, however, in the specific form we have stated it, but as a basis of alleged errors in the charge of the circuit judge. We will meet the question thus raised. There can be no question that it would be far better for the traveling public, as well as the railroads, that each passenger should obtain a ticket before boarding a train. In the year 1884 our state Legislature passed an act by which passengers on railroad trains were stimulated to buy a ticket before boarding passenger trains. "Sec. 2. That section 1451f of (A. A. 1883, pp. 485-486), be amended by adding at the end thereof the following: And railroad companies shall have the right to charge twenty-five cents extra when fare is not more than two and 50-100 dollars, and fifty cents when it is over that amount, in all cases where passengers get on at stations where tickets are offered for sale, neglect or refuse to purchase tickets: provided, this shall not apply to passengers on accommodation trains: provided, further, that offices for the sale of such tickets shall in all cases be opened not less than thirty minutes before the time fixed for the departure of trains." 18 St. at Large, p. 759. This seems to have been the first departure from the old custom of paying the exact fare for each mile traveled, and in the circular issued by the railroad commissioners (circular No. 32) on 13th August, 1894, the exact language of the foregoing statute was embodied; but on May 4, 1895, an addition was made, thus: "On and after January 10th, 1895, circular No. 32, issued by the board 17th August, 1894, shall have added thereto the following: 'Provided, that the conductor shall give the passenger a return check for the amount of excess charged, to be redeemed upon

Weber v. Southern Ry. Co

presentation to any ticket office of the company.' " By the foregoing recitals it will appear that up to 10th January, 1895, the excess of fare authorized to be collected from persons failing to buy tickets went into the treasury of the railroads, but after that date this excess was ordered to be paid to the passenger who paid the same at any ticket office of the railroad company so charging this excess, without any restriction as to the time when such excess should be paid.

By the testimony in this case, the following circular was issued by the defendant railroad:

"Southern Railway Company, Passenger Department.

"Circular No. 1,900-03, Reissued Superseding
Circular No. 797.

"File No. 52, 785.

"Washington, D. C., January 27, 1900.

"Rebate Tickets in South Carolina.

"To all Conductors and Tickets Agents in South Carolina: Conductors have been furnished a supply of rebate tickets, Form C. R. C., a fac simile of which is printed below, for use under the following instructions:

"A rate of 25 cents higher than agent's rate should be charged for each fare collected in cash between any two stations within the state of South Carolina, under the rules governing the collection of conductor's rates.

"A rebate ticket, Form C. R. C., should be issued to the passenger for each excess cash fare collected between any two stations within the state of South Carolina. These tickets should be written up to show: (a) Name of conductor; (b) points between which fare is collected; (c) train number, and punched to show the date of issue, whole or half fare and amount collected, as designated. The duplicate ticket should be examined carefully to see that it agrees with the original and forwarded to the ticket auditor with report of cash fare collections.

"Special attention is called to the fact that these rebate tickets are to be issued exclusively for excess fares collected within the state of South Carolina, and are not to be issued for fares collected between interstate points, nor are they to be used for fares collected at agent's rate within the state of South Carolina which do not require a rebate.

"Conductors will continue to use the Blanchard form of cash fare receipt for fares collected at agent's rates between interstate points.

"The excess rate of 25 cents will be refunded to passengers upon surrender of the original rebate ticket to any ticket agent within the state of South Carolina within twenty (20) days after date of issue canceled in margin.

"Ticket agents should stamp all rebate tickets redeemed and forward same to ticket auditor with report, Form 1,950, at the end of each month. The total amount of this report should be entered on credit side of Summary Passenger

than ten cents." In the case at bar the Southern Railway Company was tendered its fare for 10 miles by the plaintiff (respondent), and refused that tender. Such railroad had no right to require the extra fare of 25 cents in addition to its regular fare of 30 cents from Union to Jonesville, both points being within this state. Since the act of 1900, herein referred to, no affirmative action has been taken by the railroad commissioners or the railway company. We hold that the circuit judge erred.

We overrule exceptions 2, 3, 4, 5, 6, 7, 8, because there is nothing in the case to show that such exceptions relate to any material matter. If the circuit judge was in error as to the 25 cents excess, then it becomes of no avail to the appellant, for the legal fare was tendered by the passenger, and, of course, every act of the conductor was erroneous. He had no right to eject the passenger at Bonham, or anywhere else on its line of way, because he refused to pay an illegal exaction.

4. So far as the ninth exception is concerned, we will say that, after the foregoing views expressed by us, there was no error of the circuit judge in refusing a new trial, so far as exceptions 1, 2, 4, 7, and 8 are concerned, and we are powerless to order a new trial because the verdict is excessive.

It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, J. I concur in overruling the appellant's exceptions and in affirming the judgment of the circuit court, but I do not assent to the proposition that the regulation of the railroad company requiring an "excess fare" of 25 cents over regular rates to be paid by all persons seeking to travel upon said road, who, after reasonable opportunity therefor, have failed to purchase a ticket, is unlawful. Such a requirement is not unreasonable. It is the duty of one who wishes to become a passenger on a railroad train to comply with all reasonable regulations of the company. His right to board the train and become a passenger thereon is not absolute under all circumstances. His primary duty is to purchase a ticket at the designated agencies for the purpose, if reasonable opportunity is offered, and then to enter the train as an accepted passenger, having complied with the rules of the company. If he negligently or willfully fails in this, then he is liable to be rejected as a passenger for want of a ticket, or, as a much milder alternative, to deliver to the conductor the sum of 25 cents, called "excess fare," in addition to paying the regular fare, which "excess fare" is to be refunded to the passenger and demanded at any station of the company in the state. This regulation, as much for the convenience of the passengers, who might otherwise be rejected as passengers for want of a ticket, as it is for the advantage of the company in the conduct of its business, cannot fairly be said to be unreasonable. The tendency of such regulation is to promote the convenience and safety of passengers generally, by relieving

Weber v. Southern Ry. Co.

the conductor of selling tickets, making change, discussing fares, etc.; consuming his time and attention, which should be devoted to the control and management of his train and its connections, and to the general comfort and safety of the passengers. Such a regulation, in its tendency to cause passengers to buy tickets at the designated agencies, certainly comports with correct business methods, in securing proper oversight and custody of the company's revenues. The inconvenience to which it subjects the passenger who negligently or willfully fails to purchase a ticket from the station agent is very small, compared with the inconvenience which it entails upon the railroad company to sell tickets by conductors in charge of running trains. The regulation, too, is one approved by the railroad commissioners of the state. It is true, the railroad commissioners have no power to approve a regulation in conflict with the law of the state, but the regulation does not conflict with any law of the state. The statute provides that "the rate for transportation of passengers * * * shall not exceed three cents per mile for every mile traveled." The language evidently contemplates a charge for service rendered in transportation, to be retained by the railroad company as its own property; but the money paid or delivered by way of "excess fare," so called, is not intended to be the property of the railroad company, but is refundable on demand at any station of the company within the state. If, on reaching his destination, the passenger should, as he has the right to do, present his return check and receive back his money, how can it be said that his "rate of transportation" had been increased? If he neglects or refuses to demand return of the money, his loss of such money results from his own neglect or conduct, and not because it was exacted from him in charge for his transportation. This question was squarely presented in *Reese v. Pennsylvania R. Co.* (Pa.) 19 Atl. 72, 6 L. R. A. 529, 17 Am. St. Rep. 818, and decided in accordance with the views above stated.

I cannot subscribe to the view that this question has already been decided adversely in the case of *Kibler v. The Southern R. Co.*, 62 S. C. 272, 40 S. E. 556, and *Id.*, 64 S. C. 245, 41 S. E. 977. In the first appeal the court, speaking by Chief Justice Pope, then Associate Justice, said: "So far as the twenty-five cents extra fare is concerned, that question does not enter into this appeal." In the second appeal, exception was taken to refusal to charge defendant's eighth request, as follows: "A railroad company has the right to impose an excess charge of twenty-five cents upon passengers who fail to buy tickets when opportunity is offered and rebate check is furnished." Responding to this exception, the court, speaking by Mr. Justice Pope, said: "We think Judge Gary was right in refusing to charge the eighth request of defendant." This language, isolated from its connection, would indicate that, in the opinion of the court, the refusal to charge the request was:

Weber v. Southern Ry. Co

right, because the request contained an erroneous proposition of law; but, when the following connected language is noticed, it will be seen that the refusal of the request was right, because, whether it contained a sound or unsound proposition of law, it was inapplicable to the case before the court. The language of the court was: "But whether he was right or wrong in such declaration of the law, it will not affect this case, for the reason that defendant railroad had no tickets for sale at its agency in Newberry for less than ten cents. Its own agent testified that he would not have sold the plaintiff a ticket from Newberry to Helena for three cents, or, rather, for any amount less than ten cents. This being so, such ruling *was not necessary in this cause*. It became an abstract question of law. This ruling, as before said, *whether right or wrong, did not affect the case*. So, therefore, subdivisions 1, 2, 3 of the third exception *do not* fairly arise upon the record, and are therefore overruled." (The italics mine.) This shows conclusively that the question which has been discussed was not decided in Kibler's Case. The point decided was that the act of 1900, limiting the rate for transportation of passengers to 3 cents per mile, operated as a repeal of the provisions of section 1 of the act of 1884 (23 St. at Large, p. 759), because such provisions were inconsistent with the act of 1900; but this left untouched section 2 of the act of 1884, which gave the right to charge 25 cents extra under certain conditions. There is great force in the view, however, that any extra charge for transportation over 3 cents per mile is inconsistent with the limitation to 3 cents; and if the "excess fare," as collected in this case, was a charge for transportation or rate for transportation, in the sense of the statute, I am willing to concede that, as a charge or rate for transportation, it would be unlawful under the act of 1900, being in excess of 3 cents per mile. But I have attempted to show that money received temporarily, and to be refunded upon demand, is in no proper sense a rate or charge which involves absolute right of property and retention in the receiver. The regulation as to such "excess fare" is therefore sustained as a reasonable regulation, not in conflict with any law of the state, and approved by the railroad commissioners of the state. I have said this much because the question was considered in the opinion by Chief Justice Pope, and I wish to make clear my attitude with reference to the subject, and to prevent any further misapprehension of the point decided in Kibler's Case, *supra*; but I do not regard that the question is even now properly before us for discussion. The case shows this statement: "Throughout the trial the plaintiff did not contend that the defendant was limited to a charge of three cents per mile, as fixed by statute, but conceded that defendant had the right to impose a reasonable excess charge where opportunity was offered for purchase of ticket, and none was purchased." The charge of Judge Watts was in

Weber v. Southern Ry. Co

conformity with this concession of plaintiff's counsel, and the contention of defendant's counsel, and, as I think, in accordance with the law; and no exception had been taken to the charge in this regard by either side. It ought, therefore, to be treated as the law of this case.

The exceptions to the charge raise an interesting question, about which there is some conflict among the authorities, and I regret that the time now at my disposal will not permit a full discussion. I will content myself with briefly stating the reasons which induce me to vote for an affirmance of the judgment of the circuit court. Under the admissions of counsel, the first cause of action was practically abandoned, except in so far as the manner of performing a lawful ejection from the train was unlawful; for, having conceded the defendant's right to collect the "excess fare," and it being undisputed that the plaintiff, upon demand therefor, was unable to pay, it necessarily followed that defendant had the right to eject him as a trespasser, provided it was done in a lawful manner. *Moore v. R. Co.*, 38 S. C. 1, 16 S. E. 781. The main contest, therefore, was upon the second cause of action, which involved the right of one who had been ejected from the railroad train at a station where passengers were received, to re-enter the same train for the purpose of becoming a passenger, with an honest intention to comply with the company's reasonable regulations and with the means of complying. The judge charged substantially that, under such circumstances, it was the duty of the common carrier to receive him; and I do not think there was error in such charge, when applied to the facts in the case. The plaintiff was prevented from re-entering the train as passenger under circumstances of unusual harshness of conduct by the conductor. The plaintiff did not refuse to pay the "excess fare" in the first instance from any spirit of willfulness, or in denial of the defendant's right to collect such "excess fare," but because he only had 35 or 40 cents in money, and the regular fare was 30 cents; having failed to purchase a ticket because he only reached the station in time to board the train. When the conductor demanded his fare, plaintiff handed him 35 cents, which plaintiff testified the conductor took off with him, but afterwards returned and handed it back to him, demanding the "excess fare" in addition. The plaintiff was put off at Bonham, a station between Union and Jonesville. Plaintiff lived at Jonesville, with a wife and a large family of children, five of whom were sick, and had gone to Union and procured some medicine and soup material for them, and was returning home. When the "excess fare" was demanded, he tried to borrow it on the train, but failed. After being put off at Bonham, a passenger gave him 25 cents, and he then sought to re-enter the train; informing the conductor that he had the money, and declaring. "Here is your money, I want to go on this train. My family is sick." To this appeal the con-

Meyere v. Nashville, C. & St. L. Ry

ductor gave no heed, but, with force, prevented the plaintiff from entering the train, notwithstanding other passengers pleaded with the conductor to desist; offering to pay whatever was demanded. The conductor acted on the theory that, having been put to the trouble of stopping his train to eject plaintiff for failure to pay the "excess fare," the plaintiff had lost all right to re-enter that train. Some cases do hold that "after a person has refused to pay his fare, and is being put off the train, he requires no right to the passage by then tendering the fare demanded." *O'Brien v. Railway*, 15 Gray, 20, 77 Am. Dec. 347; *Hoffbauer v. Railway (Iowa)* 3 N. W. 121, 35 Am. Rep. 278. The general principle upon which this view rests is thus stated in 15 Gray, 20, 77 Am. Dec. 347: "After being rightfully expelled from the train, he could not again enter the same car, and require the defendant to perform the same contract he had broken." But I think the Texas, California, and Tennessee courts are right in limiting the application of such rule to cases of willful violation of contract on the part of the passenger. *Texas, etc., Pac. R. Co. v. Bond*, 62 Tex. 442, 50 Am. Rep. 532; *Bland v. So. Pac. Ry. Co.*, 55 Cal. 590, 36 Am. Rep. 50; *Louisville, etc., Ry. Co. v. Harris*, 9 Lea, 180, 42 Am. Rep. 668; and *L., N. & Gt. S. R. Co. v. Guinan*, 11 Lea, 98, 47 Am. Rep. 279. There being no evidence of any fractious or willful opposition by plaintiff to the reasonable regulations of the company, the trial judge fairly stated to the jury the law applicable to the case, and the verdict should not be disturbed.

MEYERE v. NASHVILLE, C. & ST. L. RY.

(*Supreme Court of Tennessee, Feb. 7, 1903.*)

[72 S. W. Rep. 114.]

Carriers—Injuries to Passengers—Dangerous Position—Riding on Platform—Declaration—Demurrer.*

A declaration for injuries to a passenger, alleging that he took passage on the rear coach of defendant's train, and not being able to secure a seat in that coach, because of its crowded condition, stood on the rear platform thereof, and was thrown from the train while it was passing around a curve at a rapid speed, but failing to allege that plaintiff attempted to gain a seat in any other coach of the train, or requested any of the trainmen to procure a seat for him or that there was no standing room inside the rear coach, was demurrable; it not appearing therefrom that plaintiff was not voluntarily and unnecessarily riding on such platform.

Appeal from circuit court, Davidson county; J. W. Bonner, Judge.

Action by Arthur Meyere against the Nashville, Chattanooga & St. Louis Railway. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

*See note appended to *Ward v. Chicago, etc., R. Co. (Wis.)*, 14 Am. & Eng. R. Cas., N. S., 322.

Meyere v. Nashville, C. & St. L. Ry

Frank P. Bond and Lewis Leftwich, for appellant.

Claude Waller and J. D. B. De Bow, for appellee.

McALISTER, J. Plaintiff brought this suit to recover damages for personal injuries sustained by him while a passenger on one of the defendant's trains. A demurrer to the declaration was sustained by the circuit judge, and the plaintiff appealed.

The cause of action is thus stated in the third count of plaintiff's declaration, namely: "Said plaintiff, according to the terms of his contract and his ticket, purchased of defendant at said station of Tullahoma, for the transportation of plaintiff from said station to Nashville, as aforesaid, entered the last car of said train, which was what is known as a 'day coach,' and which was attached behind the car known as a 'sleeper,' though usually a sleeper was run upon said train as the rear car, when, because of the careless and negligent conduct of defendant, its agents and employees, in failing to provide suitable, usual, and proper accommodation for plaintiff, according to its contract and agreement with plaintiff for his safe and convenient transportation over its road as aforesaid, and because of the careless and negligent conduct of said defendant, its agents or employees, in not furnishing plaintiff a seat on said train, and the crowded and overloaded condition thereof; the rear door of said car having been carelessly and negligently left ajar by the defendant, its agents and employees; plaintiff having seen other persons (passengers) standing on said platform, without objection on the part of the defendant, its agents and employees,—when, by reason of the careless, negligent, and unskillful management and operation of said train by defendant, its agents and employees, when said train was being run at a careless, negligent, and reckless rate of speed around a sharp curve in said road, by a sudden lurch of said car, plaintiff lost his balance, and because of the carelessness, negligence, and unskillfulness of defendant, its agents or employees, in not having the said door of said car (it being the last car of said train) securely closed, and in not having said platform of said car safeguarded and protected by the usual, proper, and necessary railings, chains, and guards, was violently thrown from said platform to the ground, fracturing his skull, and otherwise wounding, bruising, and crippling plaintiff, permanently disabling him, and causing him great mental and bodily suffering, and on account of which he was, and still is, unable to attend to his ordinary business duties." The demurrer to this count was, viz. "(1) The said third count fails to aver that the plaintiff could not secure a seat on the rear coach, or some other coach on the train, and that he made any effort to do so, or that he notified any of the defendant's agents in charge of the train that he could not secure a seat, but shows, on the contrary, that he took his position voluntarily and unnecessarily on the platform of the rear coach while the train was

Meyere v. Nashville, C. & St. L. Ry

in rapid motion, which platform was not provided with railings or guards. Such conduct on the part of plaintiff was negligence, which would, in law, bar any right of recovery against this defendant for any accident to him in falling off of said platform. Said count is therefore insufficient in law.

(2) The said third count fails to aver that any of the defendant's agents in charge of the train knew that plaintiff had no seat inside of the coach, and that he had taken his station for passage on the rear platform of the rear coach of said train, and fails to aver any act of negligence of the defendant which was the proximate cause of the injury to him. The said third count is therefore insufficient in law. (3) The said third count shows that plaintiff was guilty of negligence in going upon the unguarded platform of the rear coach of the train, and that said negligence was the proximate cause of the accident. The said count is therefore insufficient in law."

The determinative question of law presented by the pleadings is whether a passenger who voluntarily and unnecessarily assumes a position on the platform of a rapidly moving train can recover damages for injuries sustained in consequence of being thrown from the train, by the motion of the car while rounding a sharp curve. Mr. Wood, in his work on *Railway Law*, vol. 2, p. 1157, says: "A railroad company is bound to furnish its passengers reasonable and proper accommodations for traveling, and if it has an insufficient number of cars, so that passengers are compelled to ride upon the platform, it is liable for injuries received by them while riding there; but for injuries received while unnecessarily riding there the company is not responsible, nor while passing from one car to another unnecessarily. The fact that the conductor permits a passenger to ride upon the platform when there is no necessity for his doing so does not render the company liable for injuries received by him. No person can charge another with the consequences of his own negligence simply because such other person permitted him to do the act." Mr. Elliot, in his work on *Railroads*, vol. 4, sec. 1630, says: "It is also negligence, under ordinary circumstances, to stand upon the platform of a rapidly moving commercial railroad car. But there may be exceptional cases in which this is not true, and two or three of the courts have held that standing upon the platform is not contributory negligence, where the car is so crowded that the passenger is unable to get a seat therein, although there is room for him to stand inside the car. This seems to us, however, to be contrary both to principle and to the weight of authority. The failure to furnish him a seat may be of importance in determining the question of negligence or breach of duty on the part of the carrier, but we are unable to see its bearing upon the question of contributory negligence, especially where there is plenty of room to stand inside the car. In such case the failure to furnish a seat does not make it any safer or any less negligent to

Meyere v. Nashville, C. & St. L. Ry

stand upon the platform, and is not the proximate cause of the injury." Mr. Patterson, in his work on Railway Accident Law, sec. 272, says: "It is well settled that a passenger who voluntarily and unnecessarily places himself in a position of danger cannot hold the railway responsible for injuries of which his position is the efficient cause—as, for instance, * * * from his riding on the platform of a moving car before the train comes to a stop; but, as before stated, it has been held that the failure of the railway to perform its duty of providing the passenger with a seat will excuse his contributory negligence in riding on the platform; yet this doctrine cannot be regarded as reasonable, for, if the passenger cannot obtain a seat, he may stand within the car, or he may refuse to proceed on his journey, and may hold the railway responsible for the damages resulting from its breach of contract; but injuries resulting primarily from his voluntarily putting himself in a position of such obvious danger as that of riding on the platform of a car in motion cannot be said to have been proximately caused by the railway's failure to provide him with a seat." In volume 5, Am. & Eng. Ency. of Law (2d Ed.) p. 678, it is said: "If a passenger voluntarily and unnecessarily stands on the platform of a railroad car while it is in motion, he cannot maintain an action against the railroad company for an injury due in part to the fact of his occupying this position." Again, it is said on page 679: "Thus, where the passenger at the time of receiving an injury is on the platform of a running car, when there is room for him inside the car, this is such contributory negligence as will prevent recovery for the injury." Again, on page 681, it is said: "It has been held that for a passenger to be upon the platform of a steam car in motion is, as a general proposition, prima facie negligence, and no recovery can be had for an injury which was contributed to by the fact of his being in that position, unless his presence there is shown by affirmative proof to have been excused by the occasion." Mr. Wharton, in his work on Negligence, sec. 368, says: "Passing from car to car when the train is moving, if followed by injury to the plaintiff in consequence of such exposure, bars his recovery." In discussing this subject, Mr. Beach, in his work on Contributory Negligence, sec. 149, says: "If there is even standing room in the car, it is negligence to occupy the platform. This is the rule in Pennsylvania and Illinois, and it is commended by Dr. Wharton." We believe the true rule to be that a passenger who voluntarily and unnecessarily undertakes to ride on the platform of a moving train cannot recover damages for injuries sustained in consequence of such perilous exposure. The terms "voluntarily" and "unnecessarily" impose the limitation upon the rule, for, if it appears that, owing to the overcrowded condition of the car, there is neither sitting nor standing room on the inside, it may not be negligence to occupy the platform. But so long as there is stand-

Chicago & A. R. Co. v. Gore

ing room inside the car the passenger cannot occupy the platform. It will be observed, from a careful reading of the declaration, that it is not alleged that plaintiff requested any of the trainmen to procure him a seat, nor that he attempted to find a seat in any other coach of the train; nor is there an allegation that in fact there were no vacant seats in the other cars. It is not alleged, moreover, that there was not standing room in the coach whose platform plaintiff occupied. The substance of the plaintiff's declaration is that he took passage upon the rear coach of defendant's train at Tullahoma, and not being able to secure a seat in that coach, because of the crowded and overloaded condition thereof, he stationed himself on the rear platform of that coach, and, while the train was passing a curve at a rapid and unusual rate of speed, plaintiff was precipitated from the train and injured. It is not alleged at what rate of speed the train was moving, so as to show that it was immoderate and excessive, even if this were a matter which the law regulated. We must conclude, from the facts set out in the declaration, that the injury was brought about by the negligence and imprudence of the plaintiff in assuming voluntarily and unnecessarily a position on the platform of the car admittedly dangerous, and not designed for the use of passengers.

The judgment of the circuit court is affirmed.

CHICAGO & A. R. CO. v. GORE.

(*Supreme Court of Illinois, April 24, 1903.*)

[66 N. E. Rep. 1063.]

Passengers—Contributory Negligence—Boarding Moving Train at Direction of Conductor.*

It is not negligence as a matter of law to board a moving train at the direction of the conductor, unless the peril is so obvious that only a reckless man would encounter it.

Same—Same—Same—Evidence.

In a passenger's action for injuries sustained in attempting to board a moving train, evidence of a previous conversation on board the train with the conductor, in which the passenger was told to have his baggage rechecked himself, that the station where the accident occurred would be the proper place to do it, and that the train would stop a sufficient time therefor, is admissible.

Same—Same—Same—Same.

The passenger's evidence that, as he attempted to remount the car steps, a voice, coming from a place where a moment before he had left the conductor alone, cried, "Hurry up! Get on there!" with the testimony of another witness that it was the conductor who spoke, is admissible.

Same—Same—Same—Same.

Where a passenger, injured in attempting to remount the car steps,

*See *Pence v. Wabash R. Co.* (Iowa), 3 R. R. R. 77, 26 Am. & Eng. R. Cas., N. S., 77; *Young v. Chicago, M. & St. P. R. Co.* (Iowa), 6 Am. & Eng. R. Cas., N. S., 231.

Chicago & A. R. Co. v. Gore

alleges that he proceeded with ordinary care, evidence that he acted at the direction of the conductor is relevant to show such care.

Same—Same—Same—Special Interrogatory.

In a passenger's action for injuries, the defendant company cannot complain that its special interrogatory, whether the passenger's attempt to board the moving train was the cause of injury, was modified by inserting the word "proximate" before "cause," as in either form the interrogatory did not call for a finding of an ultimate fact, or for a probative fact from which an ultimate fact resulted, and so was improper.

Arguments of Counsel.

Starr & C. Ann. St. c. 110, par. 102, requires that special interrogatories shall be stated in writing, and submitted to the adverse party before argument: *held*, that it is proper for counsel for the adverse party, in his argument, to read the interrogatories to the jury, and discuss the evidence in connection therewith, to convince the jury that certain answers should be returned.

Instructions.

An instruction, in a passenger's personal injury action, that, if the jury believed from the evidence that plaintiff, while using reasonable care, was injured "by the negligence of the defendant or its agents," plaintiff should recover, is not objectionable as assuming defendant's negligence.

Appeal from Appellate Court, Third District.

Action by Truman K. Gore against the Chicago & Alton Railroad Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

Patton & Patton (William Brown, of counsel), for appellant.
Bell & Burton, for appellee.

BOGGS, J. The Appellate Court for the Third District affirmed the judgment in favor of the appellee, entered in the Macoupin circuit court, in the sum of \$5,304, in an action on the case against the appellant company to recover for personal injuries inflicted, as the declaration alleged, through the negligence of the servants of the company. This is an appeal to reverse the judgment of affirmance.

In September, 1899, the appellee desired to go from Chicago to Carlinville on the appellant's railroad. The State Fair was then in progress in Springfield, and the appellant company was selling tickets at reduced rates to that city. Appellee purchased a ticket from Chicago to Springfield, and had his baggage checked to the latter point. When on the train he surrendered his ticket to the conductor, and paid that official the fare charged by the company for passage from Springfield to Carlinville. He desired to have his baggage rechecked, so that it would also be transported to Carlinville. He requested the conductor to make this change in the destination of his baggage, and was told by the conductor to attend to it himself. He asked the conductor where he could attend to the matter, and was told that he could do so when the train stopped at Joliet, and, in reply to a question asked by the appellee, the conductor said there would be time for him to

Chicago & A. R. Co. v. Gore

have his baggage rechecked at Joliet. When the train arrived at Joliet the appellee went upon the platform and forward to the baggage car, and, after some delay, succeeded in getting his baggage rechecked from Springfield to Carlinville. The evidence tended to show that he proceeded with no unnecessary delay in the matter of getting his baggage rechecked and in seeking to re-enter the car, but that, through the negligence of the conductor, the train was put in motion, and was moving, when he attempted to mount the steps of the car. The evidence also tended to show that the conductor, who was still upon the platform, encouraged and advised appellee to attempt to board the train; that he supposed he might do so with safety, and attempted to reach the steps, and in doing so fell, or was thrown or drawn, under the wheels of the car, and his right foot so mangled and crushed that it had to be amputated.

It is so far within the scope of the authority of a conductor of a railway train to advise and direct passengers, in the matter of boarding the train, that an attempt to step on a moving train in compliance with such advice or direction cannot be declared, as matter of law, to be negligence that will bar recovery, unless the danger is so open and obvious that only a reckless man would encounter it. 5 Am. & Eng. Ency. of Law (2d Ed.) 653; 2 Rapalje & Mack's Digest of Railway Law, par. 370. In *Chicago and Alton Railroad Co. v. Winters*, 175 Ill. 293, 51 N. E. 901, we said (page 302, 174 Ill., and page 904, 51 N. E.): "The direction, invitation, or assurance of safety given by a servant of the company may so qualify a plaintiff's acts as to relieve it of the quality of negligence which it would otherwise have." The law has no rule declaring every attempt to board a moving train to be, *per se*, negligence. Whether or not the appellee, in attempting to get upon the car while the same was in motion, on the occasion in question, was guilty of such contributory negligence as would bar a recovery, was a question of fact to be determined by the jury in view of all the attendant and surrounding circumstances. *Chicago and Alton Railroad Co. v. Byrum*, 153 Ill. 131, 38 N. E. 578; *Chicago and Eastern Illinois Railroad Co. v. Storment*, 190 Ill. 42, 60 N. E. 104; 5 Am. & Eng. Ency. of Law (2d Ed.) 653, 656, 657; 3 Thompson on Negligence, §§ 2995, 2996.

The trial court did not err in permitting the appellee to detail the conversation which occurred between himself and the conductor, while on board the train, with reference to the course to be pursued by the appellee, when the train should arrive at Joliet, in the matter of procuring his baggage to be rechecked from Springfield to Carlinville. It was within the scope of the duty of the conductor to make such suggestions and give advice to passengers, and the conversation referred to explained why the appellee left the car and came upon the platform at Joliet, and tended to relieve him from any

Chicago & A. R. Co. v. Gore

charge of apparent negligence in leaving the car, and to justify him in so doing.

We have examined the complaint that the appellee was allowed to testify that, just as or immediately before he attempted to remount the step of the car, he heard the words, "Hurry up! Get on there!" without being able to testify that such words were spoken by the conductor. The appellee testified he did not see the person who so cried out, but that he had only a moment before left the conductor at the place from which the voice came, and that no one else was there with the conductor. This evidence tended to the identification of the conductor as the person who so called out, and that the conductor was such person was removed from question by the testimony of the witness Cowing. The declaration alleged that the appellee proceeded with reasonable and ordinary care in attempting to board the train, and that he acted upon the suggestion, advice, or direction of the conductor was competent to be proven as a circumstance tending to show the appellee has exercised ordinary care.

The appellant company asked the court to submit the following special interrogatory (except the word "proximate," inclosed in brackets) to the jury: "Did the plaintiff attempt to board the train of the defendant after it was in motion, and, if so, was such attempt the [proximate] cause of the injury to the plaintiff?" The court modified the interrogatory by inserting the word "proximate," and this action of the court is assigned as for error. This interrogatory was framed by counsel for the appellant company upon the theory that the law pronounced an attempt to board a train while in motion as, per se, contributory negligence. If that view of the law had been correct, then an affirmative answer to the interrogatory would have been inconsistent with a general verdict for the plaintiff; but, as we have seen, it was not a question of law, but of fact, whether the act of the appellee in attempting to get upon the train while the same was in motion was, under the circumstances, negligence. Whether negligent or not was to be determined upon consideration of all the attending facts and circumstances. Hence an affirmative answer to the interrogatory, as framed by counsel for the appellant and as modified by the court, would not have established an ultimate fact decisive, in any manner, of the issues in the case. That the train was in motion when the appellee attempted to enter the car is not at all inconsistent with the general verdict returned by the jury for the appellee. Special interrogatories should call for a finding as to ultimate controlling facts, or as to probative facts from which the ultimate controlling facts necessarily result. *Chicago and Northwestern Railway Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15. The special interrogatory as asked or as modified did not call for the finding of an ultimate fact, or for a probative fact from which an ultimate fact resulted, and consequently

Chicago & A. R. Co. v. Gore

should have been refused. The appellant, therefore, has no ground to complain that it was modified.

We do not conceive that it was improper practice to permit counsel for appellee to read the special interrogatories to the jury, and in connection therewith discuss the evidence, for the purpose of convincing the jury that under the evidence the interrogatories should be answered in the affirmative or in the negative, as the case might be. The objection is not that the argument of counsel appealed to the prejudice of the jurors or to their sympathies, or that it transcended legitimate grounds of debate, but simply that it was error to allow counsel to read the interrogatories to the jury and discuss the evidence which bore upon the answers which counsel conceived should be made by the jury thereto. The statute which authorizes the submission of special questions of fact to be answered by a jury (Starr & C. Ann. St. c. 110, par. 102) requires that such questions shall be stated to the jury in writing, and "shall be submitted by the party requesting the same, to the adverse party before the commencement of the argument to the jury." The end designed to be attained by the argument of counsel is to lead the jury to the proper decision of or answer to the issues made by the pleadings. It was entirely legitimate for counsel to review the evidence and suggest to the jury what, under the proof, their general verdict should be, and none the less to suggest the answers which, in the view of counsel, the evidence demanded should be returned to the special interrogatories. In *Timins v. Chicago, etc., Railroad Co.*, 72 Iowa, 94, 33 N. W. 379, it was said: "It is competent for an attorney to read special interrogatories to the jury, and to discuss the evidence applicable thereto, and to suggest the answers which in his judgment ought to be rendered."

The objection to the first, second, and third instructions given in behalf of the appellee, that they submitted to the jury, to be decided as a question of fact, whether the appellee was guilty of contributory negligence in attempting to board the train while the same was in motion, is based upon the insistence of the appellant, already disposed of, that such act constituted negligence in point of law.

It is further objected that the second of said instructions assumed that the acts of the conductor at the time in question were negligent. We do not so read the instruction. The only reference in the instruction to the defendant or its agents in charge of the train of cars is that, "if in this case the jury believe, from the evidence, that the plaintiff, while using such reasonable care for his own safety, was injured in the manner as charged in the declaration, and that such injury was occasioned by the negligence of the defendant or of its agents in charge of the train of cars mentioned in the evidence, and as charged in the declaration, then the jury should find the defendant guilty." Nothing is assumed by this instruction,

Baltimore, etc., R. Co. v. Harbin

but the jury were left entirely free to determine all charges of negligence from a consideration of the evidence.

Instructions 10, 18, and 19, asked by the appellant company, sought to have the court direct the jury that the conversation between the appellee and the conductor while on the train, before reaching Joliet, with reference to the opportunity which would be presented to the appellee, while the train was at Joliet, to arrange to have his baggage rechecked so that it would be carried from Springfield to Carlinville, was not competent for consideration. In the view we have expressed as to this conversation, it follows these instructions were properly refused.

The other refused instructions incorporated the principle, sought to be maintained by the appellant company, that the attempt on the part of the appellee to enter the train while it was in motion conclusively established that he was guilty of negligence, and were for that reason properly refused.

The alleged error in the denial of the motion in arrest of judgment involved no question not already considered.

The judgment of the Appellate Court must be, and is, affirmed. Judgment affirmed.

BALTIMORE & O. S. W. R. Co. v. HARBIN.

(*Supreme Court of Indiana, April 22, 1903.*)

[67 N. E. Rep. 109.]

Injury to Passenger—Jerks and Jars*—Complaint—Demurrer.

A complaint against a carrier alleging that the train was so negligently managed that while running at a speed of 10 miles an hour it was brought to a sudden stop, and thereby with violence threw the plaintiff from his seat, inflicting injuries, is good as against a demurrer based on the theory that no rate of speed, however high, could be said to be negligence per se as to passengers in the train.

Instructions.

Refusal to give instructions based on facts found by the jury not to have existed is not available error.

Appeal from Circuit Court, Knox County; O. H. Cobb, Judge.

Action by Allen Harbin against the Baltimore & Ohio Southwestern Railroad Company. From a judgment for plaintiff, defendant appealed. Transferred from the Appellate Court under section 1337u, Burns' Rev. St. 1901. Affirmed.

W. H. & E. H. De Wolf, for appellant.

Cullop & Shaw, for appellee.

HADLEY, C. J. Suit by appellee to recover damages for injuries received by the alleged negligent management of the

*As to the liability of a carrier for injuries to passengers from jerks and jolts of trains or cars, see monograph appended to *Freeman v. Metropolitan St. Ry. Co. (Mo.)*, 3 R. R. R. 584, 26 Am. & Eng. R. Cas., N. S., 584.

McAllister v. People's Ry. Co

train upon which he was a passenger. A demurrer to the complaint was overruled. Answer by general denial. Trial by jury. Verdict and judgment for appellee for \$375. The overruling of the demurrer to the complaint and of appellant's motion for a new trial are assigned as error.

The complaint is that the train was so negligently managed that, while running at a speed of 10 miles an hour, it was brought to a sudden stop, and thereby with great force and violence threw the plaintiff from his seat against the wall and floor of the car, inflicting upon him serious and permanent injuries. Appellant's objection to the complaint is that it charges no act of negligence, since no rate of speed, however high, can be said to be negligence per se as to passenger in the train. It will be observed that it is not the speed of the train, but the sudden stopping of the train, that is the act complained of. We cannot say, as a matter of law, that a train running at the rate of 10 miles an hour may not be so abruptly and unreasonably stopped as to constitute negligence, and under a general charge that such act was negligence the complaint, by many decisions of this court, must be held sufficient on demurrer.

It is claimed that the court erred in refusing to give to the jury instructions requested by appellant numbered 1, 2, 3, 4, 5, and 6, and in the giving of said Nos. 2, 4, and 5 as modified. No. 1 was a direction to the jury to return a verdict for the defendant, and was properly denied. Nos. 2, 3, 4, 5, and 6, as asked and refused, and Nos. 2, 4, and 5, as modified and given, was each based upon the assumption that the plaintiff had left his seat in the car, and at the time of his injury was standing in the passageway, while the answers to interrogatories returned with the general verdict find as a fact that immediately before his injury the plaintiff had not left his seat in the car, and did not leave it until thrown out of it by the sudden stopping of the car. We think No. 5, as originally requested, contained a correct statement of the law, and that it was rendered incorrect by the modification; but since these instructions, both those given and refused, related to a fact which the jury found did not exist in the case, the refusal and the giving complained of were necessarily harmless, and for which appellant is not entitled to a reversal of the judgment. *Roush v. Roush*, 154 Ind. 562, 573, 55 N. E. 1017; *Dickey v. Shirk*, 128 Ind. 278, 27 N. E. 733.

We find no error in the record. Judgment affirmed.

MCALLISTER v. PEOPLE'S RY. CO.

(*Superior Court of Delaware, New Castle, Feb. 27, 1903.*)

[54 Atl. Rep. 743.]

Carriers of Passengers—Degree of Care—Motive Power.

The degree of care required of a carrier to be exercised for the safety of passengers is the same whether the motive power is steam or electricity.

McAllister v. People's Ry. Co**Same—Same*—Cars and Appliances.**

A carrier is required to use the highest degree of care and diligence reasonably practicable in securing their safety by keeping its cars and appliances in a safe condition and at all times under the control and management of skilled and competent servants.

Injury to Passenger—Issues.

Where, in an action for injuries alleged to have resulted from a collision on a street railroad, the declaration averred that plaintiff was thrown from his seat to the ground by the force of the collision, proof that plaintiff jumped from the car on which he was riding, and was injured, in his endeavor to escape the danger of the collision, would not justify a recovery.

Same—Same.

In an action for injuries by reason of a street car collision, evidence that the motorman lost control of the colliding car by reason of the fact that a snap switch on the rear of the car was closed when it should have been open, was inadmissible under the declaration charging that the car was improperly equipped with a defective air brake.

Same—Collision—Negligence.

Where a snap switch on a street car was closed when it should have been open, and by reason of its being closed, the air brake thereon failed to act effectually, which resulted in a collision, the failure of defendant's employees to discover that the switch was closed, and open the same, constituted negligence.

Damages.

A passenger injured by a carrier's negligence is entitled to recover reasonable compensation for his injuries sustained, including pain and suffering, impaired capacity to labor since the accident, and his probable loss of time and labor in the future, resulting from his injuries; and, if the injuries are permanent in character, he is also entitled to recover for any impairment of earning capacity in the future.

Action by John B. McAllister against the People's Railway Company. Judgment for plaintiff.

Argued before LORE, C. J., and SPRUANCE and BOYCE, JJ.

J. Harvey Whiteman, Henry C. Conrad, and Daniel O. Hastings, for plaintiff.

William S. Hilles, for defendant.

BOYCE, J. (charging jury). This action was brought by the plaintiff to recover damages for personal injuries alleged to have been sustained by him by reason of the negligence of the defendant company. It is claimed by the plaintiff that he was, on the 30th day of May, 1901, a passenger on car No. 12 of the defendant company, which was then being propelled by electricity, in a westerly direction, along the track of the defendant, on Sixth street, in this city; that at the same time cars Nos. 16 and 5 of the defendant company, and in the order mentioned, were running along the same track, in an opposite direction, towards car No. 12; that the defendant company carelessly and negligently used and operated car No. 5, in that the circuit breaker, the air brake, and hand or ratchet brake attached thereto, were defective; that the car

*As to the degree of care required of passengers, see foot-note appended to *Clerc v. Morgan's Louisiana & T. R. Co.* (La.), 4 R. R. R. 690, 27 Am. & Eng. R. Cas., N. S., 690.

McAllister v. People's Ry. Co

so equipped was carelessly and negligently operated by an unfit, careless, and incompetent servant as motorman; that by reason of the defective brakes and the incompetency of the motorman, the latter lost control of the car while descending a steep grade between Broome and Madison streets intersecting Sixth street; that the car so managed collided with car No. 16, driving the latter car with great force against car No. 12, upon which the plaintiff was riding, between Madison and Monroe streets; and that the plaintiff was thereby thrown out of the car upon the ground with great force, whereby he sustained great and permanent bodily injuries. The plaintiff further alleges that he was, at the time of the accident, in the exercise of due care and caution.

The defendant company, on the other hand, while admitting that car No. 5 collided with car No. 16, which in turn collided with car No. 12, denies having previous knowledge of the alleged defects in car No. 5, and of the alleged incompetency of the motorman in charge of the car; and claims that at the time of the accident the car was nearly new, and was equipped with the best and safest appliances, and was operated by skillful and competent servants; that their servants exercised due care and diligence in attempting to avoid the collision, and that the accident was not due to any neglect or fault on the part of the defendant company, or any of its servants; that shortly before and after the accident the circuit breaker, air brake, and hand or ratchet brake were in good condition; that the defendant was not thrown out of the car by reason of the collision, but that he jumped from the car while it was in motion, and before the collision; and that the plaintiff has not sustained any permanent injury by reason of the accident complained of.

It is admitted that the defendant company is a common carrier, engaged in the business of conveying passengers over and along its roadway, and that the plaintiff was rightfully a passenger on car No. 12, immediately preceding the time of the accident.

The gist of an action for personal injuries is negligence. Negligence is never presumed; it must be proved. It is therefore incumbent upon the plaintiff in this action to satisfy you by a preponderance of the evidence that the accident complained of was the result of the negligent conduct and management on the part of the defendant company; and, if the plaintiff has failed to so prove the negligence of the company, he cannot recover. The law imposes upon common carriers of passengers the duty of providing safe cars, machinery, and appliances, and of keeping them in good repair and safe condition; and of providing competent and careful motormen and servants, and to see that they use reasonable care in operating the cars so as to avoid danger; and to do all and every the things with respect to these matters that may be reasonably necessary to secure the safe transportation

McAllister v. People's Ry. Co

of its passengers. *Maxwell v. Wil. City Ry. Co.*, 1 *Marv.* 199 (206), 40 *Atl.* 945. In the case of *Flinn v. P., W. & B. R. R. Co.*, 1 *Houst.* 469 (499), this court said: "Common carriers of passengers are responsible for any negligence resulting in injury to them, and are required in the preparation, conduct, and management of their means of conveyance to exercise every degree of care, diligence, and skill which a reasonable man would use under such circumstances. This obligation is imposed on them as a public duty, and by their contract to carry safely, as far as human care and foresight will reasonably admit. A railroad company, using as it does the powerful and dangerous agency of steam, is bound to provide skillful and careful servants, competent in every respect for the posts they are appointed to fill in their service; and is responsible not only for their possession of such care and skill, but also for the continued application of these qualities at all times." The degree of care required in these matters is the same whether the motive power be steam or electricity. A common carrier is not an insurer of the safety of its passengers, but it is required to exercise the highest degree of care and diligence that is reasonably practicable in securing their safety by keeping its cars and appliances in a safe condition, and at all times under the control and management of skilled and competent servants. There is at the same time a duty resting upon the passenger to act with prudence, and to use the means provided for his safe transportation with reasonable circumspection and care, and, if his negligent act contributes to bring about the injury of which he complains, he cannot recover. *Betts v. Wil. City Ry. Co.*, 3 *Pennewill*, —, 53 *Atl.* 358.

Evidence that the plaintiff, to escape the danger of a collision between cars Nos. 16 and 12, jumped from the car upon which he was riding, will not support any count contained in the plaintiff's declaration, it being averred in some of the counts therein to the effect that he was thrown from his seat; in others, that he was thrown out of the car upon the ground. *Higgins v. Mayor and Council of Wil.*, 3 *Pennewill*, —, 51 *Atl.* 1. The plaintiff has failed to make any allegation that he received any injury by jumping from the car, or that he did in fact jump from the car, and there is no count in the declaration which would support the proof, if there be any, that the plaintiff jumped from the car. If, therefore, you find that the plaintiff received no injury except by jumping from the car, and that whatever injury he did receive was occasioned by jumping from the car, he cannot recover.

Evidence to the effect that the motorman lost control of car No. 5, causing the collision between cars Nos. 16 and 12, because the snap switch on the rear of the car was closed, when it should have been opened, will not support those counts in the declaration which aver, in effect, that the car was improperly equipped with a defective air brake. But if

McAllister v. People's Ry. Co

you find that the switch was closed, without regard as to how or when it was closed, if by the exercise of due care and caution the servants of the company might or should have discovered that it was closed, and that by reason thereof the air brake failed to act effectually, as it was designed to act, and that the resultant failure so to act was due to the carelessness, incompetency, or negligence of the servants of the defendant company in not discovering that the switch was closed, and that, as a result of the failure of the air brake to work, the motorman lost control of car No. 5, and by reason thereof car No. 16 was forced against car No. 12, causing the plaintiff to be thrown therefrom and injured, then the failure to make the discovery and open the switch would constitute negligence. If you find that the servants of the defendant company negligently and carelessly permitted car No. 5 to be overcrowded, and that by reason thereof they lost control of the car; and that the plaintiff was injured by being thrown from car No. 12 upon the ground because of the failure of the servants of the company to control car No. 5 as a consequence of the overcrowding of the car, then the defendant company was negligent. If the injuries alleged to have been sustained by the plaintiff were occasioned by the negligence of the defendant company, or its motorman, servants, or any of them, and without the fault or negligence of the plaintiff contributing thereto, then he would be entitled to recover. But, if the negligence of the plaintiff contributed to and proximately entered into the accident which resulted in the injuries complained of, he cannot recover.

Where there is conflict in the testimony, you should reconcile it if you can. If you cannot, you should give credit to and be governed by the testimony, which, in your judgment, is most worthy of belief, taking into consideration the intelligence, apparent truthfulness, bias, and impartiality of the witness. The weight and value of the evidence so determined by you is to be your guide in reaching your verdict. And governed by this instruction you should decide this case in whose favor there is a preponderance of the evidence. If you should find for the plaintiff, your verdict should be for such a sum as will reasonably compensate him for the injuries which he has sustained, including therein his pain and suffering, his impaired power to perform labor in the past, since the accident, and such as may come to him in the future, his loss of time and labor as a result of his injuries; and if, under the evidence, you find that his injuries are of a permanent character, such as to cause any impairment of ability to earn a living in the future, you should consider that fact in determining the amount of damages, otherwise you should not award damages for permanent disability.

Verdict for plaintiff for \$1,800.

INDEX TO NOTES.

ACCIDENTS ON TRACK.

See Crossings.

ASSAULTS.

See Carriers of Passengers.

ASSISTANTS ENGAGED BY SERVANTS.

See Carriers of Passengers.

CARRIERS OF PASSENGERS.

Duty to Protect Passengers.

General rule, 435.

Knowledge, or duty to know, of passenger's peril, 435.

Limitation of carrier's liability, acts for which carrier is liable, 435.

Limitation of carrier's liability, in general, 435.

Limitation of carrier's liability, performance of duty, or inability to protect, 435.

Reason to apprehend passenger's peril, disorder among passengers, 435.

Reason to apprehend passenger's peril, general rule, 435.

Reason to apprehend passenger's peril, mixing of white and colored passengers, 435.

Reason to apprehend passenger's peril, negligence of passengers in getting on and off vehicles, 435.

Reason to apprehend passenger's peril, presence of dangerous persons on board of vessel, 435.

Reason to apprehend passenger's peril, scuffling of hackmen near depot, 435.

Liability for Acts and Omissions of Servants.

In general, 170.

Negligence of servants, 170.

Scope of employment, acts calculated, or intended, to alarm passengers, 170.

Scope of employment, assaults upon passengers, 170.

Scope of employment, assisting passenger on or off train or car, 170.

Scope of employment, directing or permitting passenger

CARRIERS OF PASSENGERS

—Continued.

to alight from moving train, 170.

Scope of employment, directing passenger to render assistance, 170.

Scope of employment, falling against, or jostling, passengers, 170.

Scope of employment, false imprisonment of passengers, 170.

Scope of employment, giving information to, or instructing passengers, 170.

Scope of employment, in general, 170.

Scope of employment, inviting or directing passenger to alight at dangerous place, 170.

Scope of employment, making overcharge for ticket, 170.

Scope of employment, pushing or pulling passenger off train or car, 170.

Scope of employment, refusing passenger entrance to car, 170.

Scope of employment, unintentional assaults upon passengers, 170.

Who are servants, assistants engaged by servants, 170.

Who are servants, construction companies, 170.

Who are servants, independent contractors, 170.

Who are servants, in general, 170.

Who are servants, persons in charge of sleeping or palace cars, 170.

Who are servants, pilots, 170.

Who are servants, postal agents, 170.

Who are servants, servants employed jointly by several masters, 170.

Who are servants, servants invested with authority of peace officers, 170.

Who are servants, servants of lessors and lessees, 170.

Who are servants, servants of receivers, 170.

CARRIERS OF PASSENGERS **CROSSINGS—Continued.**

—*Continued.*

Who are servants, surgeon employed by carrier, 170.

Wilful acts of servants, assaults upon passengers, 170.

Wilful acts of servants, false imprisonment and arrest, 170.

Wilful acts of servants, in general, 170.

Wilful acts of servants, insults to passengers, 170.

Liability for False Imprisonment and Arrest of Passenger by Servants.

General rule, 48.

Unlawful arrest without warrant, 48.

Unlawful detention to enforce payment of fare, 48.

What constitutes false imprisonment, detention or restraint, 48.

What constitutes false imprisonment, in general, 48.

What constitutes false imprisonment, unlawfulness of detention or restraint, 48.

What constitutes probable cause for detention and restraint of passengers, 48.

CHILDREN.

See Crossings.

CONSTRUCTION COMPANIES.

See Carriers of Passengers.

CONTRIBUTORY NEGLIGENCE.

See Crossings.

CROSSINGS.

Contributory Negligence.

Assumption of risk of crossing over couplings of obstructing cars, 325.

Attempting to cross after section of severed obstructing train has passed, 325.

Boy climbing between cars obstructing street, 325.

Boy climbing over bumpers of obstructing cars, with knowledge that he is seen by engineer, 325.

Boy passing under moving obstructing car, 325.

Burden of proving negligence and contributory negligence where person was injured

while passing through opening between obstructing cars, 325.

Child passing through nine-inch opening between obstructing cars, 325.

Child passing under train left on crossing through negligence, 325.

Climbing over drawbars of obstructing cars with foot on either side of pinhead, 325.

Climbing over drawbars of obstructing cars with knowledge that they may start at any moment, 325.

Climbing over platform of obstructing car, 325.

Climbing over platform of obstructing car without attempting to discover whether engine is attached, 325.

Climbing up between cars of obstructing train apparently about to start, 325.

Crossing between obstructing cars in sight of engineer, 325.

Crossing between obstructing cars to go to a fire, 325.

Crossing through eighteen-inch space between obstructing cars where implied invitation to cross, 325.

Driving around obstructing train at dangerous place, 325.

Injured by train on another track after driving through opening between obstructing cars, 325.

Passing between obstructing cars with knowledge that one of them is being moved, 325.

Passing through opening some distance from crossing where no duty to signal, 325.

Passing through two-foot opening between obstructing cars which were moved without warning, 325.

Passing under obstructing cars started without warning, 325.

Passing under obstructing train stopping for wood and water, and started without warning, 325.

Passing under obstructing train, when misled by failure to signal, 325.

CROSSINGS—Continued.

- Passing under or between cars, subsequent attempt to pass through diminished space, 325.
- Passing under or between obstructing cars in compliance with directions or invitations of railroad employees, 325.
- Passing under or between obstructing cars, train started without warning, 325.
- Person climbing between cars obstructing crossing, in violation of ordinance, not a trespasser, 325.
- Question for jury where boy was injured while climbing between obstructing cars, 325.
- Question for jury where child was injured while climbing between cars obstructing crossing an unreasonable time, 325.
- Recovery depending upon whether train was stationary or moving, where child was injured while passing under coupling pole of obstructing cars, 325.
- Trespasser passing through opening in obstructing train, 325.
- Whether gross or willful negligence to climb between obstructing cars, 325.

DEATH BY WRONGFUL FIRES.

AOT.
See Fires.

DELAY IN TRANSPORTATION.

See Carriers of Passengers.

DISPATCHERS.

See Fellow Servants.

EMPLOYEES.

See Carriers of Passengers.

EVIDENCE.

See Res Gestæ.

FALSE IMPRISONMENT.

See Carriers of Passengers.

FELLOW SERVANTS.

- Train Dispatchers and Telegraph Operators, Whether Fellow Servants of Other Railroad Employees.
- General rule, 745.
- Telegraph operators fellow servants of engineers, 745.

FELLOW SERVANTS—Cont'd.

- Telegraph operators fellow servants of firemen, 745.
- Telegraph operators fellow servants of trainmen, 745.
- Telegraph operators not fellow servants of brakemen, 745.
- Telegraph operators not fellow servants of conductors, 745.
- Telegraph operators not fellow servants of engineers, 745.
- Telegraph operators not fellow servants of firemen, 745.
- Telegraph operators not fellow servants of section hands, 745.
- Telegraph operators not fellow servants of trainmen, 745.
- Train dispatchers fellow servants of brakeman, 745.
- Train dispatchers fellow servants of engineers, 745.
- Train dispatchers fellow servants of firemen, 745.
- Train dispatchers not fellow servants of engineers, 745.
- Train dispatchers not fellow servants of firemen, 745.
- Train dispatchers not fellow servants of other employees, 745.
- Train dispatchers not fellow servants of trackmen, 745.
- Train dispatchers not fellow servants of track repairers, 745.

Liability of Railroad Companies for Personal Injuries Resulting from Fires Set by Locomotives.

- Attempt to save property of another, 219.
- Exposure to obvious risk to save property, 219.
- Girl killed in attempt to extinguish fire, anticipation of result, 219.
- Injuries sustained while trying to save his home, damages too remote, 219.
- Loss of life where absence of contributory negligence, 219.
- Sparks from locomotive causing destruction of powder mill, question for jury, 219.
- Suffocation, cold and necessity of sleeping on floor, liable for direct results, 219.
- Voluntary act proximate cause, 219.

IMPRISONMENT.

See Carriers of Passengers.

INDEPENDENT CONTRACTORS.

See Carriers of Passengers.

INSULTS.

See Carriers of Passengers.

LEASES AND RUNNING POWERS.

See Carriers of Passengers.

MASTER AND SERVANT.

See Carriers of Passengers.
Fellow Servants.
Res Gestæ.

Liability of Railroad Companies for Injuries to Employees from Unblocked Frogs or Unguarded Rails.

Assumption of risk, general rule, 508.

Assumption of risk, limitations of and exceptions to general rule, 508.

Assumption of risk of non-compliance with statute, contrary to public policy, 508.

Assumption of risk, statements and illustrations of general rule, 508.

Contributory negligence and failure of railroad to comply with statute, 508.

Contributory negligence, common-law rule, 508.

Decisions limiting or opposing common-law rule, evidence of negligence, 508.

Decisions limiting or opposing common-law rule, negligence at terminal points or yards, 508.

Decisions limiting or opposing common-law rule, negligence with respect to stations, 508.

In absence of statute, custom and usage, 508.

In absence of statute, during construction, 508.

In absence of statute, failure to repair, 508.

In absence of statute, general rule, 508.

In absence of statute, injury to arm, 508.

In absence of statute, statements and illustrations of general rule, 508.

Statutory requirements, application of statute to split

MASTER AND SERVANT—Continued.

switches, 508.

Statutory requirements, assumption of risk, 508.

Statutory requirements, in general, 508.

Statutory requirements, injury to employee of another company, 508.

Statutory requirements, reasonable time for compliance with statute, 508.

Statutory requirements, receiverships, 508.

Statutory requirements, who are employees within meaning of employers' liability act of Ohio, 508.

OBSTRUCTIONS.

See Crossings.

PASSENGERS.

See Carriers of Passengers.

PEACE OFFICERS.

See Carriers of Passengers.

PERSONAL INJURIES.

See Fires.

PERSONS IN CHARGE OF SLEEPING CARS.

See Carriers of Passengers.

PILOTS.

See Carriers of Passengers.

POSTAL AGENTS.

See Carriers of Passengers.

RECEIVERS.

See Carriers of Passengers.

RES GESTÆ.

Declarations of Railroad Employees.

Admissions by engineer made after train had stopped and trainmen were near deceased, 101.

Admissions of conductor made while carrying off slaves, 101.

Admissions of delivery clerk as to failure to deliver, made after finding goods, 101.

Admissions of employees made long after injury to passenger, 101.

Admissions of engineer as to his intoxication, made several minutes after accident, 101.

RES GESTÆ—Continued.

Admissions of engineer made after leaving service, 101.
 Admissions of engineer made several hours after accident, 101.
 Admissions of engineer while running train, 101.
 Admissions of negligence by fellow servants made after injury to employee, 101.
 Admissions of ticket agent made on day after passenger was required to pay extra fare, 101.
 Assault on passenger by brakeman, prior altercation, 101.
 Book entries made when goods received, 101.
 Brakeman's admissions as to negligence in starting train made shortly after accident to passenger, 101.
 Brutal remark of brakeman made at moment of accident, 101.
 Conductor's admission made immediately after passenger's fall, 101.
 Conductor's admissions of negligence made more than ten minutes after accident to passenger, 101.
 Conductor's statements as to bad condition of road made a moment before accident, 101.
 Conversation between plaintiff and brakeman held immediately after ejection of passenger, 101.
 Conversation between street car drivers held a considerable time after collision with wagon, 101.
 Conversation with baggage agent held on morning after loss of baggage by fire, 101.
 Conversation with conductor held just prior to killing of passenger by lunatic, 101.
 Declaration of agent as to liability of company, made day after burning of cotton at depot, 101.
 Declarations of agent procuring deed for company, 101.
 Declarations of agent to shipper as to cause of delay, 101.
 Declarations of arrested car driver made to officer on subsequent trip, 101.
 Declarations of assistant supervisor as to obligation of company to support injured

RES GESTÆ—Continued.

employee, made soon after injury, 101.
 Declarations of co-employees made almost simultaneous with injury, 101.
 Declarations of conductor after ejection of passenger, 101.
 Declarations of conductor after injury to prospective passenger by fall through uncovered bridge, 101.
 Declarations of conductor made just prior to collision, 101.
 Declarations of employees made while engaged in burning off right of way, 101.
 Declarations of employee made while investigating cause of derailment, 101.
 Declarations of engineer made two minutes after collision while standing near injured brakeman, 101.
 Declarations of engineer made while constructing defective embankment, 101.
 Declarations of engineer showing malice made sometime after frightening horse, 101.
 Declarations of engineer showing malice, made while cattle were being loaded, 101.
 Declarations of engineer wanting only frightening child made within a minute after blowing off steam, 101.
 Declarations of injured engineer made after removal from wreck, in action by another injured employee, 101.
 Declarations of injured engineer made several hours after injury to brakeman, 101.
 Declarations of master mechanic as to cause of accident made several days after explosion of boiler, 101.
 Declarations of motorman as to his failure to apply brakes after discovering plaintiff's peril made a few minutes after accident, 101.
 Declarations of motorman made while car was still on body of child, 101.
 Declarations of negligent engineer made five minutes after accident, 101.
 Declarations of negligent guard causing injury to elevated railway passenger, made at time of accident, 101.

RES GESTÆ—Continued.

Declarations of section foreman not coincident with killing of stock, 101.
 Declarations of station agent made while signing contract, 101.
 Declarations of ticket agent made after sale of ticket, 101.
 Declarations of ticket agent made some days after sale of tickets, 101.
 Declarations of trainmen made fifteen minutes after horse stepped into hole in bridge, 101.
 Declarations of trainmen made while returning to town with dead body, 101.
 Declarations of trainmen made while running train carrying delayed cattle, 101.
 Description of plaintiff's injuries made to conductor, elapse of time uncertain, 101.
 Engineer's question as to cause of failure to respond to bell-call, made a few minutes after accident, 101.
 Engineer's report made after injured person had been carried three miles to a station, 101.
 Engineer's statement made a few days after accident, 101.
 Engineer's statement that he had not seen horse, made immediately after blowing whistle, 101.
 Exclamation of road master who had stationed employee at post of danger, made immediately after accident, 101.
 Freight agent's answers to inquiries about lost baggage, 101.
 Made after injured person's return up stairs, 101.
 Made day after accident, 101.
 Made from several hours to five months prior to accident, as to defective condition of engine, 101.
 Remark by conductor made eight minutes after ejection of passenger, 101.
 Remarks of brakeman made while assisting passenger to alight, 101.
 Remarks of brakeman while ejecting trespasser, 101.
 Remarks of conductor made at

RES GESTÆ—Continued.

next station after accident to brakeman, 101.
 Remarks of guard made immediately after passenger's fall, 101.
 Remarks of trainman made immediately after killing of trespasser, 101.
 Reports made under rules or orders several days after accident, 101.
 Report of engineer made half an hour after accident, 101.
 Report of section boss as to condition of trestle made prior to accident, 101.
 Representations of carrier's agent to owner receiving injured live stock, 101.
 Scope of note, 101.
 Statements as to circumstances under which watch was taken as security for fare, made by a conductor next morning, 101.
 Statements by driver made while plaintiff was under car, 101.
 Statements of agent made after freight had been delayed, 101.
 Statements of agent while delivering delayed telegram, 101.
 Statements of another brakeman made when train had passed a mile and a half beyond bridge causing injury to brakeman, 101.
 Statements of another employee as to incompetency of employee causing accident made next morning, in action for injury to employee, 101.
 Statements of brakeman made two minutes after injury to boy passing through obstructing train by his invitation, 101.
 Statements of company's agents as to cause of derailment, made some time prior and some time after accident, 101.
 Statements of conductor as to cause of delay in transporting freight made while engaged in carrying out contract, 101.
 Statements of conductor as to its cause made soon after wreck, 101.

RES GESTÆ—Continued.

- Statements of conductor made a few days after accident, 101.
- Statements of depot agent to owner in regard to destruction of goods by fire, 101.
- Statement of employee not directly connected with occurrence made from two to five minutes after accident, as to negligence of conductor, 101.
- Statements of engineer as to cause of crossing accident, made a few minutes after, 101.
- Statements of engineer as to condition of boiler made a few minutes after its explosion, 101.
- Statements of engineer made an hour after killing of cattle, 101.
- Statements of engineer made immediately after train had backed to and stopped at place of accident, 101.
- Statements of engineer tending to show lack of care for safety of persons seen on track made immediately after stopping train, 101.
- Statements of engineer to switchman made shortly after accident on track, 101.
- Statements of fellow servant as to knowledge of servant's incompetency made several days after injury to employee, 101.
- Statements of general manager made while investigating cause of accident, 101.
- Statements of injured brakeman as to cause of accident made two minutes after, 101.
- Statements of motorman made after he had alighted to help extricate deceased's body, 101.
- Statements of night inspector as to cause of delay in carriage of live stock, 101.
- Statements of plaintiff's driver made at time of accident, 101.
- Statements of president as to injured person's right to compensation, 101.
- Statements of section foreman as to dangerous condi-

RES GESTÆ—Continued.

- tion of track where engineer was injured, made at another time, 101.
- Statements of street car driver as to condition of brake made immediately after accident, 101.
- Statements of superior employee made after accident to servant, 101.
- Statements of switchman to plaintiff made immediately after collision with wagon, 101.
- Statements of workman causing injury to property by removing cap from water pipe made just before, at time of, and subsequent to accident, 101.
- Subsequent declarations, 101.
- Telegraphic correspondence between engineer and train dispatcher held just prior to collision, 101.
- Two and a half days after accident, 101.
- Written statement by conductor made immediately after accident, 101.

SCOPE OF EMPLOYMENT.

See Carriers of Passengers.

SERVANTS.

See Carriers of Passengers.

SERVANTS EMPLOYED JOINTLY BY SEVERAL MASTERS.

See Carriers of Passengers.

SURGEONS.

See Carriers of Passengers.

TELEGRAPH OPERATORS.

See Fellow Servants.

TICKETS AND FARES.

See Carriers of Passengers.

TRAIN DISPATCHERS.

See Fellow Servants.

TRESPASSERS.

See Crossings.

WHO ARE SERVANTS.

See Carriers of Passengers.

GENERAL INDEX.

ABANDONMENT.

See Right of Way.

ABUTTERS.

See Eminent Domain.

ACCIDENTS ON TRACK.

See Crossings.

Licensees.

Street Railways.

Bridge habitually used by public for twenty years not a "traveled place," within meaning of statute providing that failure to give signals at a traveled place is negligence per se.

Ringstaff v. Lancaster & C. Ry. Co. (S. Car.), 652.

Contributory Negligence.

Contributory negligence and negligence after discovery of peril.

Barry v. Burlington Ry. & Light Co. (Iowa), 675.

Person standing within space between tracks was on track within meaning of allegation of declaration.

Potter v. Leviton (Ill.), 625.

ACTIONS.

See Death by Wrongful Act.

ADDITIONAL BURDEN.

See Electric Railways.

ADMINISTRATORS.

See Death by Wrongful Act.

AGENCY.

See Officers.

ANNOYANCE.

See Damages.

APPEAL.

See Damages.

Review.

Amount of damages.

Chicago & E. I. R. Co. v. Beaver (Ill.), 641.

Overcoming presumption of negligence arising from mere proof of injury to stock on track.

Southern Ry. Co. v. Hill (Ga.), 568.

APPEAL—Continued.

Transmission of coin tendered as fare to appellate court.

Mobile St. Ry. Co. v. Waters (Ala.), 184.

APPLIANCES.

See Master and Servant.

ARREST.

See Carriers of Passengers.

Malicious Prosecution.

ASSAULTS.

See Carriers of Passengers.

ASSUMPTION OF RISK.

See Crossings.

Master and Servant.

ATTACHMENT.

Cars employed in interstate commerce.

Wall v. Norfolk & W. R. Co. (W. Va.), 580.

Cars in possession of another company under contract.

Wall v. Norfolk & W. R. Co. (W. Va.), 580.

Railroad property.

Wall v. Norfolk & W. R. Co. (W. Va.), 580.

AUTOMATIC COUPLERS.

See Employers' Liability Acts.

AWARDS.

See Eminent Domain.

BAGGAGE.

See Carriers of Passengers.

Paying overweight charges on baggage not of itself notice to company that trunk contained merchandise.

Illinois Cent. R. Co. v. Matthews (Ky.), 769.

Presumption of negligence arising from injury to passenger's baggage.

Thomas v. Southern Ry. Co. (N. Car.), 860.

Traveler not owner of goods, but liable for them, may be treated as owner for purpose of bringing action against carrier for damages.

Illinois Cent. R. Co. v. Matthews (Ky.), 769.

BAGGAGE—Continued.

What constitutes.

Illinois Cent. R. Co. *v.* Matthews (Ky.), 769.

BILLS OF LADING.

See Carriers of Goods.
Carriers of Live Stock.

BONDS.

See Officers.

BRAKEMEN.

See Master and Servant.

BURDEN OF PROOF.

See Carriers of Passengers.
Death by Wrongful Act.
Negligence.

CAPITAL STOCK.

See Taxation.

CARRIERS.

See Carriers of Live Stock.
Carriers of Passengers.
Street Railways.

CARRIERS OF FREIGHT.

See Carriers of Goods.

CARRIERS OF GOODS.

See Carriers of Mail.

Constitutionality of statute of Alabama, authorizing assignments of claims against carriers for injuries to property. Louisville & N. R. Co. *v.* Landers (Ala.), 96.

Defective indictment, in prosecution for running trains on Sunday.

Vaughan *v.* State (Ga.), 25.

Limiting Liability.

Provision in bill of lading limiting carriers' liability to the damages resulting only from negligence of itself or agents, reasonable and binding.

Louisville & N. R. Co. *v.* Landers (Ala.), 96.

Where, in an action against a railroad company on a bill of lading, the declaration is in form prescribed by Alabama Code, that the bill introduced in evidence contains special limitations on the common-law liability constitutes no variance.

Louisville & N. R. Co. *v.* Landers (Ala.), 96.

CARRIERS OF GOODS—Continued.

Only superintendent of transportation indictable under statute of Georgia, prohibiting certain trains from running on Sunday.

Vaughan *v.* State (Ga.), 25.

Party in whose name action should be brought, under statute of Georgia, requiring any connecting carrier to give information where freight has been lost.

Central of Georgia Ry. Co. *v.* Murphey (Ga.), 28.

Under Const. of Ky., § 215, prohibiting carriers from discriminating in rates, a company may charge more for shipping high grade coal used for domestic purposes than for shipping low grade coal.

Commonwealth *v.* Louisville & N. R. Co. (Ky.), 13.

Verdict properly directed for defendant in action for damages to perishable fruit from delay.

Burnham *v.* Alabama & V. Ry. Co. (Miss.), 17.

CARRIERS OF LIVE STOCK.

Additional notice of other injuries within reasonable time after their discovery, where cattle had been removed.

Louisville & N. R. Co. *v.* Landers (Ala.), 96.

Evidence.

Conversations between plaintiff and defendant's agents relative to the transportation of the cattle, in the course of such transportation as *res gestæ*.

Louisville & N. R. Co. *v.* Landers (Ala.), 96.

Error in excluding testimony of turfmen as to value of horses.

Louisville & N. R. Co. *v.* Frazee (Ky.), 22.

Expert testimony as to value of cattle.

Louisville & N. R. Co. *v.* Landers (Ala.), 96.

Pedigree of horses.

Louisville & N. R. Co. *v.* Frazee (Ky.), 22.

Insufficiency of evidence as to cause of injuries to live stock in transit.

Western Maryland R. Co. *v.* Landis (Md.), 20.

CARRIERS OF LIVE STOCK
—*Continued.***Limiting Liability.**

Shipper not bound by clause of accepted bill of lading fixing value of horses.

Louisville & N. R. Co. v. Frazee (Ky.), 22.

Notice of claim given within reasonable time after discovery of injury, where cattle had been removed.

Louisville & N. R. Co. v. Landers (Ala.), 96.

Where, under a bill of lading requiring notice of injury before removal, the only notice given to carrier as to death of the cattle was for certain cattle that had died before removal, recovery could not be had for cattle that died after removal.

Louisville & N. R. Co. v. Landers (Ala.), 96.

CARRIERS OF MAIL.

A carrier of mail liable for its own negligence, but not for negligence or tortious acts of subordinates, in the selection of whom it has exercised ordinary care.

Bankers' Mutual Casualty Co. v. Minneapolis, St. P. & S. M. Ry. Co. (C. C. A.), 16.

Insufficiency of complaint in action for loss of mail.

Bankers' Mutual Casualty Co. v. Minneapolis, St. P. & S. M. Ry. Co. (C. C. A.), 16.

Liability of carriers of mail as public agents of the United States.

Bankers' Mutual Casualty Co. v. Minneapolis, St. P. & S. M. Ry. Co. (C. C. A.), 16.

CARRIERS OF PASSENGERS.

See Baggage.

Damages.

Death by Wrongful Act.

Personal Injuries.

Street Railways.

Tickets and Fares.

Burden of proof on plaintiff to show defendant's negligence.

Oliver v. Columbia, N. & L. R. Co. (S. Car.), 708.

Burden of proving defendant's negligence on plaintiff.

Oliver v. Columbia, N. & L. R. Co. (S. Car.), 708.

CARRIERS OF PASSENGERS
—*Continued.*

Care due drover on freight train. Western Maryland R. Co. v. State, to Use of Shirk (Md.), 904.

Care required of street car company when passengers are alighting.

Atlanta Ry. Co. v. Randall (Ga.), 698.

Care required of street railway company as a carrier of passengers.

Atlanta Ry. Co. v. Randall (Ga.), 698.

Carrier bound to exercise extraordinary diligence for protection of passenger while alighting.

Southern Ry. Co. v. Reeves (Ga.), 870.

Carrier bound to use extraordinary diligence to protect passenger while in transit from violence or injury by third person.

Brunswick & W. R. Co. v. Ponder (Ga.), 45.

Carrier liable for injury to passenger in the absence of criminal negligence of passenger, or unless the injury was the result of the violation of some express rule or regulation of carrier, actually brought to the attention of the party injured.

Chicago, etc., R. Co. v. Winfrey (Neb.), 689.

Carrier of passengers not required to exercise extraordinary diligence in maintaining depot.

Southern Ry. Co. v. Reeves (Ga.), 870.

Carrier under no obligation to inquire into legality of arrest of passenger by officer.

Brunswick & W. R. Co. v. Ponder (Ga.), 45.

Complaint did not state cause of action for false arrest and imprisonment of passenger.

Dierig v. South Covington & C. St. Ry. Co. (Ky.), 42.

Contributory Negligence.

Alighting from moving train at destination where lack of time for reflection.

Chicago, etc., R. Co. v. Winfrey (Neb.), 689.

CARRIERS OF PASSENGERS · CARRIERS OF PASSENGERS *—Continued.*

Alighting passenger holding to hand railing.

Gilmore *v.* Seattle & R. Ry. Co. (Wash.), 143.

Contributory negligence on part of passenger which will prevent recovery must be an act committed under such circumstances as to render it obviously and necessarily perilous, and show a willful disregard of danger incurred. Chicago, etc., R. Co. *v.* Winfrey (Neb.), 689.

"Criminal negligence," as used in statute of Nebraska which will defeat a recovery for injury received by passenger, is defined to be gross negligence, such as amounts to a reckless disregard of one's own safety and a willful indifference to consequences.

Chicago, etc., R. Co. *v.* Winfrey (Neb.), 689.

Crossing track to board train without seeing other train in plain view.

Steber *v.* Chicago & N. W. Ry. Co. (Wis.), 656.

Deceased killed in collision between engine and cattle on track not guilty of contributory negligence, as matter of law, in riding in car reserved for colored passengers.

Florida Cent. & P. R. Co. *v.* Sullivan (C. C. A.), 840.

Evidence admissible to show that poles passed prior to accident were placed at safe distance, in action for wrongful death of passenger struck by trolley pole while riding on running board.

Hesse *v.* Meriden, S. & C. Tramway Co. (Conn.), 774.

In action for injuries sustained in attempting to board moving train, passenger's testimony that, as he attempted to remount car, a voice, coming from place where a moment before he had left conductor alone, cried "Hurry up! Get on there!" with testimony of another witness that it was the conductor who spoke, was admissible.

Chicago & A. R. Co. *v.* Gore (Ill.), 951.

—Continued.

In action for injury to passenger, defendant company could not complain that a special interrogatory, whether passenger's attempt to board moving train was the cause of his injury, was modified by inserting the word "proximate" before "cause," as in either form the interrogatory did not call for a finding of an ultimate fact, or for a probative fact from which an ultimate fact resulted.

Chicago & A. R. Co. *v.* Gore (Ill.), 951.

Insufficiency of declaration to show that plaintiff was not voluntarily and unnecessarily riding on platform. Meyere *v.* Nashville, C. & St. L. Ry. (Tenn.), 947.

No contributory negligence shown on part of passenger riding on running board of crowded car.

Hesse *v.* Meriden, S. & C. Tramway Co. (Conn.), 774.

Not necessarily gross negligence for passenger to attempt to leave moving train. Chicago, etc., R. Co. *v.* Winfrey (Neb.), 689.

Not negligence, as matter of law, to board moving train, at direction of conductor, unless peril is so obvious that only a reckless man would encounter it.

Chicago & A. R. Co. *v.* Gore (Ill.), 951.

Passenger grasping railing on both sides of platform steps and stepping down from upper step for purpose of expectorating.

St. Louis, I. M. & S. Ry. Co. *v.* Leftwich (C. C. A.), 86.

Question for jury.

Chicago, etc., R. Co. *v.* Winfrey (Neb.), 689.

Question of negligence and contributory negligence for jury where alighting passenger was injured by reason of sudden jerk of car.

Sweet *v.* Birmingham Ry. & Electric Co. (Ala.), 784.

Riding in place not designed for passengers.

St. Louis, I. M. & S. Ry. Co. *v.* Leftwich (C. C. A.), 86.

CARRIERS OF PASSENGERS
—Continued.

Sufficiency of evidence of due care on part of passenger falling from car steps covered with snow.

Foster v. Old Colony St. Ry. Co. (Mass.), 894.

Where passenger, injured in attempting to remount car steps, alleges that he proceeded with ordinary care, evidence that he acted at the direction of the conductor is relevant to show such care.

Chicago & A. R. Co. v. Gore (Ill.), 951.

Damages.

Damages resulting from fact that female passenger was obliged to walk at night without escort too remote.

Central of Georgia Ry. Co. v. Dorsey (Ga.), 857.

Elements.

McAllister v. People's Ry. Co. (Del.), 957.

Elements of damage for carrying a passenger beyond her destination at night.

Kansas City, Ft. S. & M. R. Co. v. Dalton (Kan.), 187.

Insufficiency of evidence of willfulness and rudeness, warranting exemplary damages, where plaintiff was compelled to walk a mile to his destination, after train was backed.

Fort v. Southern Ry. (S. Car.), 91.

Liability for injury to sensibilities of passenger wrongfully ejected, but not physically injured.

Mabry v. City Electric Ry. Co. (Ga.), 900.

Mental suffering of passenger carried beyond destination at night.

Kansas City, Ft. S. & M. R. Co. v. Dalton (Kan.), 187.

Punitive damages for willfulness or gross negligence of conductor in carrying passenger beyond destination.

Birmingham Ry., Light & Power Co. v. Nolan (Ala.), 89.

Punitive damages where wrongful and intentional

CARRIERS OF PASSENGERS
—Continued.

refusal to accept plaintiff as passenger.

Kibler v. Southern Ry. (S. Car.), 891.

Sufficiency of evidence to go to jury on question of exemplary damages, where conductor, after full explanation, collected fare on threats of expulsion, from passenger holding expired ticket.

Myers v. Southern Ry. Co. (S. Car.), 92.

Verdict so excessive as to indicate prejudice on part of jury, in action for ejection of passenger.

Georgia R. Co. v. Baldoni (Ga.), 68.

Defendant's motion for nonsuit properly denied in action for injury to passenger caused by quick jerk of starting car.

Davis v. Seaboard Air Line Ry. (N. Car.), 790.

Degree of care in employing servants.

McAllister v. People's Ry. Co. (Del.), 957.

Degree of care, instruction.

Larkin v. Chicago & G. W. Ry. Co. (Iowa), 852.

Degree of care required in inspecting foreign freight cars upon which drover is being carried.

Western Maryland R. Co. v. State, to Use of Shirk (Md.), 904.

Degree of care required in keeping appliances in safe condition.

McAllister v. People's Ry. Co. (Del.), 957.

Degree of care required of carrier is the same whether motive power is steam or electricity.

Baltimore & O. S. W. R. Co. v. Harbin (Ind.), 956.

Degree of care required of carrier to protect passengers from strangers.

Fewings v. Mendenhall (Minn.), 422.

Degree of care required to prevent fall upon track material from embankment.

Galligan v. Old Colony St. Ry. Co. (Mass.), 896.

CARRIERS OF PASSENGERS —Continued.

Degree of care required to prevent track from being obstructed by earth and stones.

Galligan *v.* Old Colony St. Ry. Co. (Mass.), 896.

Duty of conductor to announce station.

Southern Ry. Co. *v.* O'Bryan (Ga.), 59.

Duty to assist passenger to alight.

Southern Ry. Co. *v.* Reeves (Ga.), 870.

Duty to keep depot premises in safe condition for persons having business at station.

Mayne *v.* Chicago, R. I. & P. Ry. Co. (Okla.), 61.

Duty to protect passengers from assaults.

Thweatt *v.* Houston, E. & W. T. Ry. Co. (Tex.), 428.

Duty to protect passengers from assaults by strangers.

Savannah, F. & W. Ry. Co. *v.* Boyle (Ga.), 430.

Duty to protect passengers from strangers.

Fewings *v.* Mendenhall (Minn.), 422.

Ejection.

Breach of contract rendering company liable where passenger was wrongfully ejected by conductor refusing to give him exchange ticket or to accept fare.

Florida Cent. & P. R. Co. *v.* Sullivan (C. C. A.), 840.

Duty to pay fare to prevent threatened wrongful ejection.

Pennsylvania Co. *v.* Lenhart (C. C. A.), 847.

Evidence admissible to show that third party offered to pay plaintiff's fare, where complaint alleged that, on a friend offering to pay fare, conductor cursed violently and said plaintiff should not ride.

Weber *v.* Southern Ry. Co. (S. Car.), 932.

Evidence.

Admissibility of evidence of conversation of conductor with passenger, in which latter was told to have baggage rechecked himself, in action for injuries sustained

CARRIERS OF PASSENGERS —Continued.

in attempting to board moving train after rechecking baggage.

Chicago & A. R. Co. *v.* Gore (Ill.), 951.

Admissibility of testimony of passenger to the effect that blood was running from injured persons' heads, to show violence of collision.

Larkin *v.* Chicago & G. W. Ry. Co. (Iowa), 852.

Error in permitting plaintiff to testify to transactions and conversations between him and ticket agent, in action for wrongful ejection.

Pennsylvania Co. *v.* Lenhart (C. C. A.), 847.

Evidence admissible as tending to illustrate manner in which plaintiff claimed he was injured, in action for injury to alighting passenger.

Central of Georgia Ry. Co. *v.* McKinney (Ga.), 71.

Evidence of negligence in permitting passenger to ride on running board while train was running at rapid rate of speed.

Hesse *v.* Meriden, S. & C. Tramway Co. (Conn.), 774.

Evidence to show that poles passed prior to accident were placed at safe distance, in action for wrongful death of passenger struck by trolley pole while riding on running board.

Hesse *v.* Meriden, S. & C. Tramway Co. (Conn.), 774.

Evidence to show whether reasonable time to change cars was given.

Oliver *v.* Columbia, N. & L. R. Co. (S. Car.), 708.

In action for injuries by reason of street car collision, evidence that motorman lost control of colliding car by reason of fact that snap switch was closed when it should have been open, inadmissible, under declaration charging that car was equipped with defective air brake.

McAllister *v.* People's Ry. Co. (Del.), 957.

CARRIERS OF PASSENGERS*—Continued.*

Instruction, in action for injury to passenger, that if jury believe from evidence, that plaintiff, while using reasonable care, was injured, "by the negligence of defendant or its agents," plaintiff should recover, not objectionable as assuming defendant's negligence.

Chicago & A. R. Co. v. Gore (Ill.), 951.

On the issue whether plaintiff was a passenger, he could testify with reference to his belief as to his right to ride on the train.

Fitzgibbon v. Chicago & N. W. Ry. Co. (Iowa), 680.

Passenger can testify that he bought ticket from one place to another without producing it.

Oliver v. Columbia, N. & L. R. Co. (S. Car.), 708.

Testimony of bystander that he saw passenger endangered from backing train and halloed to the engineer, admissible.

Oliver v. Columbia, N. & L. R. Co. (S. Car.), 708.

Gross negligence in maintaining freight platform so near a track as to strike passenger's elbow which was slightly protruding from car window.

Kird v. New Orleans & N. W. Ry. Co. (La.), 682.

Harmless error in admitting evidence of custom to board street cars in motion, in action for injuries to passenger attempting to board car while car was moving slowly.

South Chicago City Ry. Co. v. Dufresne (Ill.), 137.

Harmless error in instructing as to degree of care, in action against transfer company for loss of baggage.

City Transfer Co. v. Draper (Ga.), 119.

If plaintiff intended to endeavor to recover for violation of contract and also for illegal arrest, the complaint stated two separate and distinct causes of action.

Dierig v. South Covington & C. St. Ry. Co. (Ky.), 42.

6 R R R-62

CARRIERS OF PASSENGERS*—Continued.*

Imputation of negligence arising from mere fact of injury to passenger.

Chicago, etc., R. Co. v. Winfrey (Neb.), 689.

In action for injuries to passenger, the carrier is liable for the slightest negligence.

Sambuck v. Southern Pac. Co. (Cal.), 687.

Instruction as to care in setting down passenger applicable to pleadings.

Gilmore v. Seattle & R. Ry. Co. (Wash.), 143.

Insufficiency of allegation of refusal to carry.

Dierig v. South Covington & C. St. Ry. Co. (Ky.), 42.

Insufficiency of complaint to show cause of action for false imprisonment for refusal to accept fare.

Dierig v. South Covington & C. St. Ry. Co. (Ky.), 42.

Insufficiency of complaint where alleged refusal to stop and accept plaintiff as passenger was not proximate cause of the injury alleged.

South Chicago City Ry. Co. v. Dufresne (Ill.), 137.

Insufficiency of evidence to show gross negligence on part of conductor causing injury to street railway passenger who fell from car while leaning backwards in reaching for money to pay his fare.

Witherington v. Lynn & B. R. Co. (Mass.), 838.

Insufficiency of evidence to show negligence on part of guard on elevated railway, where passenger's hand was injured in door opened to allow passengers to alight.

Hannon v. Boston Elevated Ry. Co. (Mass.), 862.

Insufficiency of evidence to show negligence on part of motor-man in causing passenger to be injured by sudden jar where stoppage of car was necessary in order to avoid collision.

Corkhill v. Camden & S. Ry. Co. (N. J.), 786.

Insufficiency of evidence to show that defendant was chargeable with notice that passenger

CARRIERS OF PASSENGERS*—Continued.*

was in danger of being injured by tramps stealing ride.
 Savannah, F. & W. Ry. Co. v. Boyle (Ga.), 430.

It was immaterial, in action for loss of baggage, whether or not it was a general custom of the transfer company simply to carry passengers, and not to hold itself out as offering to carry baggage without extra compensation.

City Transfer Co. v. Draper (Ga.), 119.

Liability for assault by employee.

Missouri Pac. Ry. Co. v. Divinney (Kan.), 679.

Liability for death of drover riding on freight train, caused by his jumping from train from fear, instruction.

Western Maryland R. Co. v. State, to Use of Shirk (Md.), 904.

Liability for injury to alighting passenger caused by failure to sprinkle sand on car steps covered with snow.

Foster v. Old Colony St. Ry. Co. (Mass.), 894.

Liability for injury to passenger caused by negligence on track of connecting line, over which defendant company was accustomed to run its cars for a short distance and turn them over to connecting line.

Oliver v. Columbia, N. & L. R. Co. (S. Car.), 708.

Liability for injury to passenger caused by sudden jerk of street car rounding curve, as affected by his knowledge of sign forbidding passengers to ride on platform.

Burns v. Boston El. Ry. Co. (Mass.), 918.

Liability of carrier for negligence of servant.

Lima Ry. Co. v. Little (Ohio), 162.

Liability of company where intending passenger was prevented by obstructing trains from taking passage.

Mayne v. Chicago, R. I. & P. Ry. Co. (Okla.), 61.

Liability where ejected intoxicated passenger was injured

CARRIERS OF PASSENGERS*—Continued.*

by another train.

Nash v. Southern Ry. Co. (Ala.), 780.

Limiting liability, acceptance of excursion ticket as waiver of common-law rule as to carrier's liability for passenger's safety.

Crary v. Lehigh Val. R. Co. (Pa.), 119.

Limit on ticket construed to fix time for commencement and not for completion of return journey, and to entitle plaintiff to rely upon defendant's train schedule.

Morningstar v. Louisville & N. R. Co. (Ala.), 902.

Negligence of driver in jostling passenger compelled to ride on platform of crowded street car.

Cattano v. Metropolitan St. Ry. Co. (N. Y.), 153.

Negligence, question for jury where passenger was injured by stone on derrick swinging against car.

Chicago & A. R. Co. v. Murphy (Ill.), 864.

Negligence, question for jury where passenger was injured in attempting to board summer car from sudden starting of car when stepping on running board after he had waved his hand to conductor.

Powelson v. United Traction Co. (Pa.), 927.

Not negligence for street car company to take plaintiff as passenger, because car was crowded.

Burns v. Boston El. Ry. Co. (Mass.), 918.

Not negligence per se for motorman to open gate on front platform of trolley car before car comes to full stop.

Paglini v. North Jersey St. Ry. Co. (N. J.), 930.

Passenger's right to rely upon ticket agent's representation as to where train will stop.
 Kansas City, etc., R. Co. v. Little (Kan.), 701.

Presumption of negligence arising from injury to passenger in a collision can be rebutted only by showing that the collision was the result of inevitable casualty,

CARRIERS OF PASSENGERS **CARRIERS OF PASSENGERS**

--Continued.

or of some cause which human care and foresight could not prevent.

Sambuck *v.* Southern Pac. Co. (Cal.), 687.

Presumption of negligence from breaking of axle of freight car upon which drover is being carried.

Western Maryland R. Co. *v.* State, to Use of Shirk (Md.), 904.

Proximate cause of injury where intending passenger prevented from reaching his car by an obstructing train was injured when taking another route.

Mayne *v.* Chicago, R. I. & P. Ry. Co. (Okla.), 61.

Question for jury as to sufficiency of inspection of foreign car.

Western Maryland R. Co. *v.* State, to Use of Shirk (Md.), 904.

Question for jury whether jerk of train causing injury to passenger was an extraordinary one.

Illinois Cent. R. Co. *v.* Crady (Ky.), 37.

Question for jury whether passenger was given sufficient time to change cars.

Oliver *v.* Columbia, N. & L. R. Co. (S. Car.), 708.

Question of negligence and contributory negligence for jury where alighting passenger was injured by reason of sudden jerk of car.

Sweet *v.* Birmingham Ry. & Electric Co. (Ala.), 784.

Reckless disregard of passenger's safety shown by evidence that train was run on defective track at rate of a mile a minute.

Griffin *v.* Southern Ry. (S. Car.), 758.

Rev. St. of S. Car. of 1893, § 1687, requiring trains to stop at stations for a sufficient length of time to allow passengers to get on and off, applies to excursion trains.

Oliver *v.* Columbia, N. & L. Co. (S. Car.), 708.

Rule forbidding passengers to ride on platform not waived in plaintiff's favor by mere

--Continued.

fact that he found other passengers riding on platform. Burns *v.* Boston El. Ry. Co. (Mass.), 918.

Street railway company bound to highest degree of care in maintaining track consistent with nature of undertaking.

Galligan *v.* Old Colony St. Ry. Co. (Mass.), 896.

Sufficiency of evidence of negligence in action for injury to passenger caused by excessive speed around curve.

Baltimore & O. S. W. R. Co. *v.* Harbin (Ind.), 956.

Sufficiency of evidence of negligence in discharging passengers.

Fielders *v.* North Jersey St. Ry. Co. (N. J.), 875.

Sufficiency of evidence of negligence in failing to sprinkle sand on car steps covered with snow.

Foster *v.* Old Colony St. Ry. Co. (Mass.), 894.

Sufficiency of evidence of negligence where passenger was injured because of sudden jerk of car.

Timms *v.* Old Colony St. Ry. (Mass.), 783.

Sufficiency of evidence of negligence where passenger was injured by missile thrown by mob.

Fewings *v.* Mendenhall (Minn.), 422.

Sufficiency of evidence to show liability for loss of passenger's baggage.

Southern Ry. Co. *v.* Lasseter (Ga.), 146.

Sufficiency of evidence to show negligence where passenger was injured by premature starting of car.

Beringer *v.* Dubuque St. Ry. Co. (Iowa), 872.

Sufficiency of evidence to support verdict for plaintiff in action for injury received by passenger in alighting from train on unlighted platform.

Kansas City, M. & B. R. Co. *v.* McShan (Miss.), 768.

Sufficiency of evidence to warrant submission of question of defendant's negligence to jury, in action for injuries re-

CARRIERS OF PASSENGERS
—*Continued.*

ceived by being thrown from street car.

South Chicago City Ry. Co. *v.* Dufresne (Ill.), 137.

The fact that long after ejection of passenger it was discovered that his trunk contained merchandise, in violation of contract, was no defense.

Georgia R. Co. *v.* Baldoni (Ga.), 68.

Where, in action for injuries alleged to have resulted from collision on street railway, declaration averred that plaintiff was thrown from his seat by force of collision, proof that he jumped from car, in attempting to escape from danger, was not admissible.

McAllister *v.* People's Ry. Co. (Del.), 957.

Where passenger is arrested by officers, the company is under no duty to see that they use only necessary force.

Brunswick & W. R. Co. *v.* Ponder (Ga.), 45.

Who Are Passengers.

Boy, fifteen years old, who pays brakeman of passenger train to be carried to certain point, and is told to ride on platform of baggage car, to get off at all stops, and to keep out of sight, and who follows such instructions, is not a passenger.

Mendenhall *v.* Atchison, etc., R. Co. (Kan.), 685.

On the issue whether plaintiff was a passenger, he could testify with reference to his belief as to his right to ride on the train.

Fitzgibbon *v.* Chicago & N. W. Ry. Co. (Iowa), 680.

Person not member of excursion party on an excursion train believing that conductor knew he was not a member, but had a right to accept him as a passenger.

Fitzgibbon *v.* Chicago & N. W. Ry. Co. (Iowa), 680.

Person riding by permission of brakeman, with knowledge that he had no right to grant such permission, not a passenger.

Mendenhall *v.* Atchison, etc., R. Co. (Kan.) 685.

CARRIERS OF PASSENGERS
—*Continued.*

Person walking along platform to take next seat in street car, after assisting aged companion to board car.

Haselton *v.* Portsmouth, K. & Y. St. Ry. (N. H.), 705.

CHECKS.

See Tickets and Fares.

CHILDREN.

Boy twelve years old a conscious trespasser on train so as to be responsible for his own negligence and injury.

Wilson *v.* Atchison, etc., Ry. Co. (Kan.), 664.

Boy fifteen years old who pays brakeman of passenger train to be carried to certain point, and is told to ride on platform of baggage car, to get off at all stops, and to keep out of sight, and who follows such instructions, is not a passenger.

Mendenhall *v.* Atchison, etc., R. Co. (Kan.), 685.

Care required of those in charge of street cars to prevent injuries to children.

Gorman *v.* Louisville Ry. Co. (Ky.), 803.

Liability for injury to trespassing boy injured when jumping from train, as affected by failure of trainmen to remonstrate with boys in the habit of boarding and jumping from train.

Wilson *v.* Atchison, etc., Ry. Co. (Kan.), 664.

COAL.

See Carriers of Goods.

COIN.

See Appeal.

Tickets and Fares.

COMMERCIAL RAILROADS.

See Street Railways.

COMMON CARRIERS.

See Carriers of Goods.

COMMUTATION TICKETS.

See Tickets and Fares.

CONDUCTORS.

See Carriers of Passengers.

CONNECTING CARRIERS.

See Carriers of Passengers.

Constitutionality of Georgia statute requiring initial or any connecting carrier to give information where freight has been lost.

Central of Georgia Ry. Co. *v.* Murphey (Ga.), 28.

Insufficiency of evidence to show that defendant could not obtain information, as required under Georgia statute requiring any connecting carrier to give information where freight has been lost.

Central of Georgia Ry. Co. *v.* Murphey (Ga.), 28.

Liability for injury to passenger caused by negligence on track of connecting line, over which defendant company was accustomed to run its cars for a short distance to turn them over to connecting line.

Oliver *v.* Columbia, N. & L. R. Co. (S. Car.), 708.

Limiting Liability.

Provision in bill of lading limiting carrier's liability to damages resulting only from negligence of itself or agents reasonable and binding.

Louisville & N. R. Co. *v.* Landers (Ala.), 96.

CONSTITUTIONAL LAW.

See Taxation.

Constitutionality of ch. 104, p. 180, of Laws 1893, of Kansas, relating to construction of levees.

Missouri, etc., Ry. Co. *v.* Cambern (Kan.), 806.

Constitutionality of Georgia statute requiring initial or any connecting carriers to give information where fruit has been lost.

Central of Georgia Ry. Co. *v.* Murphy (Ga.), 28.

Constitutionality of § 3342, Rev. St. of Ohio, requiring railroad companies to drain their right of way so as to prevent injury to contiguous land or detriment to the public.

Chicago & E. R. Co. *v.* Keith (Ohio), 204.

Rev. St. of Mo., 1899, § 2873, providing that every railroad cor-

CONSTITUTIONAL LAW—
Continued.

poration in the state shall be liable for all damages sustained by any servant "while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof," is not unconstitutional, as subjecting railroad companies to a liability not imposed on other persons or companies under similar conditions.

Callahan *v.* St. Louis, etc., Ry. Co. (Mo.), 293.

Sections 3343-3346, Rev. St. of Ohio, are in conflict with §§ 16 and 19 of art. 1, of Const., and are void, for the reason that they attempt to authorize the taking of private property for private purposes and without due process of law.

Chicago & E. R. Co. *v.* Keith (Ohio), 204.

Statute of Ohio requiring railroad companies to drain right of way unconstitutional.

Chicago & E. R. Co. *v.* Keith (Ohio), 204.

Successor company compelled to construct crossing not deprived of its property without due process of law, though it was not notified of proceedings.

Baltimore, etc., R. Co. *v.* State (Ind.), 611.

Successor of railroad company acquires the latter's rights, subject to liabilities imposed by mileage book act of New York.

Minor *v.* Erie R. Co. (N. Y.), 53.

What constituted "property" within meaning of article of federal constitution providing that private property shall not be taken for public use without just compensation.

Southern Kansas Ry. Co. *v.* Oklahoma City (Okla.), 244.

CONTRACTS.

See Stations and Depots.

Obligation to furnish rolling stock, construction of contract.

Flanagan Bank *v.* Graham (Ore.), 446.

CONTRIBUTORY NEGLIGENCE.

See Carriers of Passengers.
Crossings.
Death by Wrongful Act.
Electric Railways.
Master and Servant.
Stock, Injuries to.
Street Railways.

Burden of proof.

Burns v. Metropolitan St. Ry. Co. (Kan.), 476.

Failure to reply to answer pleading contributory negligence entitled defendant to peremptory instruction.

Brooks v. Louisville & N. R. Co. (Ky.), 401.

Harmless error in instructing as to effect of intoxication, as bearing on question of contributory negligence.

South Chicago City Ry. Co. v. Dufresne (Ill.), 137.

CORPORATIONS.

Private corporation a "person" within Rev. St. of Wis., 1898, § 3466, providing that action may be brought against any person unlawfully holding or exercising any franchises.
State v. Milwaukee, etc., R. Co. (Wis.), 261.

COUPLERS.

See Employers' Liability Acts.

COUPLING CARS.

See Master and Servant.

CRIMINAL LAW.

See Carriers of Goods.

CROSSINGS.

See Accidents on Track.
Frightening Teams.
Licensees.
Stock, Injuries to.

Act of company in leaving cars obstructing highway must be proximate cause of injury.

Chicago, etc., R. Co. v. Roberts (Neb.), 277.

Care required of motorman when approaching intersection of streets.

Louisville Ry. Co. v. French (Ky.), 473.

Care required of pedestrian at street crossings.

Burns v. Metropolitan St. Ry. Co. (Kan.), 476.

CROSSINGS—Continued.

Care required of pedestrian crossing railroad track.

Chicago & E. I. R. Co. v. Randolph (Ill.), 632.

Care required of railroad company as affected by fact that view of persons is partially obstructed by freight cars on side track.

Chicago, etc., R. Co. v. Roberts (Neb.), 277.

Comparative rights of railroad company and travelers using highway crossings.

Chicago, etc., R. Co. v. Roberts (Neb.), 277.

Compensation where highway is constructed over right of way.

Southern Kansas Ry. Co. v. Oklahoma City (Okla.), 244.

Contributory Negligence.

Admissibility of evidence that view was obstructed when driver of team was killed by train.

Chicago & E. I. R. Co. v. Beaver (Ill.), 641.

Climbing over obstructing cars.

Burns v. Southern Ry. Co. (S. Car.), 321.

Contributory negligence, as matter of law, of intoxicated driver of vehicle.

Baltimore, etc., R. Co. v. State (Md.), 619.

Crossing track to board train without seeing other train in plain view.

Steber v. Chicago & N. W. Ry. Co. (Wis.), 656.

Driver of team killed by extra train.

Chicago & E. I. R. Co. v. Beaver (Ill.), 641.

Driving on main track after crossing side track where view is obstructed by cars.

Hines v. Texas & P. Ry. Co. (C. C. A.), 675.

Erroneous instruction invading province of jury.

Kinyon v. Chicago, etc., Ry. Co. (Iowa), 569.

Instruction erroneous for failing to require jury to find that plaintiff's negligence contributed to injury.

Kinyon v. Chicago, etc., Ry. Co. (Iowa), 569.

CROSSINGS—Continued.

- Insufficiency of evidence that driver of vehicle saw hand car before attempting to cross track.
Day v. Boston & M. R. R. (Me.), 626.
- Prevailing rule respecting care required of traveler crossing over street railway tracks.
Burns v. Metropolitan St. Ry. Co. (Kan.), 476.
- Question for jury where plaintiff while crossing the tracks, when gates were down, was struck by train.
Pennsylvania Co. v. Reidy (Ill.), 562.
- Recovery may be had for injuries occasioned by failure to give statutory signals unless the gross negligence of the party injured contributed as proximate cause.
Burns v. Southern Ry. Co. (S. Car.), 321.
- Recovery prevented by contributory negligence though there had been failure to signal.
Missouri, K. & T. Ry. Co. v. Bussey (Kan.), 667.
- Special finding that plaintiff had no control over vehicle did not acquit her of contributory negligence.
Missouri, K. & T. Ry. Co. v. Bussey (Kan.), 667.
- Defendant's negligence question for jury where plaintiff was seen to approach the tracks, and speed was not slackened.
Pennsylvania Co. v. Reidy (Ill.), 562.
- Duty of railroad to construct.
Baltimore, etc., R. Co. v. State (Ind.), 611.
- Duty to maintain.
Town of Clarendon v. Rutland R. Co. (Vt.), 1.
- Instructions as to assumption of risk properly refused because plaintiff bore no contractual relation to company.
Chicago & E. I. R. Co. v. Randolph (Ill.), 632.
- Liability for collision with pedestrian not on footwalk.
Louisville Ry. Co. v. French (Ky.), 473.
- Negligence, question for jury where evidence of excessive

CROSSINGS—Continued.

- speed, absence of signals, and insufficiency of headlight.
Chicago City Ry. Co. v. Fenimore (Ill.), 644.
- Notice of intention to lay out street across steam railway, under Laws 1897, of N. Y., c. 754.
In re Opening of Ludlow St., in City of Yonkers (N. Y.), 202.
- Question for jury whether company was under obligation to fence, as part of its depot grounds, place where cattle were killed.
Snell v. Minneapolis, etc., Ry. Co. (Minn.), 636.
- Question for jury whether proximate cause of killing of cattle was absence of fence.
Snell v. Minneapolis, etc., Ry. Co. (Minn.), 636.
- Reciprocal rights of traveler and street car company considered.
Burns v. Metropolitan St. Ry. Co. (Kan.), 476.
- Right to leave cars standing in highway at crossings.
Chicago, etc., R. Co. v. Roberts (Neb.), 277.
- Signals.**
- Common-law duty with respect to signals not abrogated by statutory requirements.
Kinyon v. Chicago, etc., Ry. Co. (Iowa), 569.
- Erroneous instruction as to what constituted negligence.
Kinyon v. Chicago, etc., Ry. Co. (Iowa), 569.
- Recovery may be had for injuries occasioned by failure to give statutory signals unless the gross negligence of the party injured contributed as proximate cause.
Burns v. Southern Ry. Co. (S. Car.), 321.
- Recovery prevented by contributory negligence though there had been failure to signal.
Missouri, K. & T. Ry. Co. v. Bussey (Kan.), 667.
- Sufficiency of allegations of common-law duty to signal for crossings.
Kinyon v. Chicago, etc., Ry. Co. (Iowa), 569.

CROSSINGS—Continued.**Speed.**

Care required of traveler as affected by negligence of trainmen in running train at excessive speed.

Day *v.* Boston & M. R. R. (Me.), 626.

Error in excluding evidence of excessive speed not waived by statement of plaintiff's counsel that it was negligence for the company to operate its trains at high rate of speed without sounding whistle.

Kinyon *v.* Chicago, etc., Ry. Co. (Iowa), 569.

Mere fact of running train at great speed over crossing raised no presumption of negligence.

Kinyon *v.* Chicago, etc., Ry. Co. (Iowa), 569.

Stop, Look and Listen.

Care required of traveler as affected by difficulties peculiar to crossing.

Day *v.* Boston & M. R. R. (Me.), 626.

Contributory negligence as matter of law in failing to see train in plain view.

Steber *v.* Chicago & N. W. Ry. Co. (Wis.), 656.

Insufficiency of evidence of due care on part of driver of vehicle.

Day *v.* Boston & M. R. R. (Me.), 626.

Negligence of person in charge of cattle.

Snell *v.* Minneapolis, etc., Ry. Co. (Minn.), 636.

Plaintiff not guilty of contributory negligence, as matter of law, in not looking a third time, just before she started across street car track.

Chicago City Ry. Co. *v.* Fenimore (Ill.), 644.

Successor company compelled to construct crossing not deprived of its property without due process of law, though it was not notified of proceeding.

Baltimore, etc., R. Co. *v.* State (Ind.), 611.

Train must be operated with reference to peculiar conditions rendering crossing

CROSSINGS—Continued.

dangerous to persons on highway.

Kinyon *v.* Chicago, etc., R. Co. (Iowa), 569.

V. S. 3844, 3846, requiring railroads to maintain crossings, did not impose any new liability on company, but related to remedy in case of default in charter duty.

Town of Clarendon *v.* Rutland R. Co. (Vt.), 1.

V. S. 3844, requiring railroads to maintain crossings, not invalid as authorizing a taking of a company's property without due process of law.

Town of Clarendon *v.* Rutland R. Co. (Vt.), 1.

Whether ordinance relating to obstruction of crossing by train applicable to station yard.

Burns *v.* Southern Ry. Co. (S. Car.), 321.

CROSSINGS OF RAILROADS.

Notice of intention to lay out street across steam railway, under Laws 1897, of N. Y., c. 754.

In re Opening of Ludlow St., in City of Yonkers (N. Y.), 202.

CULVERTS.

See Water and Watercourses.

CURVES.

See Carriers of Passengers.

DAMAGES.

See Appeal.

Carriers of Live Stock.

Carriers of Passengers.

Death by Wrongful Act.

Elevated Railways.

Negligence.

Personal Injuries.

Right of Way.

Street Railways.

Appeal for delay only.

Potter *v.* Leviton (Ill.), 625.

Damages traceable in some measure to tortious act, but resulting chiefly from contingent circumstances, too remote.

Central of Georgia Ry. Co. *v.* Dorsey (Ga.), 857.

DAMAGES—Continued.

Elements of damages for carrying a passenger beyond her destination at night.

Kansas City, Ft. S. & M. R. Co. *v.* Dalton (Kan.), 187.

Evidence.

Duty to instruct on measures of damages as affected by admission of evidence, without objection, that widow of deceased was in poor health.

Illinois Cent. R. Co. *v.* Atwell (Ill.), 317.

Mortality tables.

Central of Georgia Ry. Co. *v.* Duffy (Ga.), 660.

Excessive verdict where fracture of neck of the femur.

Beringer *v.* Dubuque St. Ry. Co. (Iowa), 872.

Exemplary or punitive damages may be awarded where a wrong has in it the elements of negligence which is gross or wanton or willfully oppressive.

Kansas City, etc., R. Co. *v.* Little (Kan.), 701.

Indignity need not be done in the presence of a number of persons, in order to entitle the person wronged to recover damages for humiliation and disgrace suffered.

Kansas City, etc., R. Co. *v.* Little (Kan.), 701.

Instruction stating hypothetical case furnishing to jury standard of gross and reckless negligence amounting to willfulness, as charged in complaint, not ground for reversal.

Boyd *v.* Blue Ridge Ry. Co. (S. Car.), 754.

Punitive damages may be recovered against railroad company for injuries caused by such gross negligence and recklessness as to imply willfulness.

Boyd *v.* Blue Ridge Ry. Co. (S. Car.), 754.

Verdict not excessive, in action for injury to passenger caused by sudden starting of car while she was alighting.

Louisville Ry. Co. *v.* Casey (Ky.), 789.

Where two or more persons are injured by negligent act of railroad company, that one of them was sued and recovered exemplary damages for inten-

DAMAGES—Continued.

tional wrong is no bar to claim of others to recover such damages.

Griffin *v.* Southern Ry. (S. Car.), 758.

DEATH BY WRONGFUL ACT.

Authority of administratrix to release claim against relief association.

Pittsburg, C., C. & St. L. Ry. Co. *v.* Gipe (Ind.), 383.

Burden of proving due care on part of deceased.

Day *v.* Boston & M. R. R. (Me.), 626.

Contributory Negligence.

Jumping from train through fear.

Western Maryland R. Co. *v.* State, to Use of Shirk (Md.), 904.

Damages.

As a general rule in action for death there should be more evidence as to quantum of damages than mere fact that injured party died at certain age, to warrant award of full statutory damages.

Hesse *v.* Meriden, S. & C. Tramway Co. (Conn.), 774.

Claim that there was not sufficient evidence bearing on quantum of damages to warrant award of full statutory amount.

Hesse *v.* Meriden, S. & C. Tramway Co. (Conn.), 774.

Elements.

Chicago & E. I. R. Co. *v.* Beaver (Ill.), 641.

Western Maryland R. Co. *v.* State, to Use of Shirk (Md.), 904.

Excessive verdict.

Garbaccio *v.* Jersey City, etc., St. Ry. Co. (N. J.), 66.

Full statutory damages properly awarded.

Hesse *v.* Meriden, S. & C. Tramway Co. (Conn.), 774.

Evidence.

Burden of proving due care on part of deceased.

Cox *v.* South Shore & B. St. Ry. Co. (Mass.), 461.

Insufficiency of evidence of due care on part of deceased.

Cox *v.* South Shore & B. St. Ry. Co. (Mass.), 461.

DEATH BY WRONGFUL AOT ELEVATED RAILWAYS.*—Continued.*

Presumption of due care on part of deceased drover who jumped from train to avoid danger.

Western Maryland R. Co. *v.* State, to Use of Shirk (Md.), 904.

Right of foreign administrator to sue.

Florida Cent. & P. R. Co. *v.* Sullivan (C. C. A.), 840.

DEFECTS.

See Master and Servant.

DEGREE OF CARE.

See Carriers of Passengers. Licensees.

Master and Servant.

Street Railways.

Trespassers.

DELAY.

See Carriers of Goods.

DISCOVERED PERIL.

See Accidents on Track. Crossings.

DISCRIMINATION.

See Carriers of Goods.

DISFIGUREMENT.

See Personal Injuries.

DISGRACE.

See Damages.

DROVERS.

See Carriers of Passengers.

DRUNKENNESS.

See Carriers of Passengers.

EJECTION.

See Carriers of Passengers.

ELECTRIC RAILWAYS.

See Street Railways.

Contributory Negligence.

Care required of pedestrian in using street railways.

Judge *v.* Elkins (Mass.), 830.

Not an additional burden on highway.

Lonaconing, M. & F. R. Co. *v.* Consolidation Coal Co. (Md.), 8.

See Street Railways.

Effect of ownership of fee on abutting owner's right to damage resulting from noise in operation of elevated railway.

Baker *v.* Boston Elevated Ry. Co. (Mass.), 831.

Elevated railroad passenger injured by falling sawdust not entitled to recovery under doctrine of *res ipsa loquitur*.

Wadsworth *v.* Boston El. Ry. Co. (Mass.), 778.

Noise an element of damage to abutting owner.

Baker *v.* Boston Elevated Ry. Co. (Mass.), 831.

Whether presence of sawdust and shavings and a piece of wood on elevated railroad structure, by the falling of which a person is injured, not of itself evidence of negligence.

Wadsworth *v.* Boston El. Ry. Co. (Mass.), 778.

EMINENT DOMAIN.

See Crossings.

Electric Railways.

Right of Way.

Compensation where highway is constructed over right of way.

Southern Kansas Ry. Co. *v.* Oklahoma City (Okla.), 244.

Compliance with statutory requirements with respect to due process of law and just compensation.

Southern Kansas Ry. Co. *v.* Oklahoma City (Okla.), 244.

Consents of abutting owners to construction and operation of street railways are not property rights.

Hamilton, G. & C. Traction Co. *v.* Parish (Ohio), 193.

Consents of abutting owners to construction and operation of street railways are not property rights, but rights in their nature personal to each owner of an abutting lot.

Hamilton, G. & C. Traction Co. *v.* Parish (Ohio), 193.

Consents of abutting owners to construction and operation of street railways are personal rights bestowed on abutters as check upon power of municipal authorities to authorize

EMINENT DOMAIN—Cont'd.

street railways to be constructed and operated against the wishes of abutters.

Hamilton, G. & C. Traction Co. *v.* Parish (Ohio), 193.

Damages.

Measure of damage where highway is constructed over right of way.

Southern Kansas Ry. Co. *v.* Oklahoma City (Okla.), 244.

Liability of purchaser of railroad property to owner entitled to lien on right of way.

Southern Ry. Co. *v.* Gregg (Va.), 808.

Owner's lien on property condemned enforceable in equity.

Southern Ry. Co. *v.* Gregg (Va.), 808.

Payment of award.

Southern Ry. Co. *v.* Gregg (Va.), 808.

Presumption of payment of award from lapse of time, rebutted by evidence.

Southern Ry. Co. *v.* Gregg (Va.), 808.

Public use, construction of levee along bank of river.

Missouri, etc., Ry. Co. *v.* Cambern (Kan.), 806.

Railroad company's right to injunction against dispossession prior to its exercise of right to condemn.

Winslow *v.* Baltimore & Ohio R. Co. (U. S.), 792.

Right of Southern Kansas Railroad Company to condemn land in Indian Territory for turnouts and sidings.

Southern Kansas Ry. Co. *v.* Oklahoma City (Okla.), 244.

Right to compensation where construction of highway crossing over right of way.

Southern Kansas Ry. Co. *v.* Oklahoma City (Okla.), 244.

Right to condemn railroad right of way for telegraph lines.

Ft. Worth & R. G. Ry. Co. *v.* Southwestern Telegraph & Telephone Co. (Tex.), 222.

Turnouts and sidings are property within meaning of article five of the amendment of the federal constitution prohibiting the taking of property without just compensation.

Southern Kansas Ry. Co. *v.* Oklahoma City (Okla.), 244.

EMINENT DOMAIN—Cont'd.

What constituted "property" within meaning of article of federal constitution providing that private property shall not be taken for public use without just compensation.

Southern Kansas Ry. Co. *v.* Oklahoma City (Okla.), 244.

EMPLOYEES.

See Master and Servant.

EMPLOYERS' LIABILITY ACTS.

Burden of proving that cars were being used in moving interstate commerce, where they were not furnished with automatic couplers, as required by act of congress.

Winkler *v.* Philadelphia & R. Ry. Co. (Del.), 361.

Contributory Negligence.

Contributory negligence may be good defense where non-compliance with act of congress requiring cars to be equipped with automatic couplers.

Winkler *v.* Philadelphia & R. Ry. Co. (Del.), 361.

Doctrine of assumption of risk rendered inapplicable by statute of North Carolina.

Mott *v.* Southern Ry. Co. (N. Car.), 444.

If a car being moved has come from a point out of the state, it has been moving interstate commerce, within the meaning of act of congress requiring cars to be equipped with automatic couplers.

Winkler *v.* Philadelphia & R. Ry. Co. (Del.), 361.

Insufficiency of evidence to show compliance with act of congress requiring cars to be equipped with automatic couplers.

Winkler *v.* Philadelphia & R. Ry. Co. (Del.), 361.

Locomotive tender as a car within meaning of act of congress requiring cars to be equipped with automatic couplers.

Winkler *v.* Philadelphia & R. Ry. Co. (Del.), 361.

Though a car to which a tender was being coupled was not used in interstate commerce, the case was within the act of

EMPLOYERS' LIABILITY FARES.*ACTS—Continued.*

congress requiring cars to be equipped with automatic couplers, if the removal of such car was a necessary step in moving an interstate car.
Winkler v. Philadelphia & R. Ry. Co. (Del.), 361.

EQUITY.*See Eminent Domain.***ESTOPPEL.***See Taxation.***EVIDENCE.**

See Carriers of Passengers.
Connecting Carriers.
Damages.
Master and Servant.
Negligence.
Personal Injuries.
Res Gestæ.

Comparative weight of positive and negative testimony.

Southern Ry. Co. v. O'Bryan (Ga.), 59.

Pieces of broken car wheel, in action for death of conductor killed in derailment.

Roberts v. Port Blakely Mill Co. (Wash.), 403.

EXCESSIVE VERDICT.*See Death by Wrongful Act.***EXCESS RATES.***See Tickets and Fares.***EXCURSION TICKETS.***See Tickets and Fares.***EXECUTORS.***See Death by Wrongful Act.***EXEMPLARY DAMAGES.**

See Carriers of Passengers.
Damages.
Negligence.
Personal Injuries.

EXEMPTIONS.*See Taxation.***EXPENSES.***See Damages.***EXPERT TESTIMONY.**

See Carriers of Live Stock.
Personal Injuries.

FALSE IMPRISONMENT.*See Carriers of Passengers.**See Tickets and Fares.***FELLOW SERVANTS.**

See Employers' Liability Acts.
Master and Servant.

Engineers of different trains fellow servants, under employer's liability act of Indiana.

Pittsburg, C., C. & St. L. Ry. Co. v. Gipe (Ind.), 383.

Instruction in regard to incompetency of fellow servant not warranted by evidence.

Gila Valley, G. & N. R. Co. v. Lyon (Ariz.), 817.

Question whether negligence of fellow servant was proximate cause or whether defendant's negligence was a contributing cause ordinarily for the jury.

Gila Valley, G. & N. R. Co. v. Lyon (Ariz.), 817.

Section hand and foreman are not.

Illinois Cent. R. Co. v. Atwell (Ill.), 317.

Train dispatcher issuing orders for movement of trains a representative of the railroad company.

Northern Pac. Ry. Co. v. Mix (C. C. A.), 739.

FENCES.*See Stock, Injuries to.*

Sufficiency of special finding that stock killed on track escaped through a defective, open gate.

Saar v. Chicago, etc., R. Co. (Iowa), 554.

FIREMEN.*See Master and Servant.***FIRES.**

Deductions on account of insurance, under Pub. St. Massachusetts, ch. 112, § 214, as amended by statute 1895, ch. 293.

Lyons v. Boston & L. R. R. (Mass.), 268.

Negligence of railroad company in starting fire on plaintiff's premises as proximate cause of injury to his health, by overexertion in putting it out.

Glanz v. Chicago, M. & St. P. Ry. Co. (Iowa), 213.

FIRES—Continued.

Proximate cause where personal injuries were sustained in attempt to extinguish fire. *Logan v. Wabash Ry. Co. (Mo.)*, 274.

Statute throwing burden of proof on railroad company where loss is sustained from fire set by locomotive not applicable to actions for personal injuries.

Duree v. Chicago, M. & St. P. Ry. Co. (Iowa), 369.

Sufficiency of evidence of origin. *Glanz v. Chicago, M. & St. P. Ry. Co. (Iowa)*, 213.

FOREIGN CARS.

See Carriers of Passengers.

FORFEITURE.

See Public Lands.

FRANCHISES.

See Quo Warranto.
Street Railways.

FREIGHT TRAINS.

See Carriers of Passengers.

FRIGHT.

See Damages.
Death by Wrongful Act.

FRIGHTENING TEAMS.

Burden of proof to show that emission of steam was unnecessary.

Louisville & N. R. Co. v. Lee (Ala.), 815.

Railroad company not liable for injuries to horses taking fright at ordinary operation of hand car.

Chicago, etc., R. Co. v. Roberts (Neb.), 277.

Railroad not liable for injuries caused by team taking fright at ordinary operation of train.

Hendricks v. Fremont, etc., R. Co. (Neb.), 281.

FROGS.

See Master and Servant.

GATES.

See Fences.

GRANTS.

See Public Lands.

GROSS NEGLIGENCE.

See Carriers of Passengers.
Crossings.
Damages.

HAND CARS.

See Frightening Teams.

HEADLIGHT.

See Crossings.

HOMESTEADERS.

See Public Lands.

HORSES.

See Carriers of Live Stock.

HUMILIATION.

See Damages.

ICE.

See Carriers of Passengers.
Master and Servant.

INCONVENIENCE.

See Damages.

INDEBTEDNESS.

See Stock and Stockholders.

INDIOTMENTS.

See Carriers of Goods.

INDIGNITIES.

See Damages.

INSPECTION.

See Carriers of Passengers.

INSTRUCTIONS.

See Damages.

INSURANCE.

See Fires.

INTERSTATE COMMERCE.

See Attachment.
Employers' Liability Acts.

INTERVENING ACTS.

See Negligence.

INTOXICATION.

See Carriers of Passengers.
Contributory Negligence.

ISSUES.

See Carriers of Passengers.

JERKS AND JARS.

See Carriers of Passengers.

JERKS AND JOLTS.

See Carriers of Passengers.

JURISDICTION.

See Railroad Commissions.
Torts.

LEGAL TENDER.

See Tickets and Fares.

LEVEES.

*See Constitutional Law.
Eminent Domain.*

LICENSEES.

See Stations and Depots.

Care due person at point habitually used by many people, with the knowledge and without the disapproval of the railroad company.

Bullard v. Southern Ry. Co. (Ga.), 606.

Contributory Negligence.

Question for jury in action for killing of deceased at point habitually used for crossing by public.

Bullard v. Southern Ry. Co. (Ga.), 606.

Duty to know that licensee is on train.

Central of Georgia Ry. Co. v. Duffy (Ga.), 660.

Liability for injury to licensee as affected by fact that his employee had been notified by company to withdraw him.

Central of Georgia Ry. Co. v. Duffy (Ga.), 660.

Liability for injury to licensee on train as affected by ignorance on part of trainmen of his presence.

Central of Georgia Ry. Co. v. Duffy (Ga.), 660.

LIENS.

See Eminent Domain.

Priority.

Flanagan Bank v. Graham (Ore.), 446.

LIFE TABLES.

See Damages.

LIGHTS.

See Carriers of Passengers.

LIMITING LIABILITY.

See Carriers of Live Stock.

LIVE STOCK.

See Carriers of Live Stock.

LOSS OF TIME.

See Damages.

LOST TICKETS.

See Tickets and Fares.

MACHINERY.

See Master and Servant.

MAIL.

See Carriers of Mail.

MALICIOUS PROSECUTION.

Insufficiency of evidence to show that station agent was acting within scope of his authority in procuring arrest of person loitering around station.

Wikle v. Louisville & N. R. Co. (Ga.), 333.

MASTER AND SERVANT.

*See Contributory Negligence.
Employers' Liability Acts.
Evidence.*

Fellow Servants.

Malicious Prosecution.

Negligence.

Personal Injuries.

Res Gestæ.

Trials.

Application of employers' liability act of Missouri.

Callahan v. St. Louis, etc., Ry. Co. (Mo.), 293.

Assumption of Risk.

Attempting to stop car running downgrade.

McGrath v. Delaware, L. & W. R. Co. (N. J.), 334.

Danger incurred in obedience to orders of superior.

Long v. Illinois Cent. R. Co. (Ky.), 349.

Doctrine of assumption of risk rendered inapplicable by statute of North Carolina.

Mott v. Southern Ry. Co. (N. Car.), 444.

Employee does not assume risk arising from company's neglect to furnish safe cars.

Northern Pac. Ry. Co. v. Tynan (C. C. A.), 394.

Employee does not assume risk created by employer's negligence.

Alabama Great Southern R. Co. v. Brooks (Ala.), 375.

Employee working under car did not assume risk of failure to give warning.

Carroll v. New York, N. H. & H. R. R. (Mass.), 313.

Error in not charging as to assumption of risk by brakeman of injury from accumulation of ice on switch track.

Sankey v. Chicago, R. I. & P. Ry. Co. (Iowa), 306.

MASTER AND SERVANT—
Continued.

Section hand injured by sparks and cinders thrown off by engine.

Duree *v.* Chicago, M. & St. P. Ry. Co. (Iowa), 369.

Care required of master in providing machinery.

Atlantic & D. Ry. Co. *v.* West (Va.), 291.

Care required of master to notify trainmen in order to prevent collisions.

Northern Pac. Ry. Co. *v.* Mix (C. C. A.), 739.

Contributory Negligence.

Attempting to stop car running downgrade with rotten sprag.

McGrath *v.* Delaware, L. & W. R. Co. (N. J.), 334.

Brakeman injured while standing with his back in direction from which car might be kicked.

Dolphin *v.* New York, N. H. & H. R. Co. (Mass.), 341.

Brakeman killed while working from inside of curve while attempting to couple cars on side track.

Northern Pac. Ry. Co. *v.* Tynan (C. C. A.), 394.

Burden of proving that deceased engineer was guilty of contributory negligence. Central of Georgia Ry. Co. *v.* Vining (Ga.), 312.

Employee injured by passing car while working near track.

Riddle *v.* Forty-Second St., M. & St. N. Ave. Ry. Co. (N. Y.), 373.

Failure of fireman injured in collision to give engineer proper signals.

Texas & P. Ry. Co. *v.* Reagan (C. C. A.), 345.

Going between standing cars. Dillon *v.* Iowa Cent. Ry. Co. (Iowa), 336.

Hazardous work in removing hand car from track under orders.

Illinois Cent. R. Co. *v.* Atwell (Ill.), 317.

Injury to brakeman's foot crushed between couplers was caused by contributory negligence and not by defective couplers.

MASTER AND SERVANT—
Continued.

Elmore *v.* Seaboard Air Line Ry. Co. (N. Car.), 410.

Insufficiency of allegation of obvious danger.

Alabama Great Southern R. Co. *v.* Brooks (Ala.), 375.

Pleading.

Alabama Great Southern R. Co. *v.* Brooks (Ala.), 375.

Pleading obvious danger.

Alabama Great Southern R. Co. *v.* Brooks (Ala.), 375.

Duty to warn servant of special risk cannot be delegated so as to relieve master of responsibility.

Mercantile Trust Co. *v.* Pittsburgh, etc., Ry. Co. (C. C. A.), 354.

Employee working under car had right to assume that train would not be backed on track at unreasonable rate of speed. Carroll *v.* New York, N. H. & H. R. R. (Mass.), 313.

Evidence.

Examination of conductor to bring out fact that he remained silent when brakeman told him, after accident to latter, that he tried to couple air brakes according to conductor's orders.

Alabama Great Southern R. Co. *v.* Brooks (Ala.), 375.

Expert testimony as to whether cinder injuring section hand was hot.

Duree *v.* Chicago, etc., Ry. Co. (Iowa), 369.

Testimony of third party as to silence of conductor when brakeman told him after accident to latter, that he tried to couple air brakes according to conductor's orders.

Alabama Great Southern R. Co. *v.* Brooks (Ala.), 375.

Insufficiency of allegation of defendant's negligence in causing death of brakeman killed while between cars.

Alabama Great Southern R. Co. *v.* Brooks (Ala.), 375.

Insufficiency of evidence of negligence on part of switching crew where engineer of front train was killed while between cars.

Dillon *v.* Iowa Cent. Ry. Co. (Iowa), 336.

MASTER AND SERVANT—
Continued.

Insufficiency of evidence of negligence where section hand was struck in eye by something while train was passing.
Duree v. Chicago, M. & St. P. Ry. Co. (Iowa), 369.

Liability for injury to brakeman caused by accumulation of ice on switch track.

Sankey v. Chicago, R. I. & P. Ry. Co. (Iowa), 306.

Liability of company for death of brakeman caused by overloading cars.

Louisville, H. & St. L. Ry. Co. v. Chandler (Ky.), 365.

Liability of company for malpractice in treatment of injury to boy.

Sawdey v. Spokane Falls & N. Ry. Co. (Wash.), 283.

Liability of master for negligent act of servant depends upon whether it was performed within scope of employment.

Lima Ry. Co. v. Little (Ohio), 162.

Mere fact that foreman, as employees were about to use hand car for pleasure trip, requested them to bring his mail, did not render them in the employ of the company while on the trip.

Illinois Cent. R. Co. v. Dotson (Ky.), 380.

Negligence in failing to warn trainmen of damage to railroad track from storm primary cause of death of brakeman.

Mercantile Trust Co. v. Pittsburgh, etc., Ry. Co. (C. C. A.), 354.

Negligence in using old style Miller hook coupler.

Northern Pac. Ry. Co. v. Tynan (C. C. A.), 394.

Negligence of master not presumed from mere fact that lever of hand car broke.

Brooks v. Louisville & N. R. Co. (Ky.), 401.

Nonsuit in action for injury to employee loading car resulting from fall of portion of load.

Schultz v. Chicago, M. & St. P. Ry. Co. (Wis.), 343.

Nonsuit properly denied in action for death of conductor of logging train, from derailment caused by alleged negligence in failing to provide safe cars.

MASTER AND SERVANT—
Continued.

Roberts v. Port Blakely Mill Co. (Wash.), 403.

Not negligence to use unblocked frogs in railroad freight yard.

Kilpatrick v. Choctaw, O. & G. R. Co. (C. C. A.), 501.

Question for jury whether, by contract of employment, providing for the retention of part of employee's salary for hospital fund, company contracted to treat employee for all injuries, or for only those received in course of employment.

Sawdey v. Spokane Falls & N. Ry. Co. (Wash.), 283.

Question for jury whether railroad was guilty of negligence in not furnishing safe premises where brakeman was injured by act of conductor in allowing cars to run on siding by their momentum without any one in charge.

Gila Valley, G. & N. R. Co. v. Lyon (Ariz.), 817.

Question for jury whether train dispatcher was guilty of negligence causing collision in which brakeman was injured.
Northern Pac. R. Co. v. Mix (C. C. A.), 739.

Relationship a question for jury under proper instruction from court.

Lima Ry. Co. v. Little (Ohio), 162.

Rev. St. of Mo., 1899, § 2873, providing that every railroad corporation in the state shall be liable for all damages sustained by any servant "while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof" is not unconstitutional, as subjecting railroad companies to a liability not imposed on other persons or companies under similar conditions.

Callahan v. St. Louis, etc., Ry. Co. (Mo.), 293.

Rule providing for minimum time for running cars between certain points not binding on engineer, so as to forfeit the right of his widow to recover for his death.

Central of Georgia Ry. Co. v. Vining (Ga.), 312.

MASTER AND SERVANT—
Continued.

Rules of railroad company directing actions of train dispatcher prima facie evidence of what is due care on his part. *Northern Pac. Ry. Co. v. Mix* (C. C. A.), 739.

Statute throwing burden of proof on railroad company where loss is sustained from fire set by locomotive not applicable to actions for personal injuries.

Duree v. Chicago, M. & St. P. Ry. Co. (Iowa), 369.

Sufficiency of evidence of malpractice in treatment of injured employee.

Sawdey v. Spokane Falls & N. Ry. Co. (Wash.), 283.

Sufficiency of evidence of negligence of train dispatcher, in action for injury to brakeman from collision between trains.

Northern Pac. Ry. Co. v. Mix (C. C. A.), 739.

Sufficiency of evidence of negligence where brakeman was injured by reason of accumulation of ice on switch track.

Sankey v. Chicago, R. I. & P. Ry. Co. (Iowa), 306.

Sufficiency of evidence to show that brakeman slipped on accumulation of ice inside of rail of switch track.

Sankey v. Chicago, R. I. & P. Ry. Co. (Iowa), 306.

Sufficiency of evidence to show want of ordinary care in construction of platform causing injury to servant.

Atlantic & D. Ry. Co. v. West (Va.), 291.

Violation of rule by train dispatcher prima facie evidence of negligence.

Northern Pac. Ry. Co. v. Mix (C. C. A.), 739.

Where death of railroad section hand was due to attempt to obeying improper order of foreman, his administrator might recover, foreman not being a fellow servant with regard to exercise of his power to command.

Illinois Cent. R. Co. v. Atwell (Ill.), 317.

Work of operating railroad, what constitutes, within meaning of

6 R R R—63

MASTER AND SERVANT—
Continued.

employers' liability act of Missouri.

Callahan v. St. Louis, etc., Ry. Co. (Mo.), 293.

MENTAL SUFFERING.

See Damages.

Personal Injuries.

MERCHANDISE.

See Baggage.

MILEAGE BOOKS.

See Tickets and Fares.

MOBS.

See Carriers of Passengers.

MORTALITY TABLES.

See Damages.

MORTGAGES.

See Liens.

MOTORMEN.

See Street Railways.

MUNICIPAL CORPORATIONS.

See Eminent Domain.

NEGLIGENCE.

See Accidents on Track.

Crossings.

Damages.

Elevated Railroads.

Master and Servant.

Burden of proving, instruction. *Roberts v. Port Blakely Mill Co.* (Wash.), 403.

Definition, instruction.

Roberts v. Port Blakely Mill Co. (Wash.), 403.

In an action against railroad for personal injuries, petition must show that injury was naturally and probably consequent from the negligence of the company.

Mayne v. Chicago, R. I. & P. Ry. Co. (Okla.), 61.

Instruction.

Metropolitan St. Ry. Co. v. Rouch (Kan.), 457.

Negligence in operating trains generally a question for jury. *Central of Georgia Ry. Co. v. McKinney* (Ga.), 71.

Proximate cause where intervening act.

Southern R. Co. v. Webb (Ga.), 76.

NEGLIGENCE—Continued.

Question for jury.

Alabama Midland R. Co. *v.* Hatcher (Ga.), 486.

Sufficiency of evidence of willful negligence.

Griffin *v.* Southern Ry. (S. Car.), 758.

When question of law.

Chicago, etc., R. Co. *v.* Winfrey (Neb.), 689.

NOISE.

See Elevated Railways.

NONASSIGNABLE DUTIES.

See Fellow Servants.

Master and Servant.

NOTICE.

See Baggage.

Tickets and Fares.

NOTICE OF CLAIM.

See Carriers of Live Stock.

Personal Injuries.

NUISANCES.

See Elevated Railways.

NURSING.

See Personal Injuries.

OBSTRUOTED VIEWS.

See Crossings.

OBSTRUCTIONS.

See Crossings.

OBSTRUCTIONS NEAR TRACK.

See Carriers of Passengers.

OFFICERS.

Authority to give bonds when pleading for writ of certiorari.

Alabama Midland Ry. Co. *v.* Stevens (Ga.), 568.

Delivery of rolling stock to company where purchased by general manager as contractor.

Flanagan Bank *v.* Graham (Ore.), 446.

Ratification of act of agent in giving bond when pleading for writ of certiorari.

Alabama Midland Ry. Co. *v.* Stevens (Ga.), 568.

OPINION EVIDENCE.

See Street Railways.

ORDINANCES.

See Crossings.

Street Railways.

ORIGIN.

See Fires.

PARTIES.

See Baggage.

Death by Wrongful Act.

PASSENGERS.

See Carriers of Passengers.

Street Railways.

PEDESTRIANS.

See Electric Railways.

Street Railways.

PEDIGREE.

See Carriers of Live Stock.

PERISHABLE FREIGHT.

See Carriers of Goods.

PERSONAL INJURIES.

See Accidents on Track.

Crossings.

Fires.

Street Railways.

Conductor of freight train may properly be found to be in charge or control of it, though he is temporarily absent, if nothing is done meanwhile contrary to his orders.

Carroll *v.* New York, N. H. & H. R. R. (Mass.), 313.

Damages.

Compensation may be had for mental suffering and distress of mind caused by disfigurement.

Gray *v.* Washington Water Power Co. (Wash.), 479.

Damages on account of malpresentation and death of child, at its birth, fifteen months after the accident, too remote.

Simonson *v.* Minneapolis St. L. R. Co. (Minn.), 190.

Duty to specially instruct on measure of damages, as affected by admission of evidence, without objection, that widow of deceased was in poor health.

Illinois Cent. R. Co. *v.* Atwell (Ill.), 317.

Elements of damage.

Chicago City Ry. Co. *v.* Fennimore (Ill.), 644.

Evidence of amount which husband of injured wife paid physician for his services, admissible to show wife's condition.

Oliver *v.* Columbia, N. & L. R. Co. (S. Car.), 708.

PERSONAL INJURIES—Continued.

Injured party may testify as to his own estimate as to the amount of his damage.

Oliver *v.* Columbia, N. & L. R. Co. (S. Car.), 708.

No recovery can be had for fright or mental suffering as an independent element of damage, unaccompanied by bodily injury.

Kansas City, Ft. S. & M. R. Co. *v.* Dalton (Kan.), 187.

Reason for allowing punitive damages.

Oliver *v.* Columbia, N. & L. R. Co. (S. Car.), 708.

Recovery of exemplary damages in vindication of private right which has been willfully invaded.

Oliver *v.* Columbia, N. & L. R. Co. (S. Car.), 708.

Remote damages.

Simonson *v.* Minneapolis & St. L. R. Co. (Minn.), 190.

To sustain a claim for exemplary damages against a railroad company there must not only be gross negligence, but a willful, reckless disregard of the rights of the party injured.

Oliver *v.* Columbia, N. & L. R. Co. (S. Car.), 708.

Where physician stated that he knew value of services for nursing, his evidence as to value was properly admitted.

Beringer *v.* Dubuque St. Ry. Co. (Iowa), 872.

Evidence.

Evidence of similar accidents.
Central of Georgia Ry. Co. *v.* Duffy (Ga.), 660.

Examination of plaintiff's person.

Sambuck *v.* Southern Pac. Co. (Cal.), 687.

Nonexpert testimony as to nature of injuries.

Chicago & E. I. R. Co. *v.* Randolph (Ill.), 632.

Negligence of railroad company in starting fire on plaintiff's premises as proximate cause of injury to his health from overexertion in putting it out.
Glanz *v.* Chicago, M. & St. P. Ry. Co. (Iowa), 213.

Proximate cause where personal

PERSONAL INJURIES—Continued.

injuries were sustained in attempt to extinguish fire.

Logan *v.* Wabash Ry. Co. (Mo.), 274.

Question for jury whether injuries to passengers were permanent.

Louisville Ry. Co. *v.* Casey (Ky.), 789.

Statute throwing burden of proof on railroad company where loss is sustained by fire set by locomotive not applicable to actions for personal injuries.

Duree *v.* Chicago, M. & St. P. Ry. Co. (Iowa), 369.

Sufficiency of notice of claim, under St. 1894, of Mass., c. 389, § 1.

Carroll *v.* New York, N. H. & H. R. R. (Mass.), 313.

PERSONS.

See Corporations.

PLACARDS.

See Tickets and Fares.

PLATFORMS.

*See Carriers of Passengers.
Street Railways.*

PLEADING.

See Contributory Negligence.

POLICE POWER.

See Streets and Highways.

V. S. 3844, 3845, 3846, requiring railroads to maintain crossings, a valid police regulation.
Town of Clarendon *v.* Rutland R. Co. (Vt.), 1.

PRESUMPTIONS.

*See Baggage.
Carriers of Passengers.
Stock, Injuries to.*

PROSECUTIONS.

See Carriers of Goods.

PROXIMATE CAUSE.

*See Fellow Servants.
Negligence.
Personal Injuries.*

PUBLIC LANDS.

*See Water and Watercourses.
Effect of inclusion in forest reservation on rights of settlers*

PUBLIC LANDS—Continued.

or unsurveyed railroad lands,
under act of Jan. 13, 1886.

Holmes *v.* United States (C.
A.), 486.

Rights of bona fide purchasers
against persons claiming by
adverse possession.

San Jose Land & Water Co. *v.*
San Jose Ranch Co. (U. S.),
824.

Rights of settlers on unsurveyed
lands where exceptions from
forest reservations.

Holmes *v.* United States (C.
A.), 486.

Rights of subsequent grantees
to forfeited land.

San Jose Land & Water Co. *v.*
San Jose Ranch Co. (U. S.),
824.

PUBLIC POLIOY.

See Stations and Depots.

PUBLIC USE.

See Eminent Domain.

PUNITIVE DAMAGES.

See Carriers of Passengers.
Damages.
Personal Injuries.

QUESTIONS OF LAW.

See Tickets and Fares.

QUO WARRANTO.

A street railway franchise is a
"franchise" within meaning
of statute of Wisconsin pro-
viding that action may be
brought against any person
unlawfully holding or exercis-
ing any franchise, and may
be annulled for cause by quo
warranto.

State *v.* Milwaukee, etc., R.
Co. (Wis.), 261.

RAILROAD COMMISSIONS.

Duties and powers.

Morgan's Louisiana & T. R. &
S. S. Co. *v.* R. Commission
of Louisiana (La.), 122.

In selecting location for depot
regard is to be had as to ability
of the railroad, in view of
its entire business, to estab-
lish and maintain depot, and
not to its situation at some
special locality.

Morgan's Louisiana & T. R. &
S. S. Co. *v.* R. Commission
of Louisiana (La.), 122.

Jurisdiction of supreme court

RAILROAD COMMISSIONS—Continued.

in disposing of matters of dis-
pute between railroads and
state railroad commission.

Morgan's Louisiana & T. R.
& S. S. Co. *v.* R. Commission
of Louisiana (La.), 122.

RAILROADS.

See Attachments.

Contracts.

Crossings.

Eminent Domain.

Malicious Prosecution.

Negligence.

Officers.

Stations and Depots.

Stock and Stockholders.

Street Railways.

Torts.

Trials.

Venue.

RAILROADS IN STREETS.

See Eminent Domain.

RATES.

See Carriers of Goods.
Tickets and Fares.

REAL ESTATE.

See Public Lands.

REBATES.

See Tickets and Fares.

RECKLESSNESS.

See Carriers of Passengers.
Damages.

RELIEF ASSOCIATIONS.

See Death by Wrongful Act.

REMOTE DAMAGES.

See Damages.

RES GESTÆ.

Conversations between plaintiff
and defendant's agent relative
to the transportation of cat-
tle, in the course of their
transportation as res gestæ.
Louisville & N. R. Co. *v.*
Landers (Ala.), 96.

Declarations of general superin-
tendent made while examining
wreck, three hours after it oc-
curred, as to negligence of
company in using such wheels.
Roberts *v.* Port Blakely Mill
Co. (Wash.), 403.

Exclamations of pain immedi-
ately after injury.

Oliver *v.* Columbia, N. & L.
R. Co. (S. Car.), 708.

REVIEW.

See Appeal.

RIGHT OF WAY.

See Eminent Domain.

Water and Watercourses.

Abandonment.

Question one of intention.

Garlick *v.* Pittsburgh & W.
Ry. Co. (Ohio), 234.

Damages.

Measure of damages where
highway is constructed over
right of way.

Southern Kansas Ry. Co. *v.*
Oklahoma City (Okla.),
244.

Recovery of possession of right
of way where failure to carry
out agreement to build depot.
Southern California Ry. Co. *v.*
Slauson (Cal.), 231.

Remedy where failure to build
depot on land granted, accord-
ing to contract.

Southern California Ry. Co.
v. Slauson (Cal.), 231.

Right of Southern Kansas Rail-
road Company to condemn
land in Indian Territory for
turnouts and sidings.

Southern Kansas Ry. Co. *v.*
Oklahoma City (Okla.), 244.

Right to compensation where
construction of highway over
right of way.

Southern Kansas Ry. Co. *v.*
Oklahoma City (Okla.), 244.

Right to condemn right of way
of railroad company for tele-
graph lines.

Ft. Worth & R. G. Ry. Co. *v.*
Southwestern Telegraph &
Telephone Co. (Tex.), 222.

ROLLING STOCK.

See Taxation.

RULES.

See Carriers of Passengers.
Master and Servant.

**RUNNING TRAINS ON SUN-
DAY.**

See Carriers of Goods.

SAWDUST.

See Elevated Railroads.

SERVANTS.

See Master and Servant.

SETTLERS.

See Public Lands.

SIDINGS.

See Eminent Domain.

SIGNALS.

See Crossings.

Stock, Injuries to.

SNOW.

See Carriers of Passengers.

SPEED.

See Carriers of Passengers.

Crossings.

Stock, Injuries to.

Street Railways.

STATIONS AND DEPOTS.

See Carriers of Passengers.

Stock, Injuries to.

Duty to keep depot premises in
safe condition for persons hav-
ing business at station.

Mayne *v.* Chicago, R. I. & P.
Ry. Co. (Okla.), 61.

In selecting location for depot,
regard is to be had to the
ability of the railroad, in view
of its entire business, to estab-
lish and maintain the depot,
and not to its situation at some
particular locality.

Morgan's Louisiana & T. R.
& S. S. Co. *v.* R. Commis-
sion of Louisiana (La.),
122.

Invalid contract restricting loca-
tion of stations.

Beasley *v.* Texas & P. Ry. Co.
(U. S.), 463.

Recovery of possession of right
of way where failure to carry
out agreement to build depot.
Southern California Ry. Co. *v.*
Slauson (Cal.), 231.

Recovery of property conveyed
to company under illegal con-
tract restricting location of
stations.

Beasley *v.* Texas & P. Ry. Co.
(U. S.), 463.

STATUTES.

See Death by Wrongful Act.

**STOCK AND STOCKHOLD-
ERS.**

See Taxation.

Duty of company to notify hold-
ers of their option to exchange
certificates of indebtedness
for stock.

Johnson *v.* Richmond, F. & P.
R. Co. (Va.), 498.

STOCK, INJURIES TO.

*See Crossings.
Fences.*

Contributory Negligence.

Error in withdrawing question of cattle driver's negligence from jury.

Brunick *v.* Ann Arbor R. Co. (Mich.), 591.

Error in withdrawing from jury all questions of defendant's negligence save alleged failure to reasonably signal for crossing.

Kinyon *v.* Chicago, etc., Ry. Co. (Iowa), 569.

Insufficiency of evidence to make out prima facie case.

Kansas City, Ft. S. & M. Ry. Co. *v.* Walker (Ark.), 595.

Judgment properly directed for defendant where only evidence of negligence was that cattle were found dead on track.

Saar *v.* Chicago, etc., R. Co. (Iowa), 554.

Overcoming presumption of negligence arising from mere proof of injury to stock on track.

Southern Ry. Co. *v.* Hill (Ga.), 568.

Presumption of negligence arising from mere proof of injury to stock on track.

Southern Ry. Co. *v.* Hill (Ga.), 568.

STOCKMEN.

See Carriers of Passengers.

STREET RAILWAYS.

*See Carriers of Passengers.
Children.*

Death by Wrongful Act.

Electric Railways.

Elevated Railways.

Eminent Domain.

A street railway franchise is a "franchise" within meaning of statute of Wisconsin providing that action may be brought against any person unlawfully holding or exercising any franchise, and may be annulled for cause by quo warranto.

State *v.* Milwaukee, etc., R. Co. (Wis.), 261.

Care required of motorman to avoid injuring person on track.

Barry *v.* Burlington Ry. & Light Co. (Iowa), 675.

STREET RAILWAYS—Cont'd.

Care required of motorman when approaching intersection of streets.

Louisville Ry. Co. *v.* French (Ky.), 473.

Care required of pedestrian at street crossings.

Burns *v.* Metropolitan St. Ry. Co. (Kan.), 476.

Commercial railroads organized under Rev. St. of Wis. 1898, § 1820, without power to accept street railway franchises.

State *v.* Milwaukee, etc., R. Co. (Wis.), 261.

Contributory Negligence.

Boarding moving cars.

South Chicago City Ry. Co. *v.* Dufresne (Ill.), 137.

Care required of pedestrians.

Kernan *v.* Market St. Ry. Co. (Cal.), 471.

Duty of driver of vehicle to turn off street railway tracks.

Metropolitan St. Ry. Co. *v.* Rouch (Kan.), 457.

Evidence that car upon which plaintiff was injured while riding on running board was of greater width than the other cars of the company was properly excluded.

Moody *v.* Springfield St. Ry. Co. (Mass.), 116.

Evidence that plaintiff had previously ridden on running board without being injured was properly excluded.

Moody *v.* Springfield St. Ry. Co. (Mass.), 116.

Insufficiency of evidence.

Kernan *v.* Market St. Ry. Co. (Cal.), 471.

Leaning back in returning money to pocket, or in looking for friend also on footboard.

Anderson *v.* City & Suburban Ry. Co. (Ore.), 763.

Passenger riding on front platform jostled by crowd.

Cattano *v.* Metropolitan St. Ry. Co. (N. Y.), 153.

Prevailing rule respecting care required of traveler on street railway tracks.

Burns *v.* Metropolitan St. Ry. Co. (Kan.), 476.

Riding on footboard, instructions.

Anderson *v.* City & Suburban Ry. Co. (Ore.), 763.

STREET RAILWAYS—Cont'd.

Riding on footboard of street car.

Anderson *v.* City & Suburban Ry. Co. (Ore.), 763.

Riding on running board where vacant seats in cars.

Moody *v.* Springfield St. Ry. Co. (Mass.), 116.

Duty of company to keep depot platform in safe condition.

Haselton *v.* Portsmouth, K. & Y. St. Ry. (N. H.), 705.

Duty of motorman after discovering peril of person on track.

Barry *v.* Burlington Ry. & Light Co. (Iowa), 675.

Duty to keep track in condition for public travel, instruction.

Gray *v.* Washington Water Power Co. (Wash.), 479.

Evidence.

Of negligence in running car without signals at excessive speed.

Kernau *v.* Market St. Ry. Co. (Cal.), 471.

Opinion evidence as to speed of street cars.

Mathieson *v.* Omaha St. Ry. Co. (Neb.), 469.

Ordinance regulating speed of electric street cars immaterial where it is not shown at what rate car in question was running.

Mathieson *v.* Omaha St. Ry. Co. (Neb.), 469.

That rail was used on inside of new cars purchased by defendant and was not used on old cars, was properly excluded in action for injury sustained by passenger riding on running board.

Moody *v.* Springfield St. Ry. Co. (Mass.), 116.

The fact that street railway had been operated for over ten years, and that no accident had occurred from like cause, did not show absence of negligence, as matter of law.

Anderson *v.* City & Suburban Ry. Co. (Ore.), 763.

Liability for collision with pedestrian not on footwalk.

Louisville Ry. Co. *v.* French (Ky.), 473.

Negligence of driver in jostling passenger compelled to ride on platform of crowded street car.

Cattano *v.* Metropolitan St. Ry. Co. (N. Y.), 153.

STREET RAILWAYS—Cont'd.

Ordinance construed to be an attempt to confer street railway franchise, and not to be a mere regulation of rights conferred on commercial railroads.

State *v.* Milwaukee, B. & L. G. R. Co. (Wis.), 261.

Ordinance requiring street railway to pave street could not be supported as an exercise of police power.

Fielders *v.* North Jersey St. Ry. Co. (N. J.), 875.

Ordinary commercial railroad, which has formally accepted street railway franchise attempted to be conferred upon it, is holding and exercising such franchise, within meaning of statute of Wisconsin, providing that action may be brought against any person unlawfully holding or exercising any franchise.

State *v.* Milwaukee, etc., Ry. Co. (Wis.), 261.

Question for jury whether adopted platform was reasonably safe.

Haselton *v.* Portsmouth, K. & Y. St. Ry. (N. H.), 705.

Reciprocal rights of traveler and street car company considered.

Burns *v.* Metropolitan St. Ry. Co. (Kan.), 476.

Right of abutters to demand compensation for their consent to construction and operation of street railway.

Hamilton, G. & C. Traction Co. *v.* Parish (Ohio), 193.

Rights of pedestrian injured by failure of street railway to properly pave street.

Fielders *v.* North Jersey St. Ry. Co. (N. J.), 875.

Substantial damages for injury caused by mistake of agent in issuing transfer.

Lawshe *v.* Tacoma Railway & Power Co. (Wash.), 38.

Sufficiency of evidence to show that motorman should have seen person on track before accident.

Barry *v.* Burlington Ry. & Light Co. (Iowa), 675.

Sufficiency of evidence to show that street railway company had adopted platform built by side of its line.

Haselton *v.* Portsmouth, K. & Y. St. Ry. (N. H.), 705.

STREETS AND HIGHWAYS. TAXATION—Continued.

See Crossings.

Electric Railways.

Eminent Domain.

Street Railways.

Notice of intention to lay out street across steam railway, under Laws 1897 of N. Y., c. 754.

In re Opening of Ludlow St., in City of Yonkers (N. Y.), 202.

Ordinance requiring street railway to pave street could not be supported as exercise of police power.

Fielders v. North Jersey St. Ry. Co. (N. J.), 875.

SUNDAY.

See Carriers of Goods.

SWITCH TRACKS.

See Master and Servant.

TAXATION.**Exemptions.**

Consolidated company could not claim right to exemption formerly possessed by one of the consolidating companies. Yazoo & M. V. R. Co. v. Adams (Miss.), 519.

Exemption granted by Laws of 1878, of Miss., p. 233, repealed by Code 1880, §§ 597-608.

Yazoo & M. V. R. Co. v. Adams (Miss.), 519.

Railroad assessors had no jurisdiction to determine question of exemption, so as to render them res adjudicata.

Yazoo & M. V. R. Co. v. Adams (Miss.), 519.

Res adjudicata.

Yazoo & M. V. R. Co. v. Adams (Miss.), 519.

State was not estopped from subjecting property of railroad to payment of back taxes.

Yazoo & M. V. R. Co. v. Adams (Miss.), 519.

Statute granting immunity from taxation having been repealed, no rights in that regard were acquired by the new company formed by consolidation.

Yazoo & M. V. R. Co. v. Adams (Miss.), 519.

Void charter provision purporting to grant to company right to appropriate taxes on road for thirty years in payment of debts incurred in construction thereof, unless eight per cent. dividends are being earned.

Yazoo & M. V. R. Co. v. Adams (Miss.), 519.

The amount of anticipated dividends on stock of other corporations owned by a domestic railroad corporation, its bills receivable for expenditures on leased lines, and the value of coal and supplies owned by the corporation without the state, are no part of its taxable property.

People v. Knight (N. Y.), 547.

The value of the rolling stock of a domestic railroad corporation is capital stock employed within the state unless such stock is used exclusively outside of the state.

People v. Knight (N. Y.), 547.

Under Laws 1896, of New York, c. 908, §§ 182, 190, the franchise tax is based on actual and not the par value of the capital stock of a corporation employed within the state.

People v. Knight (N. Y.), 547.

Where a domestic railroad corporation owns the stock of a domestic transportation corporation, which employs its capital outside of the state, such stock constitutes no part of the railroad's taxable property.

People v. Knight (N. Y.), 547.

Where a domestic railroad corporation purchased stock of a foreign corporation by the issue of bonds, the stock being pledged to a trust company in the state as security for the bonds, is no part of its taxable property.

People v. Knight (N. Y.), 547.

TELEGRAPHS AND TELEPHONES.

See Eminent Domain.

Right of Way.

TESTIMONY.

See Evidence.

TICKETS AND FARES.

See Carriers of Passengers.

Acceptance of excursion ticket as waiver of common-law rule making carrier liable for passenger's safety.

Crary v. Lehigh Val. R. Co. (Pa.), 119.

Contract on ticket signed by purchaser conclusive evidence to conductor in regard to time of its expiration.

Rolfs v. Atchison, etc., Ry. Co. (Kan.), 920.

In action for ejectment of passenger on ground that fare tendered was not legal tender, an objection to question to plaintiff as to where he got money to pay his fare after he was put off should have been sustained.

Mobile St. Ry. Co. v. Watters (Ala.), 184.

Limit on ticket construed to fix latest time for commencement and not for completion of return journey, and to entitle plaintiff to rely upon defendant's train schedule.

Morningstar v. Louisville & N. R. Co. (Ala.), 902.

Mileage book act of New York valid though applied to successor of old company, which had right to charge specified fare.

Minor v. Erie R. Co. (N. Y.), 53.

Parol evidence of statement by ticket agent inadmissible to vary written contract on ticket fixing time for its expiration.

Rolfs v. Atchison, etc., Ry. Co. (Kan.), 920.

Placard posted in ticket office as notice to passenger that ticket must be used on day of sale.

Georgia R. Co. v. Baldoni (Ga.), 68.

Rights of purchaser of lost commutation ticket.

Southern Ry. Co. v. De Sausure (Ga.), 147.

Successor of railroad company acquires the latter's rights, subject to liabilities imposed by mileage book act of New York.

Minor v. Erie R. Co. (N. Y.), 53.

Sufficiency of evidence that coin tendered as fare was of legal tender quality.

Mobile St. Ry. Co. v. Watters (Ala.), 184.

Sufficiency of plea to put in issue

TICKETS AND FARES—Continued.

condition of coin tendered as fare.

Mobile St. Ry. Co. v. Watters (Ala.), 184.

Where passenger does not buy ticket when opportunity is given, railroad company has no right to charge excess fare and give rebate checks therefor between points within the state.

Weber v. Southern Ry. Co. (S. Car.), 932.

Whether regulation of railroad company as to excess rates and rebate checks is reasonable is a question of law for the court.

Weber v. Southern Ry. Co. (S. Car.), 932.

Worn money as legal tender.

Mobile St. Ry. Co. v. Watters (Ala.), 184.

TORTS.

See Malicious Prosecution.

Jurisdiction where continuous tort by railroad company was commenced in one county and completed in another.

Central of Georgia Ry. Co. v. Dorsey (Ga.), 857.

Where declaration in action for tort alleged that it was brought by plaintiff "suing for the use" of another, amendment striking out such words properly allowed as being only matter of form.

Chicago & A. R. Co. v. Murphy (Ill.), 864.

TRAIN DISPATCHERS.

See Fellow Servants.

Master and Servant.

TRAMPS.

See Carriers of Passengers.

TRANSFER COMPANIES.

See Carriers of Passengers.

TRANSFERS.

See Street Railways.

TRESPASSERS.

See Accidents on Track.

Children.

Licensees.

Care due trespasser on train.

Johnson v. New York Cent., etc., R. Co. (N. Y.), 595.

Wilson v. Atchison, etc., Ry. Co. (Kan.), 664.

TRESPASSERS—Continued.

Sufficiency of complaint in action for death of boy trespasser caused by alleged defect in track.

Elkins v. South Carolina & G. R. Co. (S. Car.), 598.

Sufficiency of evidence to show violent ejection from train.
Johnson v. New York Cent., etc., R. Co. (N. Y.), 595.

TRIAL.

Remarks of attorney tending to prejudice jury against defendant railroad company was not ground for reversal.

Louisville, H. & St. L. Ry. Co. v. Chandler (Ky.), 365.

TROLLEY CARS.

*See Carriers of Passengers.
Street Railways.*

TURNOUTS.

See Eminent Domain.

UNBLOCKED FROGS.

See Master and Servant.

VENUE.

Actions against railroads.

Boyd v. Blue Ridge Ry. Co. (S. Car.), 754.

VICE PRINCIPALS.

*See Fellow Servants.
Master and Servant.*

WANTONNESS.

See Carriers of Passengers.

WATER AND WATER-COURSES.

Constitutionality of § 3342, Rev. St. of Ohio, requiring railroad company to drain its right of way so as to prevent

WATER AND WATER-COURSES—Continued.

injury to contiguous land or detriment to the public.

Chicago & E. R. Co. v. Keith (Ohio), 204.

Evidence.

Harmless error in admission of expert testimony as to sufficiency of culverts.

Gulf, C. & S. F. Ry. Co. v. Steele (Tex.), 492.

Liability for injury to land by reason of insufficient culverts.

Gulf, C. & S. F. Ry. Co. v. Steele (Tex.), 492.

Right to use of water against prior appropriators.

San Jose Land & Water Co. v. San Jose Ranch Co. (U. S.), 824.

Sections 3343-3346, Rev. St. of Ohio, are in conflict with §§ 16 and 19 of art. 1 of Const., and void, for the reason that they attempt to authorize the taking of private property for private purposes without due process of law.

Chicago & E. R. Co. v. Keith (Ohio), 202.

Statute of Ohio requiring railroad companies to drain right of way unconstitutional.

Chicago & E. R. Co. v. Keith (Ohio), 204.

WILLFULNESS.

*See Carriers of Passengers.
Damages.
Negligence.*

WORN COIN.

See Tickets and Fares.

YARDS.

See Crossings.

177

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